Canadian College of Construction Lawyers

# LEGAL UPDATE

L.U. #145

November 17, 2017

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**Legislative Update—Bill 142**
LUC #145 [2017]
Primary Topic:
IX Construction and Builders' Liens
Jurisdiction: Ontario
Authors:
Brendan D. Bowles and Emma Cosgrave (Student at Law), Glaholt LLP

## Legislative Update – The Progress of Bill 142 in the Ontario Legislature

Bill 142, the Bill introduced to amend Ontario's *Construction Lien Act*, was carried into its second reading in the Ontario Legislature on September 12, 2017, and was referred to the Standing Committee on the Legislative Assembly on October 4, 2017. The Standing Committee reviewed the Bill on October 25, 2017 and November 1, 2017; further review of the Bill by the Standing Committee is expected. After the Bill is fully reviewed by the Standing Committee, it will be reported to the House with any amendments, and will undergo a third reading.

Bill 142 was created after the extensive report of Bruce Reynolds and Sharon Vogel, "Striking the Balance: Expert Review of Ontario's Construction Lien Act", was published on Aril 30, 2016. Previous attempts at legislative reform in Ontario, most recently the 2014 Prompt Payment Act, had failed for want of advance consultation with key stakeholders. By contrast, Reynolds and Vogel consulted broadly and incorporated comments and suggestions from numerous stakeholders throughout Ontario. Three major changes recommended in the report, and subsequently incorporated into Bill 142, have drawn widespread approval in principle throughout the Legislature. These changes are: a new prompt payment regime, an adjudication mechanism for dispute resolution, and modernization of the lien and holdback process.

The proposed adjudication section is perhaps the most novel of the proposed changes in that it aims to radically reform how construction disputes are resolved in Ontario by providing for earlier, cheaper and faster decisions. Few can defend the cost and time required to litigate most construction disputes and therefore adjudication as a concept has been met with general approval. However, specific concerns have arisen over the limitations adjudicative determinations will have on the development of case law, and the resolution of future disputes.

MPP Michael Harris summarized these concerns as follows:[1]

> While we all support prompt-payment measures and moving forward, of course, there will be further concerns and we look forward to hearing those throughout this debate. I know my caucus colleagues will be highlighting a number of areas for possible attention as we move this ahead. Of course, the lack of public notice on written decisions of adjudicators definitely is one of those issues that we heard about. As the bill currently stands, written decisions of adjudicators would be provided to the

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> parties involved but would not be made public, thus leaving no body of case law to help or assist in future disputes. For lawyers here or for others, precedent-setting case law is important when making decisions down the road.
>
> We ask why there is no ability to appeal adjudicated decisions.... [1]

As the Bill is currently drafted, the decision of an adjudicator will only be made available to the parties in the dispute, not the public. In addition to avoiding the potential loss of case precedent, proponents of publicity argue that an impetus to create a better quality decision is created when an adjudicator is aware their decision will be made widely available. Further, making a decision public can help the authorized nominating authority better oversee their adjudicators, provide better training for future adjudicators, and increase the overall quality of the dispute resolution mechanism.

Others have argued that providing decisions to the public can create negative repercussions. For instance, if parties become aware that certain adjudicators tend to lean a particular way on particular issues, parties can engage in "adjudicator shopping" and try to avoid or appoint these adjudicators depending on their desired result. Moreover, many parties choose to use adjudication to resolve their disputes because of the inherent confidentiality in the mechanism. Allowing adjudicator determinations to enter the public sphere can dissuade parties from using adjudication as a dispute resolution forum.

It is noteworthy that in the U.K. adjudicator's decisions are not public. In Queensland, Australia they are publicly reported. As it currently stands, Ontario would be following the British, not the Australian model. However, given that adjudication decisions are meant to be binding only on an interim basis for the benefit of the immediate parties and not binding on a court hearing the dispute after the conclusion of the project, the value of a precedent database of adjudication decisions is arguably diminished. To the extent development of case law is of prime concern, having a public database of adjudicator's interim decisions may not be sufficiently valuable so as to override the benefits of confidentiality.

Another concern is whether parties will have sufficient protection from bad adjudication decisions. Bill 142 does not seek to use adjudication to oust the role of the courts, but it is intended to reduce the frequency with which construction disputes do end up in court due to the excessive costs and delay which can be inherent in that process. But it is a misconception to think of adjudication as removing the process entirely from the purview of the

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[1]Harris, M. (2017, Sept. 13), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-13&Parl=41&Sess=2&locale=en#para840

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courts. Fundamentally, a party who is unhappy with an adjudicators decision can always sue after the project is over and start afresh. Further, Bill 142 provides for an application to set aside an adjudicator's decision.

Proponents of adjudication argue that including a further appeal mechanism within the scheme of Bill 142 is counterintuitive to the reasoning behind implementing an adjudication scheme, namely, providing parties with prompt, binding decisions during the project. Allowing parties to appeal adjudicator determinations will in effect create an unwarranted secondary litigation process, and undermine the objective of providing for prompt resolution of payment issues during the project by preventing the flow of funds pursuant to an adjudicator's decision while appeals are exhausted.

There has also been some criticism that the prompt payment proposals do not contain sufficient enforcement mechanisms to protect smaller contractors and workers. As stated by MPP Monique Taylor during the debates, for example:

> The debate is really just beginning on this bill. We've heard already and we've seen for the last number of years that construction workers are asking for this to be put forward. This could have been done years ago, but the Liberals backtracked on one of their own bills that had already passed second reading.
>
> We know that contractors and people who are doing the small jobs, the construction jobs, on the construction sites are the ones who pay the biggest cost for this. They're the ones who aren't getting paid on time. We've seen it very clearly in Hamilton with the building of Tim Hortons stadium, our Ticats stadium, where the ripple effect just continued all the way down the line and people weren't getting paid for the work that they were doing. It doesn't just hurt the company owner; it hurts the people who are going to work every day, punching the clock and coming out without the paycheque at the end of the day.
>
> One of our biggest concerns is the lack of enforcement that we're seeing within the bill as it's currently written. We're hoping, as the bill moves forward and moves on to committee, that changes will be made to ensure there is an enforcement process that is put into this bill, because we can put as much legislation before this House as we choose, but without the enforcement piece, nothing is ever going to be done because there will be no action when it actually hits the street.[2]

The above Hansard excerpt is interesting in that it demonstrates the lack of political opposition to the concept of the Bill. Indeed, the governing Liberals are mostly criticized for having taken too long to get to this point!

