Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #151

March 2, 2019

INSIDE THIS ISSUE:

Editor's Note

The Legal Update Committee has been hard at work to hit the ground running in 2019 with important updates on a cross-section of "hot topics" from across Canada. This issue includes recent caselaw on limitation periods, standard of review, personal liability for breach of trust and another case comment arising out of the Muskrat Falls infrastructure project that will be a very useful precedent for counsel advising clients on contracts with stepped dispute resolution clauses.

Of course, clients will often begin a retainer by asking counsel: "How do we recover my losses?" It is therefore important for construction lawyers to also be conversant with topics such as insurance and insolvency, both of which are well covered in Legal Update #151.

We begin this issue with insurance, specifically, two recent cases from Alberta and Ontario respectively applying the Supreme Court's *Ledcor* decision respecting the coverage available under a builder's risk insurance policy.

With respect to insolvency, important decisions from both the Alberta and Ontario Courts of Appeal are summarized in this issue. The Alberta case dealt with the enforceability of a clause requiring a subcontractor to forfeit 10% of its subcontract price to the general contractor upon the insolvency of the subcontractor. The decision contains a noteworthy dissent and possibly a road map for how this case might reach the Supreme Court.

The January, 2019 decision of the Ontario Court of Appeal in *Guarantee Company of Canada v Royal Bank* immediately caught my attention when it was released because it deals with the frequently litigated issue of the priority to be enjoyed by statutory trust beneficiaries in an insolvency - a "hot topic" that I presented on at our 2018 Banff conference. I am pleased to say that with the benefit of hindsight, and this new decision, that much of what I had to say in Banff has proven completely wrong!

Editor's Note

LUC #151 [2019]

Author:
Brendan D. Bowles,
Glaholt LLP

Back to Index

Editor's Note

In Ontario there had been doubt as to the strength of the trust remedy in an insolvency, especially where there has been comingling of funds. This pessimism definitely informed my Banff remarks. My views have significantly evolved now that a five-judge unanimous decision of the Ontario Court of Appeal has found that the statutory trust provisions do create a common law trust which can exist even where there has been commingling of funds. The decision is consistent with the Alberta Court of Appeal's *Iona* decision, leave to appeal from which was denied by the Supreme Court.

Commingling is a ubiquitous practice in the construction industry which the Ontario Court of Appeal has now clearly said is not necessarily fatal to the trust remedy in a bankruptcy. Of course, every case turns on its facts, so caution is warranted, but is significant that the highest court in Ontario is now on record that, on the right facts, specifically where the funds are readily ascertainable and identifiable, the exclusion of trust funds from the property of the debtor available to general creditors does not offend the federal bankruptcy distribution scheme. Indeed, it should be noted that *Guarantee Company of Canada v Royal Bank* was decided under the former *Construction Lien Act*; if anything, with its more prescriptive bookkeeping requirements imposed on trustees, the new *Construction Act* should prove even more robust in protecting unpaid trust claimants where their payer has gone bankrupt.

Your Legal Update Committee looks forward to another year of timely and relevant updates on developments that are important to your practice. Please send your contributions to Legal Update to me at bb@glaholt.com .

Brendan

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

LUC #151 [2019]

Primary Topic:
XIII Insurance
Jurisdiction:
Canada
Authors:
Sharon Vogel, Partner and Webnesh Haile, Associate
Singleton Urquhart Reynolds Vogel LLP

Canlii References
2018 ABQB 674 (Alberta)
2018 ONSC 4426 (Ontario)

Back to Index

CANADA

Language is worth a thousand pounds a word!
- Lewis Carroll, Alice's Adventures in Wonderland & Through the Looking -Glass

Two recent decisions have considered the Supreme Court of Canada's landmark decision in *Ledcor*, which addressed the coverage available under a builder's risk policy. In an Alberta case, *Ledcor* was distinguished based on the policy wording at issue. In a recent Ontario decision, the purpose of a builder's risk policy as described in *Ledcor* was affirmed, but in the result a subcontractor was found not to be an insured under the policy. These two decisions demonstrate the continuing importance of examining the wording of the insurance policy at issue carefully.

Alberta Decision – *Condominium Corporation No. 9312374 v. Aviva Insurance*

In *Condominium Corporation No 9312374 v. Aviva Insurance Company of Canada*,[1] the Court of Queen's Bench of Alberta considered whether coverage under an "all risks" property insurance policy (the "All Risks Policy") extended to damage caused by faulty workmanship. Reversing the Master's decision, the Court held that **no** coverage was available for faulty workmanship, given the policy wording at issue.