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[2] Taylor M. (2017, Sept. 13), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-13&Parl=41&Sess=2&locale=en#para840; Tabuns, P. (2017, Sept. 14) "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-14&Parl=41&Sess=2&locale=en#para1617; Forster C. (2017, Sept. 28), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-28&Parl=41&Sess=2&locale=en#para250;Bisson, G. (2017, Oct. 3), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=en&Date=2017-10-03&detailPage=%2Fhouse-proceedings%2Ftranscripts%2Ffiles_html%2F03-OCT-2017_L101.htm&Parl=41&Sess=2#para1273

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**Legislative Update—Bill 142**

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However, the substance of the criticism is that there is inadequate enforcement provided in Bill 142 for payment breaches. This underscores that proponents of adjudication still have their work cut out for them in terms of explaining the benefits of the process as a means to advance the goals of prompt payment. Indeed, payments are improperly withheld or late the contractor or subcontractor has the ability to enforce prompt payment by initiating an adjudication proceeding. If the payer does not pay the determination within the specified period of time, which on any analysis will be quicker and less expensive than going to court, the unpaid contractor or subcontractor has the ability to legally suspend work until they are paid the amount owed to them, in addition to interest and reasonable costs incurred by the unpaid party as a result of the suspension of the work. Put another way, Bill 142 does contain "teeth" to ensure prompt payment, with adjudication being the main lever that an unpaid contractor or subcontractor has access to real time resolution of payment disputes while the project is still being constructed.

In sum there is momentum to the process but there is also still work to be done in terms of education on novel concepts such as adjudication and in crafting amendments to the Bill in its current form, not to mention the regulations. All of this will be occurring with a provincial election looming in Ontario on June 7, 2018. Nevertheless, there is reason for optimism. Broad stakeholder consultation in the expert review stage has likely smoothed over many of the objections and concerns one might otherwise have expected. Crucially, there is broad political consensus that the changes as proposed in principle are needed, particularly insofar as prompt payment is concerned. The next few months will be critical to the introduction of this significant legislative reform.

# Punishing the Procrastinator – Limitation Period kills Plaintiff's claim

**Zeppa v Woodbridge Heating & Air Conditioning Ltd.** 2017 ONSC 5847

LUC #145 [2017]

Primary Topic:
I General
Jurisdiction:
Ontario
Author:
Ken Crofoot,
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***ONTARIO***

This case deals with a home owner faced with an newly installed air conditioning system that did not work properly. On one level there is nothing remarkable about the judicial conclusion that the claim was statute barred when brought. On another level, the case shows the dilemma that an owner faces when considering an appropriate course of action when something is not working as intended. In hindsight, the course of action is obvious but it only becomes clear incrementally with the passage of time. The old adage "he/she who hesitates is lost" would seem to be apt.

The Plaintiff husband and wife owners retained the Defendant to install the heating, ventilation and air conditioning system in their new home in a suburb northwest of Toronto. The installation involved two boilers, three fireplaces, radiant floor heating in all tiled areas, a pool heater for an indoor swimming pool, a gas line for a barbecue and a chimney for a wood oven pizza maker. The work was completed in the fall of 2006 and early winter of 2006-2007 at a total cost of approximately $50,000-$60,000. Almost immediately, problems were encountered with the systems. The heat, hot water and air conditioning sometimes did not function. The pool heater did not work. The heated floors, when turned on, were too hot to walk on. Woodbridge would attend to make adjustments and the systems would work for a few days following which the problems would recur.

In May of 2007, the Defendant suggested entering into a maintenance agreement and the Plaintiffs signed a two year maintenance agreement at a cost of $2300 per year. This proved unsuccessful in addressing the issues. The maintenance program was not renewed on its expiry in May 2009 but Woodbridge did continue to make a number of service calls. At this time, Woodbridge started to suggest that parts of the system might need to be replaced. This caused the Plaintiffs to seek outside advice and the last service call by Woodbridge was in the fall of 2009.

The plaintiff was advised in the fall of 2009 and winter of 2010 by other HVAC repairpersons that the system was junk, had not been installed correctly and was in need of replacement. The system was able to function through to the fall of 2010 when it failed again which caused the Plaintiffs to meet with the Defendant with no outcome noted by the Court. The Plaintiffs then contacted the boiler manufacturer which advised that based on information they had received, it appeared the installation had been done incorrectly. The Plaintiffs then retained an engineering firm which provided a report dated December 17, 2010 making various recommendations. The Plaintiff also received an environmental report dated November 24, 2010 from another expert finding significant negative environmental impacts on the house resulting from the deficient system, including mould and damaged wood elements throughout the house.

# Punishing the Procrastinator – Limitation Period kills Plaintiff's claim

**Zeppa v Woodbridge Heating & Air Conditioning Ltd.** 2017 ONSC 5847

LUC #145 [2017]

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Author:
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Estimates indicated the total cost to remediate the house would be almost $300,000. On February 21, 2012 the Plaintiffs commenced the action. After discoveries on December 12, 2016, the Defendant brought a motion to dismiss the action as being barred pursuant to s. 4 of the *Limitations Act*.

The Motion's Court Judge was of the view that the Plaintiffs had discovered the claim well prior to February 2010 (two years before the action).

The statutory criteria set out in Section 5 of the *Limitations Act* defining the concept of discovery of a claim are as follows:

a) *That an injury, loss or damage has occurred;*

b) *That the injury loss or damage was caused by or contributed to by an act or omission;*

c) *That the act or omission was that of the person against whom the claim is made; and*

d) *That, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.*

The Judge was prepared to accept that during the period of the Defendant's involvement, the limitation period was not running based on the reasoning of *Presidential MSH Corp. v Marr, Faster & Co. LLP* 2017 ONCA 325, because during that period it is possible that litigation was not then an appropriate means to address the concerns. However, by the time the maintenance contract was not renewed, the Court felt that the Plaintiff was aware that maintenance was not the issue and that the on-going problems resulted from the installation.

The Plaintiffs filed another experts report on the motion that only a specialist would know that the boilers had not been installed properly. The Plaintiffs argued that it was therefore only when the Plaintiffs were advised of this in a letter from the boiler manufacturer in November of 2010, that the limitation began to run. The Court disagreed on the basis that the Plaintiffs did not have to know that the boilers were installed improperly to know that they had a claim against the Defendant. The Court felt that by late 2009 the Plaintiffs were no longer looking to the Defendant to remedy the problems. It was at that time that they could be taken to know that a legal proceeding was an appropriate means to remedy the loss or damage. The Court felt that knowing the exact "how it happened" need not be known for the limitation period to run.

In any event, the Judge went on to note that even if it were assumed that the deficient boiler installation was a necessary element of the discovery of the claim, such knowledge was discoverable by the Plaintiffs prior to Febru-

# Punishing the Procrastinator – Limitation Period kills Plaintiff's claim

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ary 2010. The other HVAC service providers had raised enough issues to have caused the Plaintiffs to contact the boiler manufacturer earlier and to have obtained the information of the improper installation with reasonable diligence.

The Plaintiffs also argued there had been concealment by the Defendant of the fact that it had been told of the improper installation by the boiler manufacturer. It was argued the concealment affected the discovery of the cause of action. The Judge did not think this extended the limitation period in the circumstances[1].

The Court summarized the applicable law as follows:

*(a) A person has discovered a claim when the person knows, or ought to know, enough facts on which to advance the claim;*

*(b) It is not necessary that the claimant have a comprehensive or complete understanding of how the harm or loss occurred, or even be certain that the defendant was the cause of the harm. It is sufficient if the claimant knows that loss or damage has occurred and knows enough to have prima facie grounds to infer that the acts or omissions were caused by the party or parties identified;*

*(c) The question of "how it happened" and whether the defendant is legally responsible will be revealed through the legal proceeding and need not be known in advance for limitations purposes; and*

*(d) A claimant must exercise due diligence in acquiring material facts upon which to base a claim. Limitation periods are not enacted to be ignored, and a "meritorious claim [will] sleep undisturbed alongside the meritless".*

As a result the motion succeeded and the action was dismissed with costs payable to the Defendant.

This case raises interesting questions inherent in any case where an owner attempts to deal with nagging continuing issues with construction work.

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[1]Concealment expressly extends the 15 year limitation ultimate period under Section 15 of the *Limitations Act* but is not a specific criteria with respect to discovery for the determination of the two year period under Section 5. If the homeowner could set up a position that it was relying on the contractor to be honest and forthright with respect to the causes, one wonders if an argument of estoppel could be raised against the limitations defence based on the contractor's conduct which exploited the Plaintiff for several years of maintenance work but never disclosed information the boiler manufacturer appears to have provided to it as to the deficient installation which left it for the homeowner to discover on its own. Estoppel is available against a limitations pleading based on fraudulent concealment. See *Re Canadian Red Cross Society* 2005 Canlii 35481(Ont. Sup. Ct.)

# Punishing the Procrastinator – Limitation Period kills Plaintiff's claim

**Zeppa v Woodbridge Heating & Air Conditioning Ltd.** 2017 ONSC 5847

LUC #145 [2017]

Primary Topic:
I General
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Ontario
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A home owner usually does not have the expertise to assess the issue and after paying for the installation may be reluctant (or may not have sufficient funds) to engage experts to assess the problem. The initial response will be exactly as occurred in this case – to let the installer deal with the problem in a system it installed. As long as the installer is continuing to work with the problem, it makes sense that the limitation period does not run as there is no purpose served in a legal proceeding. However, where such work is proving over time to be ineffectual, at what point should the owner start to have an obligation to engage in its own investigation? In this case, the Court finds that the limitation period commenced running essentially around the time that the Plaintiffs started to engage other servicepersons which was in late 2009. These servicepersons do not appear to have been system engineers and one could question the fairness of starting the limitation period immediately at this stage before any real expert assessment was obtained. Should the owner have been granted a grace period to determine if their repairs would be more effective or to reach the realization that more outside help was needed? The difference is significant because if the limitation period was considered to run from the engineers' reports and the boiler manufacturer's advice, the action would have been within time.

The other issue is that the system appears to have worked on and off after repairs. Each time the system was rendered operational, a homeowner would be likely to want to believe that perhaps this time the system was fixed. This optimism coupled with a reluctance to spend money, would lead most homeowners to defer legal action.

Lastly, the magnitude of the claim changed considerably when the environmental report was received. Instead of just remedial work to an HVAC system, the Plaintiffs were looking at mould removal and major structural and cosmetic work to the elements of the house. Perhaps these homeowners were prepared to absorb $50,000 in HVAC remediation to avoid the aggravation of litigation but the $300,000 amount pushed them to sue. Does it really make sense that they should lose the right to bring the larger claim based on their earlier knowledge of the smaller claim?

The Plaintiffs procrastination ultimately resulted in the loss of their cause of action. This seems a harsh resultant given that they are simple homeowners who mistakenly relied upon a contractor who appears to have been either incompetent and/or less than totally honest.

Plaintiffs' counsel has confirmed that an appeal has been filed.

## No Duty of Fairness or right to judicial review at Prequalification Stage

**Grascan Construction Ltd v Metrolinx**
2017 ONSC 6424

LUC #145 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Ontario
Author:
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*Grascan Construction Ltd v Metrolinx*, 2017 ONSC 6424, should be viewed as a cautionary case for contractors when bidding on public projects. In *Grascan Construction Ltd v Metrolinx*, the court dismissed the contractor's application for judicial review of a decision by the two public sponsors of a new infrastructure project to disqualify a bidder for failure to abide by the RFQ rules. The decision thoroughly discusses the applicable standard of review and the duty of fairness owed to RFQ participants.

The facts of this case involve the Ontario government's commitment to funding the improvement of transit infrastructure in Southern Ontario. This transit improvement program was to be delivered by Metrolinx over a ten-year period. The Lakeshore – East Corridor Expansion project (the "Project") is one of the many projects under this program.

On March 22, 2017, Ontario Crown agencies, Metrolinx and Ontario Infrastructure and Lands Corporation ("OI") (collectively, the "Sponsors"), issued an open market Request for Qualifications ("RFQ") to build and finance the Project. The Project RFQ process was intended to identify prequalified parties to participate in the request for proposals ("RFP") process.

The applicants, Grascan Construction Ltd. ("Grascan") and Torbridge Construction Ltd. ("Torbridge"), were part of a consortium called Lakeshore East Corridor Infrastructure Partnership ("LIP") that filed a submission for the Project RFQ process.

One of the requirements in the RFQ process was for each applicant to obtain an accounting firm letter ("AFL") by the submission deadline. The AFL was designed to identify possible unethical bidding practices, including failures to disclose conflicts of interests. Because this AFL requirement was relatively new, all Project RFQ applicants had the ongoing opportunity to submit questions regarding the requirements of the AFL or to request an extension of the Submission Deadline during the open-market period for the Project RFQ. However, the Project RFQ gave the Sponsors the general right to disqualify an Applicant "…at any time and in their discretion… without incurring any liability for costs and damages incurred by the Applicant… in the event that the Applicant… (iii) fails to comply with a requirement prescribed by Section 4.4 [the AFL requirement]".

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Although LIP obtained a letter from Deloitte LLP ("Deloitte") advising that the AFL was in progress, LIP ultimately failed to provide the AFL by the submission deadline. As a result, the Sponsors disqualified LIP's prequalification submission from the Project RFQ and did not consider their submission for its technical and financial attributes.

LIP brought an Application to quash the Sponsors' decision, alleging that the Sponsors breached their Duty of Fairness. LIP argued that the Sponsors had not insisted on the AFL in prior projects and that by refusing to exercise their discretion to waive the AFL requirement, the Sponsors' effectively permitted only the largest construction companies to compete for the Project.

The Sponsors argued that the Application should be dismissed as the Project RFQ clearly stated that a failure to include an AFL was grounds for disqualification, and that the applicants failed to request an extension of the submission deadline. Furthermore, the Sponsors argued that if the relief sought were to be granted, this would prejudice the integrity of the Project RFQ process.

In dismissing the Application, the Court considered the following issues:

- Was the Sponsors' decision subject to judicial review?
- If so, what was the standard of review?
- Did the Sponsors owe a duty of fairness to LIP and if so, has LIP proven that the Sponsors breached that duty and/or that the Sponsors' decision was unreasonable?
- Was LIP estopped from seeking judicial review?
- Should relief be denied on the basis of prejudice?