While providing maintenance and rehabilitation work to a condominium parkade, the defendant contractor and engineer cut too deeply into the parkade slab, damaging the parkade's structural integrity. The condominium corporation made a claim under the All Risks Policy. The insurer denied the claim on the basis that:

a) the "faulty workmanship" exclusion, which provided that the All Risks Policy did not insure against the cost of making good faulty or improper material, workmanship or design, applied to exclude coverage for the property damage sustained; and

b) the exception to the exclusion which provided coverage for "loss or damage caused directly by a resultant peril not otherwise excluded" was not triggered, since the faulty workmanship had not caused an otherwise-covered "resultant peril" (such as a fire) that had caused the property damage for which coverage was sought.

The condominium corporation relied on *Ledcor*, in which the Supreme Court of Canada held that the cost of removing and replacing windows damaged by faulty workmanship of a window cleaning contractor was covered

[1] 2018 ABQB 674

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

LUC #151 [2019]

Primary Topic:
XIII Insurance
Jurisdiction:
Canada
Authors:
Sharon Vogel, Partner and Webnesh Haile, Associate
Singleton Urquhart Reynolds Vogel LLP

Canlii References
2018 ABQB 674 (Alberta)
2018 ONSC 4426 (Ontario)

Back to Index

CANADA

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

through an exception to the "faulty workmanship" exclusion for "damage not otherwise excluded by the policy."

The condominium corporation argued that an exception to the exclusion should apply to restore coverage for the cost of repairing the property damage because the damage to the building's structural integrity was a "resultant peril not otherwise excluded", such that it was covered under an exception to the exclusion. In response to the condominium corporation's argument that the damage to the structural integrity of the building itself was a "resultant peril", the Court held that "damage is not a peril; it is a result" and therefore the exception to the exclusion did not apply.

The Alberta Court of Queen's Bench distinguished *Ledcor* on a number of grounds:

a) the policy at issue in *Ledcor* was a builder's risk policy which insured contractors and engineers, but the All Risks Policy at issue insured only the owners of the condominium and was not a course of construction policy;

b) the purpose of the builder's risk policy in *Ledcor* was to provide broad coverage for all involved in a construction project, while the purpose of the All Risks Policy at issue was to insure against property damage caused by a peril not otherwise excluded; and

c) the "relatively high premiums" paid for builder's risks policies such as that considered in the *Ledcor* decision was not a consideration with respect to the All Risks Policy at issue.

Most importantly, the Court engaged in a careful review of the language of the All Risks Property Policy, finding that the insured had shown that the cost of making good faulty workmanship in this case included the cost of repairing the parkade's structural integrity. The Court found that the insurer had satisfied its onus to demonstrate that the faulty workmanship exclusion applied. The Court then held that the condominium corporation had failed to satisfy its onus to demonstrate that an exception to the exclusion applied. The Court distinguished the wording of the resultant damage exception from that used in *Ledcor*.

Ontario Decision – *Maio v. Mer Mechanical*

In *Maio v. Mer Mechanical Inc.*, 2018 ONSC 4426, a plumbing subcontractor insured under a Residential Builders – All Risks Insurance ("RBAR") component of a Commercial Multi-Peril Policy was unsuccessful in a motion for summary judgment against the insurer. The insurer had brought a subrogated action against the subcontractor. The subcontractor was responsible for the installation of a faucet assembly component that became detached

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

LUC #151 [2019]

Primary Topic:
XIII Insurance
Jurisdiction:
Canada
Authors:
Sharon Vogel, Partner and Webnesh Haile, Associate
Singleton Urquhart Reynolds Vogel LLP

Canlii References
2018 ABQB 674 (Alberta)
2018 ONSC 4426 (Ontario)

Back to Index

CANADA

A Thousand Pounds a Word: Following Ledcor, Policy Wording Continues to Govern in Insurance Policy Disputes

over time due to "creep/stress relaxation", causing over $3,000,000 in property damage to a recently-completed home construction project. The subcontractor argued that a waiver of subrogation clause in the RBAR builder's risk policy barred the insurer's action.

The Ontario Superior Court of Justice referred to *Ledcor*, noting that the primary purpose of a builder's risk policy is to provide coverage during a construction project in order to avoid interruption as a result of disputes. Significantly, the Court considered the authorities cited by the subcontractor and found that the definition of "occurrence" in the policies at issue in the cases cited was broader than the definition in the RBAR policy. On a proper reading of the terms of the RBAR builder's risk policy, the occurrence that led to the damage was not an "occurrence" as defined in the RBAR policy, the subcontractor was not an insured under the RBAR policy because the loss was not an "occurrence" within the definition of the policy, and therefore the insurer's subrogated claim against the subcontractor was not barred.