In determining whether or not LIP's submission was subject to judicial review, LIP relied on s. 2(1)1 and 2(1)2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("JRPA"). With respect to s. 2(1)2 of the JRPA, which allows an application for judicial review to be brought for an exercise of a statutory power, the Court relied upon *Midnorthern Appliances Industries Corp v The Ontario Housing Corp.* (1977), 17 OR (2d) 290, for the proposition that not all decisions made by entities created by statute can be reviewed by a court. The Court then stated that LIP had failed to identify any specific right or power in Metrolinx or OI's enabling statutes prescribing how the Sponsors were to make policy decisions regarding the requirements of the Project RFQ, nor how they were to make disqualification decisions. The Court did

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not accept that the broadly worded objectives of each Crown agency could be used as the basis for a judicial review of their decision to reject LIP's submission.

LIP also relied upon s. 2(1)1 of the JPRA, which allows for, *inter alia*, the common law remedy of *certiorari* for administrative decisions of a public nature. LIP relied on *Martineau v Matsqui Institution Inmate Disciplinary Board,* [1980] SCR 602 at p 628 and *Bot Construction Ltd v Ontario (Ministry of Transportation) (2009)*, 99 OR (3d) 104 ("Bot Construction") for the authority that *Certiorari* is available as a general remedy to supervise the machinery of governmental decision-making.

With respect to the application of s. 2(1)1 of the JPRA on the facts presented, the Court distinguished the authorities relied upon by LIP stating that they either dealt with a formal consultation process prior to the launching of the request for proposals or the actual bid process, calling for tenders, or request for proposals. It found that each of those situations was distinguishable from the prequalification RFQ process. The Court then considered the dicta in *Hub Excavating Ltd v Orca Estates Ltd*, 2009 BCCA 167, where the British Colombia Court of Appeal stated that "[t]here is no free-standing duty of fairness in the bidding process independent of [the] contractual duty [arising on the formation of Contract A]".

Ultimately, the Court accepted that the "weight of authority supports the position of the Sponsors that no duty of fairness arises at the stage where potential bidders are prequalified" and concluded that it could not judicially review the Sponsors' decision. Nevertheless, the Court continued to consider the balance of the application.

The Court stated that had the Sponsors' decision been subject to judicial review, it would have been assessed under the standard of reasonableness since the "challenge made by the LIP applicants is not really one of procedural fairness in that the Sponsors followed the process set out in the Project RFQ."

Despite the Court finding that the proper standard of review was that of reasonableness, the Court considered the arguments made by LIP with respect to a breach by the Sponsors' duty of procedural fairness. Ultimately, the

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## No Duty of Fairness or right to judicial review at Prequalification Stage

Court rejected LIP's argument that only large construction companies were able to meet the RFQ requirements, stating that obtaining an AFL was not a matter of financial resources. Rather, the Court found that LIP was slow in providing the information that Deloitte requested, and that Deloitte was being diligent in requesting information from LIP. Furthermore, the Court found that even if LIP was not given enough time to obtain an AFL, they remained silent and did not advise the Sponsors of their concerns, nor did they ask for an extension of the Submission Deadline. With respect to LIP's argument that in their past experience with the Sponsors, they were not required to prepare an AFL, the Court stated that "to allow the position of the LIP applicants to prevail would mean that the Sponsors in situations like this would have to consider what each of the applicants might be thinking the Sponsors might do in light of their own unique experiences rather than relying on the clear language of the Project RFQ." The Court found that in any event, the Sponsors did not breach any duty of fairness and that their decision was reasonable.

With respect to the Sponsors' argument that LIP was estopped from seeking judicial review, they relied upon a declaration from Grascan's President and Chief Operating Officer, which stated, among other things, that "any omission or failure to substantially comply with a requirement included in the RFQ Documents may result in the Project RFQ Prequalification Submission being disqualified." The Court found that this argument was supportive of its conclusion that the Sponsors did not breach any duty of fairness owed to LIP and that the Sponsors' decision was reasonable.

Finally, the Court considered the Sponsors' argument that relief should be denied on the basis of prejudice to the other compliant RFQ applicants. The Court emphasized that it was not necessary to consider this issue, however, that it agreed with the Sponsors that the compliant parties "would have a good complaint if the applicants were prequalified even though they did not comply with all the terms of the Project RFQ."

# Saskatchewan Reconsiders Priority between Security Holders and Lien Claimants

**National Bank of Canada v KNC Holdings Ltd.**
2017 SKCA 57

LUC #145 [2017]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Saskatchewan
Author:
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*Saskatchewan*

## I. Facts

Coast Resources Ltd., an oil and gas company operating in Saskatchewan, was indebted to security interest holders and lienholders. National Bank provided various loans to Coast Resources Ltd. and held a valid security interest in the real and personal property of the company. Coast Resources Ltd. was indebted to National Bank in the amount of $5,400,000 plus interest and other charges. National Bank sought appointment of a receiver pursuant to section 243 of the Bankruptcy and Insolvency Act in March of 2014.

The property of Coast Resources Ltd. was also the subject of a number of liens. Three liens had priority over the interest of National Bank and were paid. The payment of these liens was not opposed. The remaining liens, registered after National Bank's security was registered, were central to the matter.

The Receiver operated on an approval and vesting order to sell property for $1,960,000. The order discharged the Liens on the condition that $490,388 be held back as the Lien fund until priority between the Lien holders and National Bank was determined.

KNC Holdings Ltd. brought an application to determine the priority among the parties to the Lien fund. The Lienholders relied on the decision in *Canada Trust Co. v Cenex Ltd*. (1982), 1982 CanLII 2651 (SK CA) ("Cenex"). Cenex had contemplated the interpretation of section 12 of The Mechanics' Lien Act which was the predecessor of section 22 of *The Builders' Lien Act*. Cenex interpreted *The Mechanics' Lien Act* to give lienholders a priority over security interest holders.

National Bank maintained Cenex was decided incorrectly. Section 22 merely extended the category of interests affected by a lien on minerals to include the interests of all parties with an ownership interest in the minerals, but did not attach an interest to security interests held in the assets thereby creating a priority scheme.

The Chambers judge found he was bound by the decision in Cenex. The Lien interest was held to have priority over the security interest of National Bank. An order was made to divide the Lien fund between the Lien holders. National Bank appealed the decision on the basis that Cenex was wrongly decided and the security interest had priority over the interest of the Lienholders.

## II. Decision in Cenex

The decision in Cenex interpreted section 12 of The Mechanics' Lien Act,

## Saskatchewan Reconsiders Priority between Security Holders and Lien Claimants

National Bank of Canada v KNC Holdings Ltd.
2017 SKCA 57

LUC #145 [2017]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Saskatchewan
Author:
Murray R. Sawatzky, Q.C., McDougal Gauley LLP

*Saskatchewan*

which was effectively the same as section 22(2) of The Builders' Lien Act. Cenex operated a uranium mine and was subject to creditors, debenture holders and lienholders. A receiver was appointed and the assets were taken over by the receiver, including ore, mining leases and equipment and physical assets.

The Court of Queen's Bench held the debenture had priority over the liens because section 12 of The Mechanics' Lien Act prescribed only the circumstances in which a lien arose and did not establish priority between interests.

On appeal, Hall J.A. held the lienholders had priority over the other parties in relation to the ore. The liens attached to "all the estates and interests in the mineral concerned" which included the equity of the security holders in the ore. Section 12(2) was held to create a special type of lien which gives the lienholder priority over all other estates and interest to a specific asset, being severed or extracted ore. The severed ore was held to be an entitlement of lienholders because the work and materials supplied by the lienholders transformed the minerals in situ into marketable and more valuable assets.

### III. Decision in National Bank of Canada v KNC Holdings Ltd.

The Court of Appeal did not endorse the decision in Cenex and held section 22(2) of The Builders' Lien Act does not create a priority preference as between lienholders and other security holders.

Section 22(2) of *The Builders' Lien Act* reads:

*(2) Where services or materials are provided:*

*(a) preparatory to;*

*(b) in connection with; or*

*(c) for an abandonment operation in connection with;*

*the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials, the lien given by subsection (1) is also a lien on:*

*(d) all the estates or interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding that fee simple has expressly requested the services or materials;*

*(e) the mineral when severed and recovered from the land while it is in the hands of the owner, and to the proceeds of the mineral and to the amounts to be paid in lieu of the proceeds of the mineral to the owner by a person that operates the mine, oil well or gas well;*

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***Saskatchewan***

*(f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines, mining claim or land, oil or gas well and the appurtenances thereto;*

*but, in all other respects, this Act applies to the lien existing by virtue of this subsection notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.*

The decision of the Honourable Chief Justice Richards engages in an exercise of statutory interpretation. Section 22(1) explains when builders' liens arise and prescribe the assets to which such liens attach. It does not address the priority of liens relative to other interests. Section 22(2) provides that, when services or materials are provided in connection with the recovery of a mineral, a lien attaches to all the estates or interests in the minerals, to the mineral after it is severed from the land and to the interests of the owner, subject to the specified exceptions. The provision does not address the priority of liens in relation to other kinds of security interests.
The decision in Cenex erred in two material respects: the interpretation of the phrase "all the estates and interests in the mineral concerned" and finding the priority of lienholders was restricted to severed ore. The interpretation of the phrase "all the estates and interests in the mineral concerned" was much more straightforward and should have been naturally understood as ensuring farm-ins and joint ownerships did not frustrate the builders' lien regime. It was aimed at ownership structures, rather than catching security interests. The decision in Cenex then erred in finding the priority only applied to severed ore. The plain language in section 12 could not be reconciled with the interpretation of the court in Cenex. If the lienholders had a priority over other creditors in relation to severed ore because their liens attached to the creditors' equity, then the lienholders should have had priority to all of the assets and not simply the ore. The decision in Cenex was rejected accordingly.

The Court of Appeal then considered the work of the Special Advisory Committee which was established to review *The Mechanics' Lien Act*. A report entitled "Liens in the Construction Industry" considered section 12(2) and the Cenex decision. The committee was critical of the Cenex decision and feared interpreting section 12(2) as establishing a priority rule would create serious consequences for financers of mining and oil and gas. The Committee maintained property of an owner should be attached by a builders' lien but did not believe the liens should have any special priority over other security interests. The Committee drafted language for a proposed *Builders' Lien Act* section 20(2)(d), which is contrasted against the language of 12(2)(d).

# Saskatchewan Reconsiders Priority between Security Holders and Lien Claimants

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*The Builders' Lien Act*

*12(2)(d) all the estates or interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding that fee simple has expressly requested the services or materials;*

The Committee's *Builders' Lien Act* Proposal

*20(2) (d) all the estates or interests of persons holding a real property interest in the mines and minerals concerned, in addition to the owner, other than the estate in fee simple, unless the person holding that fee simple has expressly requested the services or materials;*

The proposed inclusion of "real property interest" was intended to make it clear the lien was imposed upon real property interests and did not affect pre-existing financing on the mineral or proceeds derived from the mineral.

There was no legislative debate about the passing of *The Builders' Lien Act* which could assist the Court in understanding why "the real property interest" was not included in the legislation. The Court also considered whether it should be understood that the Legislature adopted the Cenex interpretation on the common law basis that the statutory language had been interpreted by the courts and re-enacted without change. The Court found the re-enactment was not an endorsement of Cenex when considering section 36 (2) of *The Interpretation Act, 1995* which provides that re-enactments do not imply the adoption of judicial interpretations.

The appeal succeeded on the basis that the lienholders did not have priority over the interests of the secured parties.

**SMART Technologies ULC v Electroboard Solutions Pty Ltd**, 2017 ABQB 559 (CanLII)

LUC #145 [2017]

Primary Topic:
I General
Jurisdiction:
Alberta
Author:
E. Jane Sidnell, Rose LLP

***ALBERTA***

## Angels Dancing on the Head of a Pin - The Alberta Court's Take on an Arbitration with a Strong Dissent

SMART Technologies ("**SMART**") develops interactive whiteboards and group collaboration tools for classrooms and meeting rooms. In the mid-1990's, Electroboard Solutions Pty Ltd. and Electroboard Solutions (NZ) Ltd. ("**Electroboard**") started distributing SMART products in Australia and New Zealand. Until 2014, Electroboard was SMART's only distributor in those countries and had entered into several distribution agreements (collectively, the "**Distribution Agreement**").

Electroboard failed to pay a number of SMART invoices totalling approximately $3.6M. On July 3, 2014, SMART issued its claim for payment of the invoices. On July 31, 2014 SMART terminated the Distribution Agreement. Electroboard defended and issued a counterclaim which raised problems with SMART's products' functionality, and claimed breach of contract, and passing off. Later, Electroboard amended its counterclaim to add an allegation that SMART breached a duty to negotiate in good faith and relied on *Bhasin v Hrynew*, 2014 SCC 71 (CanLII). Electroboard sought to set-off SMART's claim by returning $3.6 million in SMART products and claimed approximately $18M for other damages. SMART's position on the counterclaim was that Distribution Agreement precluded SMART's liability and contained a "no set-off" clause.

The Distribution Agreement required that:

- any disputes be resolved through arbitration;
- the arbitration would be administered by the American Arbitration Association, in accordance with the International Centre for Dispute Resolution's International Arbitration Rules (the "**ICDR Rules**");
- secondary to the ICDR Rules, the arbitration and agreements would be governed by the laws of the Province of Alberta and the federal laws of Canada;
- an arbitral award could be appealed to a panel of three arbitrators and, pursuant to clause 10.1.6 of the Distribution Agreement, the appeal tribunal could replace or modify the initial arbitral award only if it found clear errors of law or clear and convincing factual errors:

> 10.1.6 All arbitration awards shall be final and binding, and enforcement of the award shall not be subject to appeal except as expressly provided in this agreement. If the award exceeds $750,000 US. a party may notify the AAA of an intention to appeal to a second arbitral tribunal of

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> three arbitrators, constituted in the same manner as the initial tribunal. The appeal tribunal shall not modify or replace the initial award except for clear errors of law or clear and convincing factual errors. The award of the appeal tribunal shall be final and binding, and enforcement of the tribunal's award shall not be subject to appeal or further review.

- the applicable law is the International Commercial Arbitration Act, RSA 2000, c I-5, and in particular Schedule 2 to the Act, the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**").