Conclusion

Both of these cases demonstrate that although courts are alive to the purpose of an insurance policy when interpreting it, the language of the policy itself will determine whether a policy will provide coverage in a given circumstance.

Picture by Niabot (Own work) [CC BY-SA 3.0 (http://creativecommons.org/licenses/by-sa/3.0)], via Wikimedia Commons

Capital Steel Inc v Chandos Construction Ltd

Capital Steel Inc v Chandos Construction Ltd, 2019 ABCA 32

LUC #151 [2019]

Primary Topic:
VII Breach of Terms of Contract
Secondary Topic:
IV Subcontracts
Jurisdiction:
Alberta
Author:
E. Jane Sidnell, Rose LLP

Canlii Reference

Back to Index

ALBERTA

This decision arose in the context of a subcontract for steel supply and installation. Chandos, the general contractor, included a clause in the subcontract whereby Capital Steel, the subcontractor, would be required to pay 10% of the contract price in the event of Capital Steel's insolvency:

> Clause VII Q
>
> In the event the Subcontractor commits any act of insolvency, bankruptcy, winding up or other distribution of assets, or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations, then in any such events:
>
> ...
>
> (d) the Subcontractor shall forfeit 10 [percent] of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period.

The majority of the Alberta Court of Appeal found the clause to be unenforceable based on the common law anti-deprivation rule:[1]

> ... The anti-deprivation rule prevents parties from agreeing to remove property from a bankrupt's estate in the event of insolvency that would have otherwise vested in the trustee ... Provisions that offend the anti-deprivation rule reduce the total pot of assets available to the bankrupt's creditors.

The majority discussed the fact that the anti-deprivation rule is not codified in the *Bankruptcy and Insolvency Act* but found that the anti-deprivation rule is incorporated into the common law as part of the "fraud on the bankruptcy law" principle.[2]

The majority also referred to the United Kingdom Supreme Court's decision in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*[3] and referred to and rejected the purpose-based test set out by the United Kingdom Supreme Court in that decision:

> ... The court concluded that the anti-deprivation rule does not apply to "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy"; *Belmont* at para

1 *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32, at paragraph 21

2 *Ibid,* at paragraph 17

3 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*, [2001] UKSC 38

Capital Steel Inc v Chandos Construction Ltd

Capital Steel Inc v Chandos Construction Ltd, 2019 ABCA 32

LUC #151 [2019]

Primary Topic:
VII Breach of Terms of Contract
Secondary Topic:
IV Subcontracts
Jurisdiction:
Alberta
Author:
E. Jane Sidnell, Rose LLP

Canlii Reference

Back to Index

ALBERTA

> 104. This test looks at the purpose of the provision rather than its effect. I decline to adopt *Belmont*. The purpose-based test articulated in *Belmont* is inconsistent with Canadian cases applying the anti-deprivation rule and would eliminate virtually all of the rule's utility.[4]

The majority of the Alberta Court of Appeal preferred an effects-based approach, which when applied to the clause in question, had the effect of depriving creditors of property of the bankrupt that would otherwise be available to them in bankruptcy. As a result, the majority found the clause unenforceable and allowed the trustee's appeal from the judgment below.

Given the finding on the unenforceability of the provision based on the anti-deprivation rule, the majority of the Alberta Court of Appeal did not address whether the clause was an unenforceable penalty clause.

In a very lengthy dissent, Wakeling JA, took a different approach and used the most encouraging language than I have ever seen for a Leave to Appeal Application to the Supreme Court of Canada by noting that this is a case of "national importance"[5] and that the Supreme Court of Canada had not ruled on the issue.

Wakeling JA found that the anti-deprivation rule was not part of the common law of Canada and provided a lengthy review of the United Kingdom Supreme Court's decision in *Cavendish Square Holdings BV v El Makdessi*[6] and other cases.

The *Cavendish Square* case, together with its companion case *ParkingEye Ltd. v Beavis*, was a departure for the UK courts in that it was determined that liquidated damages are not limited to a genuine pre-estimate of damages. If liquidated damages: (1) have a reasonable commercial basis; and (2) are not extravagant, exorbitant or unconscionable, then they are enforceable even if they are not a genuine pre-estimate of damages. In such cases, liquidated damages clauses are not considered penalty clauses. In the end, the dissenting opinion of Wakeling JA was that the provision in the Chandos subcontract was not a penalty and was therefore enforceable. He would have upheld the decision below.