The parties submitted their dispute to a single arbitrator: Daniel J. McDonald, QC, FCIArb. On the application of SMART, the arbitrator issued a summary judgment award in favour of SMART on the outstanding invoices and a later award in favour of SMART on the remaining issues, including dismissing Electroboard's amended counterclaim focusing on the breach of the duty and good faith and honesty in contractual performance.

The initial arbitral award was appealed to an appeal arbitral tribunal (the "**Appeal Tribunal**"):

- John Lorn McDougall, QC, of Arbitration Place in Toronto (Chair) (majority);
- Ret. Judge Billie Colombaro, a former appellate court judge of the United States' Third Circuit Court of Appeal (majority); and
- Ret. Judge Carl Anderson, a former presiding justice of the California Court of Appeal (dissent).

The majority of the Appeal Tribunal reversed the initial arbitral award, dismissed SMART's claim and ordered SMART to take back all of Electroboard's remaining stock of SMART products for credit and reimburse Electroboard for shipping and related expenses. Solicitor-client costs followed.

One of the arbitrators on the Appeal Tribunal issued a strong and stinging dissent which is described in paragraphs 63 to 65 of the Court's decision:

> [63] A strong dissent was issued by one of the members of the Appeal Tribunal. The dissenting arbitrator raised the issue of the role of an appellate arbitrator. He stated that the proper role is to review the interpretation and application of the law of the initial arbitrator for "clear error" and to review the initial arbitrator's findings of fact for "clear and convincing factual errors". He noted that instead of doing this, the Majority took a "holistic" approach to appellate review and believed their

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> role was "to do justice between the parties above all else" and reach a "just result relatively *unhindered* by the findings below."
>
> [64] The Dissent took issue with the Majority's decision 1) to reverse the Summary Judgment Award on an issue that was first raised on appeal, and 2) to reverse the Partial Final Award by failing to give due deference to the findings of fact made by the Arbitrator.
>
> [65] The Dissent was especially concerned with the Majority's approach to the facts because the Arbitrator heard live evidence from witnesses whereas the Appeal Tribunal only had a written record to review. He noted that the credibility of witnesses is best judged by those who see and observe how a witness gives evidence and responds to questions, noting it is a tenet of appellate judicial review to give deference to the trier of fact. He condemned the Majority's reweighing of the impact of the evidence and found the Majority "totally disregard [ed] every finding of fact the Arbitrator found below to be true."

SMART applied to the Alberta Court of Queen's Bench to set aside the Appeal Tribunal's award and restore the initial award. Electroboard applied for enforcement of the Appeal Tribunal's award. On the application the Court acknowledged that it was bound by Article 34 of the Model Law.

The Model Law contains only 6 grounds on which an arbitral award can be overturned. As the Court noted, it is clear that only true jurisdictional errors permit judicial intervention. Pursuant to Article 34(2)(a)(iii), SMART argued that the majority of the Appeal Tribunal exceeded its jurisdiction by deciding the case on the basis of *ex aequo et bono* (what is equitable and good):

> Article 34. Application for setting aside as exclusive recourse against arbitral award …
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that: …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …

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The Court summarized the arguments of SMART and Electroboard at paragraphs 20 to 23:

> [20] In support of its argument, SMART provided a detailed review of the procedural steps and awards made from the early stages in front of the Arbitrator to the Final Award issued by the Appeal Tribunal. SMART points to a number of instances which it argues demonstrate the Majority's disregard for the law and pursuit of justice on its own terms.
>
> [21] Those instances include:
>
> 1) The Chair of the Appeal Panel (a member of the Majority) commenting at the appeal that submissions on the standard of review were "angels dancing on the head of a pin."
>
> 2) The Majority exceeding the scope of the submission to arbitration by considering the Arbitrator's decision to grant the Summary Award. The Majority challenged the evidentiary record and the legal test relied upon (*Hryniak v Mauldin*...), despite the fact the parties had agreed on both of those matters. The Majority also raised the issue of the Arbitrator's jurisdiction on its own volition as it was not in Electroboard's Notices of Appeal.
>
> 3) The Majority deciding to set aside the entirety of the Summary Awards instead of modifying the awards to allow set-off as requested by ELB.
>
> 4) The Majority failing to show any deference to the Arbitrator's findings of fact.
>
> 5) The Majority deciding impermissible questions of mixed fact and law, whereas appeals are only allowed on clear errors of law and clear and convincing errors of fact.
>
> 6) The Majority based its costs decision on an improper ground of appeal, as the Majority found Electroboard should be awarded full indemnity because it was deprived of its right to be heard at the initial stage of the arbitration. SMART submits that the Arbitrator did not have the opportunity to grant or deny Electroboard the

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right to be heard on any issue that was relevant to the Appeal, so this was an improper basis for awarding indemnity costs.

[22] In the alternative, SMART argues the Majority ignored the Appellant Rules on costs that applied to the Appeal. It submits this was an error of jurisdiction on its own.

[23] Electroboard disagrees with SMART's characterization of the Majority's decision. It argues that the Majority decided the Appeal within the terms and scope of the submission to arbitration by concluding that the Arbitrator made clear errors of law and fact. Electroboard submits that SMART is attempting to re-litigate the merits underlying the Appeal, which is specifically prohibited under Article 34.

The Court noted some of the difficulties with the decision of the Appeal Tribunal, expressed its sympathy for SMART, but ruled against it for the reasons set out in paragraphs 85 and 89 to 91 and 94 to 96:

[85] I have some sympathy for SMART's position, as it appears the Majority of the Appeal Tribunal did not follow the typical approach in appellate review, at least in courts, of focusing their discussion on a review of the findings of fact and the application of the law to those facts in the court below. In particular, the Majority gave little deference to some of the Arbitrator's findings of fact, stating that deference was not owed on the Summary Judgment Award because the Arbitrator decided the matter on the Record and did not observe witnesses or decide credibility on the basis of in-person observations. However, the Majority did not acknowledge that deference should apply to some findings of fact and the credibility assessments considering that the Arbitrator heard a 5-day oral hearing for the Partial Final Award. Instead, the Majority declared no deference arose for the Partial Final Award because there were clear and convincing factual errors. This is not convincing on its own.

. . .

[89] There are some gaps and problems in the approach of the Majority to its review, and its comments about "angels dancing on the head of a pin" are unfortunate, however the focus of this Court's inquiry is on whether the Majority decided a matter within its jurisdiction.

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[90] Therefore, despite some hesitation regarding the Majority's approach to appellate review, I reject SMART's allegation that the Majority decided the matter *ex aequo et bono* and completely ignored the applicable standard of review.

[91] In particular, I note that even if the Appeal Tribunal's standard of review was improperly applied, a failure to apply the appropriate standard of review is an error of law, not an error of jurisdiction … A jurisdictional error would only have occurred if the Majority's decision ignored the standards of review completely and was based solely on what the Majority saw as "equitable and good" (*ex aequo et bono*) …

. . .

[94] The comments of the Dissent, which evidence obvious frustration with the "holistic" approach to appellate review of the Majority, does not go so far as to suggest that the Majority did not apply the law in coming to its decision. In fact the Dissent notes that the Arbitrator and the Majority interpret *Bhasin's* new contractual obligations differently. The Arbitrator's interpretation was reasonable and did not rise to the level of a 'clear error of law' for the Dissenting Arbitrator. The Majority came to the opposite conclusion. However, there was not a failure to apply the law.

[95] At most, SMART and the Dissent's view on the Majority's problematic appellate approach could support a finding that the standard of review was applied improperly. However as noted previously, that would be an error of law, not jurisdiction.

[96] I find that the Majority of the Appeal Tribunal applied the law and did not decide the appeal *ex aequo et bono*.

This case is a cautionary tale for those who think that errors of law are not just "angels dancing on the head of a pin".

**Strata Plan KAS 3575 v. Renascence Enterprises (Shannon Lake) Corp.**
2017 BCSC 1336

LUC #145 [2017]

Primary Topic:
I General
Secondary Topic:
XI Engineers
Jurisdiction:
British Columbia
Author:
Dirk Laudan,
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***BRITISH COLUMBIA***

## No Danger means no Claim in Negligence

A recent construction defects case in British Columbia provided a useful reminder that not all costs incurred by an owner as a result of construction defects can be properly claimed against those responsible.

This was a successful summary application by a structural engineer, in a multiparty construction defects case, to strike out a claim against it on the basis that the claim was for unrecoverable pure economic loss. The damage suffered by the owner was to a parking area, including spalling of the floor slab, missing control joints and tension cuts, and insufficient thickness. The plaintiff had not pleaded that these alleged defects were dangerous to the health or safety of occupants of the condominium complex, or anyone else.

The failure to plead danger was no mere slip. On discovery, the strata's representative had testified that the strata corporation had no concern that the defects were dangerous, and had never received advice to that effect. The defects were not urgent and remedial work had not been undertaken. It appears the plaintiff had concluded that no serious allegation of dangerousness could be maintained on the facts.

The court considered the law articulated in the *Winnipeg Condominium* case: contractors, architects and engineers owe a duty to owners, including subsequent purchasers, and will be liable in negligence if it was foreseeable that a failure to take reasonable care would create defects posing a substantial danger to health and safety of occupants. Despite occasional comments in cases such as *Aurora v. Whirlpool Canada LP*, 2013 ONCA 657, to the effect that the question of whether recovery in tort for non-dangerous defects is still open, the court here considered itself bound by existing authority rejecting recovery in tort for non-dangerous construction defects, even where the damage is foreseeable and resulting from the defendant's negligence.

As a result of the test in the *Winnipeg Condominium* case, plaintiffs in construction defects cases usually plead that the alleged construction defects are dangerous. It is often assumed that structural defects in buildings, including parking structures, are inevitably dangerous. *Strata Plan KAS 3575* reminds us that dangerousness depends on the particular facts of the case, and that, unless the law changes, proving that dangerousness remains an essential element of a successful construction defects claim based on the law of negligence. Also, this case is a good example of the successful use of summary proceedings for dismissal of an action against a single defendant in a multiparty dispute.

# "Improvement" Extended to Include Well, Mine or Oilsands Project in Alberta

**Trotter and Morton Building Technologies Inc v. Stealth Acoustical & Emission Control Inc (Stealth Energy Services)**, 2017 ABQB 262

LUC #145 [2017]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
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***ALBERTA***

The decision of Master J.T. Prowse, Q.C. in *Trotter and Morton Building Technologies Inc v. Stealth Acoustical & Emission Control Inc (Stealth Energy Services)*, 2017 ABQB 262 ("*Trotter and Morton*") was released on April 11, 2017. This judgment involving two builders' lien actions reinforced the factors that a court is to consider when determining whether the work or materials provided to a project are an "improvement" within the meaning of the *Builders' Lien Act*, RSA 2000, c. B-7 ("*BLA*") sufficient to form the basis for a valid builders' lien.

Background

Trotter and Morton Building Technologies Inc. ("Trotter") and Hamil Contracting Corp. ("Hamil") were each subcontracted by Stealth Acoustical & Emission Control Inc. ("Stealth") to work on four pumphouse buildings. Stealth had an offsite fabrication contract with Canadian Natural Resources Limited ("CNRL") to construct the four pumphouse buildings at Stealth's Calgary facility for use, ultimately, at CNRL's Horizon oilsands project.

Stealth filed for bankruptcy and went into receivership. Trotter and Hamil were left unpaid, filed liens against CNRL's Horizon project and then applied to have those liens declared valid.

The primary issue before the Court was whether the work and materials provided by Trotter and Hamil to the pumphouse buildings related to an "improvement" as defined by the *BLA* and, therefore, constituted the basis for valid builders' lien claims. Also at issue was whether the Trotter lien could include amounts for materials that were never "furnished", within the meaning of the *BLA*, to the Horizon site.

The Master's Decision

The Master allowed Trotter and Hamil's applications. He concluded that both the pumphouse buildings, for which Trotter and Hamil provided work and materials, as well as the entire Horizon oilsands project itself were "improvements" under the *BLA*, and therefore the liens of Trotter and Hamil were valid.

The Court revisited the *BLA*'s definition of an "improvement":

> *[A]nything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land.*

(a) The Pumphouse Buildings as "Improvements"

In determining that the pumphouse buildings themselves were "improvements", the Master first noted their location and function. The

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buildings were to be transported to the Horizon site and placed at large, known and specifically designated locations that required extensive preparation for them, which included grading the land, building access roads and drilling holes for pilings. Once delivered, the buildings would be integrated into, and form an integral part of, the tailings management facility, which itself could not function as designed without the pumphouse buildings. In turn, the tailings management facility was designed to be fully integrated into the larger Horizon project.

Next, the Court considered the size and degree of affixation of the pumphouse buildings to the land. The Master observed the huge size (24' x 89' x 21') and weight (200,000-260,000 lbs) of the buildings. He also noted that each pumphouse building would be affixed to the land by welding the structural steel base of each building to metal plates that were in turn bolted to the top of the piles. However, it was mentioned that the bolts could be undone and the buildings moved without damaging them.

The Master regarded the likelihood of the pumphouse buildings staying on the liened Horizon site and determined that there was no way of assigning a percentage of the likelihood that the buildings would stay where first placed or be moved and repurposed elsewhere on the Horizon site.

After surveying the case law on "improvements" the Court concluded that the pumphouse buildings were "improvements" under the *BLA* as they were very large and heavy buildings, designed to be securely affixed to the land, and designed to be fully integrated into the tailings management facility, which in turn is an integral part of an oilsands project. The possibility that the buildings could be moved and repurposed elsewhere was not sufficient to overcome their status as improvements.

(b) The Horizon Oilsands Project as the "Improvement"

In the alternative, even if the pumphouse buildings were not improvements themselves, the Court concluded that the entirety of the Horizon oilsands project was itself an "improvement" under the *BLA* to which the Trotter and Hamil liens could attach. The Master relied on s. 6(2) of the *BLA* such that the pumphouse buildings were "materials … furnished … in connection with … the recovery of a mineral". Saskatchewan appellate and Alberta superior court decisions support the finding of the well, mine or oilsands plant as the "improvement".