4 *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32, at paragraph 46
5 *Ibid,* at paragraph 58
6 [2015] UKSC 67

Construction Act Trusts and Bankruptcy – Finally, some Certainty

Construction Act Trusts and Bankruptcy – Finally, some Certainty

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
II Statutory Regulation
Jurisdiction:
Ontario
Author:
Andrea Lee, Partner and Markus Rotterdam, Director of Research, Glaholt LLP

CanLII References:

2019 ONCA 9

Back to Index

ONTARIO

In January 2019, when the Ontario Court of Appeal released its decision in *The Guarantee Company of Canada v. Royal Bank of Canada*, 2019 ONCA 9, a collective sigh of relief went up from parties seeking to enforce *Construction Act* (the "*Act*") trust rights in the face of an insolvency.

Section 8 of the *Act* provides that amounts owing to or received by a contractor or subcontractor on account of an improvement constitute a trust fund for the benefit of the subcontractors and other suppliers of services or materials to the improvement. As trustee, the contractor or subcontractor cannot appropriate or convert any part of the trust fund to its own use or to any use inconsistent with the trust until all suppliers of services or materials to the improvement are fully paid.

However, in Ontario, when a trustee makes an assignment into bankruptcy, the question of whether the trust will survive the bankruptcy has historically been answered in the negative, leaving unpaid parties fighting to collect from whatever assets are available to the pool of other creditors.

In *British Columbia v. Henfrey Sampson Belair Ltd.*, [1989] 2 S.C.R. 24 ("*Henfrey*"), the Supreme Court of Canada laid out the test to determine whether a statutory trust ought to be excluded from a bankrupt's property for distribution to creditors pursuant to section 67(1)(a) of the *Bankruptcy and Insolvency Act* (the "BIA"), which provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person". The Supreme Court held that the three elements of a common law trust had to be present before a statutory trust could fall under s. 67(1)(a) BIA: certainty of intention, certainty of subject matter, and certainty of object.

In *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062 ("*Atlas Block*"), the court held that a supplier's trust claim under the Act did not survive Atlas's bankruptcy. Following *Henfrey*, the court held that section 67(1)(a) of the BIA did not extend to assets subject to a deemed trust created by provincial statute where such deemed trust did not otherwise have all the attributes of a valid trust at common law. Since the funds from the projects in *Atlas Block* were commingled with funds from other sources, there was no certainty of subject matter and consequently no common law trust. In the words of the court, "once co-mingling has occurred, that is the end of the matter".

The court's analysis turned on the fact that, as in *Ivaco Inc. (Re),* 2006 CanLII 34551 (ONCA), the Act did not set out specific obligations on the trustee, and therefore the subsequent receiver, to establish and maintain a separate account designated as a trust account. The court noted that a deemed trust was, in a sense, a legal fiction; that only a trust at common law was exempt from the bankrupt's estate; and that if the province wanted to re-

Construction Act Trusts and Bankruptcy – Finally, some Certainty

Construction Act Trusts and Bankruptcy – Finally, some Certainty

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
II Statutory Regulation
Jurisdiction:
Ontario
Author:
Andrea Lee, Partner and Markus Rotterdam, Director of Research, Glaholt LLP

CanLII References:

2019 ONCA 9

Back to Index

ONTARIO

quire that a party maintain funds in a separate account, it could have legislated that separation, but it did not do so.

The authors of *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, took that last comment to heart and, after reviewing various options, including requiring parties to open project trust accounts or project bank accounts, suggested amendments to the trust regime. The legislature eventually settled on what is now s. 8.1 of the *Act*:

> (1) Every person who is a trustee under section 8 shall comply with the following requirements respecting the trust funds of which he or she is trustee:
>
> 1. The trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the trust funds, the funds shall be deposited into a bank account in all of the trustees' names.
>
> 2. The trustee shall maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information.
>
> 3. If the person is a trustee of more than one trust under section 8, the trust funds may be deposited together into a single bank account, as long as the trustee maintains the records required under paragraph 2 separately in respect of each trust.
>
> (2) Trust funds from separate trusts that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust.

The recent Ontario Court of Appeal decision in *The Guarantee Company of Canada v. Royal Bank of Canada* ("*GCNA v. RBC*") revisited the discussion concerning statutory trusts and bankruptcy. The conclusions reached by the court, read together with the requirements of the new s. 8.1 of the Act, should finally clarify this area of law.