At first instance the *Trotter and Morton* decision appears to run contrary to prior builders' lien case law where liens filed against the wrong land were invalidated. In this case, the Court reinforced that it is the overall project that is to be considered the improvement. Therefore work may have been

# "Improvement" Extended to Include Well, Mine or Oilsands Project in Alberta

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*ALBERTA*

done or materials provided to another portion of the project land and not the parcel that was liened. No mention was made in *Trotter and Morton* as to whether a lienholder could or should list two potential improvements on its lien form; being the work or materials provided or, in the alternative, the well, mine or oilsands to which the work or materials were supplied.

(c) Undelivered Materials Do Not Form the Basis of a Valid Lien

Finally, the Master reinforced a long standing principle of lien case that, in order to be considered an "improvement", materials actually have to be "furnished" to the project site. The Court invalidated the portion of the Trotter lien that included materials supposedly furnished by Trotter that were never delivered to the Horizon site.

# Liability for Filing a Lien Requires "Grossly Excessive" Claim

**Ravenda Homes Ltd. v. 1372708 Ontario Inc.**, 2017 ONCA 834

LUC #145 [2017]

Primary Topic: IX Construction and Builders' Liens
Jurisdiction: Ontario
Author: Arielle Wasserman, Articling Student, Glaholt LLP

***ONTARIO***

In *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, the Court of Appeal takes a closer look into s. 35 of the *Construction Lien Act*, as well as what it means to be an "owner" under the Act.

## Facts

Ravenda and 1372708 worked together to develop a residential subdivision in Fort Erie. Their first written agreement permitted, but did not require, Ravenda Homes to build three model homes on the property which was owned by 1372708.

The second written agreement provided Ravenda Homes with the option to purchase the developed lots from 1372708 without a deposit, and 1372708 anticipated obtaining municipal approvals and building permits by June 1, 2016. The agreement provided that it would be null and void unless it was fully executed by the parties and returned to Ravenda on that same day. 1372708 did not execute the agreement until after the deadline.

Ravenda Homes proceeded to build the three model homes and entered into 32 agreements of purchase and sale with potential homebuyers. Meanwhile, 1372708 pursued municipal approvals for the proposed plan of subdivision, so that the requisite building permits could be obtained.

Towards the end of the summer 2006, Ravenda Homes took the position that 1372708 had failed to act in good faith to take the necessary steps to obtain municipal approvals, which made it impossible for Ravenda Homes to meet its construction deadlines under the agreements of purchase and sale. In September 2006, Ravenda Homes withdrew from the project on the basis that 1372708 had repudiated their agreement.

Ravenda commenced an action for breach of contract as well as a construction lien action. 1372708 counterclaimed for damages caused by Ravenda's withdrawal from the project and the registration of the certificate and lien. Following a summary judgment motion, the motion judge dismissed Ravenda's action for breach of contract, allowed Ravenda's lien action, and allowed 1372708's counterclaim in part, awarding damages for a portion of the cost of the letter of credit posted to vacate Ravenda's lien.

## Section 35 of the Act

Ravenda claimed that the motion judge failed to apply the correct test under s. 35 of the Act, and therefore erred in awarding 1372708 damages for the overpayment of annual fees and legal fees for the letter of credit posted to vacate Ravenda's lien.

The Court of Appeal agreed. The language of s. 35 is as follows:

# Liability for Filing a Lien Requires "Grossly Excessive" Claim

Ravenda Homes Ltd. v. 1372708 Ontario Inc., 2017 ONCA 834

LUC #145 [2017]

Primary Topic: IX Construction and Builders' Liens
Jurisdiction: Ontario
Author: Arielle Wasserman, Articling Student, Glaholt LLP

***ONTARIO***

> 35. In addition to any other ground on which the person may be liable, any person who preserves a claim for lien or who gives written notice of a lien,
>
> (a) for an amount which the person knows or ought to know is **grossly in excess** of the amount which the person is owed; or
>
> (b) where the person knows or ought to know that the person does not have a lien,
>
> is liable to any person who suffers damages as a result. (emphasis added.)

The basis of 1372708's damages claim under s. 35 was that after having obtained expert evidence, Ravenda revised the value of its lien from $456,200 to $326,293. This meant that 1372708 had incurred additional amounts to maintain a letter of credit to vacate Ravenda'a lien at the original price, an amount that turned out to be unnecessary.

The Court of Appeal found that the motion judge had awarded 1372708 its overpayment of the fees because the lien was "excessive." However, the correct test under s. 35 required the motion judge to consider whether Ravenda's lien claim was "grossly in excess" of what was ultimately proven to be owed under the lien, not merely "excessive".

The Court of Appeal therefore set aside the provisions of the motion judge's order that granted 1372708's costs incurred to post the letter of credit for the construction lien, and referred this issue to trial as well.

## "Owner" Under the Act

1372708 claimed that the motion judge erred in finding that Ravenda had a valid claim for lien, on the basis that Ravenda fell within the definition of "owner" under s. 1 of the Act, and therefore could not lien its own improvement, and that in any event, Ravenda did not build the homes "at the request" of 1372708, as the owner.

The basis of Ravenda's lien claim was that the construction of the model homes and sales office constituted an improvement for the benefit of 1372708, as an owner of the premises. Therefore, Ravenda's claim for lien depended on whether or not 1372708 was an "owner" under the Act.

Section 1 of the Act provides as follows:

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> "owner" means any person, including the Crown, having an interest in a premises at whose request and,
>
> (a) upon whose credit, or
>
> (b) on whose behalf, or
>
> (c) with whose privity or consent, or
>
> (d) for whose direct benefit,
>
> an improvement is made to the premises but does not include a home buyer

The Court of Appeal first addressed whether Ravenda was an "owner" under the Act. 1372708 argued that the motion judge's finding that the improvement was for the "benefit" of both parties resulted in Ravenda Homes being an "owner" under the Act. However, the court held that while Ravenda had an interest in the improvement, it did not have an interest in the premises, and therefore the motion judge was correct in stating that Ravenda Homes was not an "owner" under the Act.

As the sole owner of the land, there was no question of 1372708's "interest in the premises." Rather, 1372708's ownership turned on the meaning of "at the request of". The Court of Appeal mentioned several factors in reference to "request":

> 1. The request that work be done or services be supplied may be express or implied from the circumstances of the case;
>
> 2. The request could be implied from the nature of the arrangements or dealings between the parties; as a result, the court must look not only to the contract but also to the substance of the transaction between the parties; and
>
> 3. Whether there has been a request in any given case is a question of fact.

The Court of Appeal found that the motion judge was alive to the criteria of "owner", particularly the meaning of request. The Court of Appeal found that the motion judge's findings satisfied the criteria for a valid lien. While the

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motion judge did not expressly state that 1372708 impliedly requested that Ravenda Homes build the model homes, this could be inferred from his finding that 1372708 was an active participant who impliedly encouraged the building of the model homes in furtherance of the parties' agreement to develop the subdivision. Therefore, the Court of Appeal found that 1372708 was in fact an owner under the Act, and Ravenda lien was valid.

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