In *GCNA v. RBC*, the court considered the s. 8 trust in the context of the bankruptcy of a contractor, A-1 Asphalt Maintenance Ltd. Multiple liens were registered against various A-1 projects. At the time of A-1's bankruptcy, it had four major ongoing projects, three with the City of Hamilton and one with the Town of Halton Hills. All four contracts had outstanding accounts receivable for work performed by A-1. The bankruptcy judge directed

Construction Act Trusts and Bankruptcy – Finally, some Certainty

Construction Act Trusts and Bankruptcy – Finally, some Certainty

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
II Statutory Regulation
Jurisdiction:
Ontario
Author:
Andrea Lee, Partner and Markus Rotterdam, Director of Research, Glaholt LLP

CanLII References:

2019 ONCA 9

Back to Index

ONTARIO

the receiver to establish a "Paving Projects Account" and a general post-receivership account. The order provided that all receipts from the four paving projects were to be deposited into the Paving Projects Account.

The City and the Town paid $675,372.27, which represented debts owing to A-1 by the City and the Town when A-1 filed its Notice of Intention, to the receiver, who deposited the funds into the Paving Projects Account. It was common ground that those funds were subject to the s. 8 trust, but GCNA, the bonding company that had settled the liens and become subrogated to the claims, further argued that the funds had to be excluded from A-1's property on bankruptcy pursuant to s. 67(1)(a) of the BIA. Not surprisingly, RBC, a secured creditor pursuant to a general security agreement, took the position that the funds formed part of A-1's estate and were available to creditors.

The motion judge concluded that GCNA had failed to establish sufficient certainty of subject matter and that the funds were not held in trust within the meaning of s. 67(1)(a). She held that *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc*. (2005), 74 O.R. (3d) 382 (C.A.) required segregation of funds to maintain a common law trust, and that even though the receiver's accounting could identify the funds in the Paving Projects Account, that was not enough to establish certainty of subject matter. The mere fact of commingling the funds from the various projects into a single account was held to have destroyed the certainty of subject matter. According to the motion judge, therefore, GCNA was only entitled to a *pro rata* share of the funds as a secured creditor.

GCNA appealed. In allowing the appeal, the Court of Appeal began by finding that *Henfrey* contemplated that a provincial statute could supply the required element of certainty of intention for a statutory trust and that the trust created by the *Act* did not give rise to an operational conflict with the BIA. Accordingly, the doctrine of paramountcy did not apply.

The court next concluded that the motion judge erred by finding that the requirement of certainty of subject matter was not met in this case. Citing from Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), the court held that to satisfy the requirement for certainty of subject matter, it "must be possible to determine precisely what property the trust is meant to encompass. The subject matter is ascertained when it is a fixed amount or a specified piece of property; it is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise."

The court held that the amounts owed by the City and the Town on account of the paving projects were debts, that a debt was a chose in action which could properly be the subject matter of a trust, and that consequently it did

Construction Act Trusts and Bankruptcy – Finally, some Certainty

Construction Act Trusts and Bankruptcy – Finally, some Certainty

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
II Statutory Regulation
Jurisdiction:
Ontario
Author:
Andrea Lee, Partner and Markus Rotterdam, Director of Research, Glaholt LLP

CanLII References:

2019 ONCA 9

Back to Index

ONTARIO

not matter that neither the City nor the Town had created segregated accounts or specifically earmarked the source of the funds they would use to pay the debts they owed for the paving projects. Sharpe J.A. wrote as follows:

> Section 8(1) embraces "all amounts, owing to a contractor or subcontractor, whether or not due or payable". That language designated precisely what property the trust is meant to encompass. A-1 owned those debts. They constituted choses in action which are a form of property over which a trust may be imposed. It follows that at the moment of A-1's bankruptcy, the trust created by s. 8(1) was imposed on the debts owed by the City and the Town to A-1.

Finally, since the evidence clearly established that the funds paid for each paving project were readily ascertainable and identifiable, the fact that they were commingled into the same Paving Projects Account did not deprive the funds of certainty of subject matter. Only when commingling is accompanied by conversion and tracing becomes impossible is the required element of certainty of subject matter lost.

Consequently, the court concluded that by operation of s. 67(1)(a) of the BIA, the funds satisfied the requirements for a trust at law and were not property of A-1 available for distribution to A-1's creditors.

In light of cases such as *Atlas Block*, it was not entirely clear whether s. 8.1 of the *Act* alone would have achieved its goal of turning the s. 8 trust funds into common law trust funds. However, going forward, the requirement in s. 8.1 that a trustee must maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information, in conjunction with the Court of Appeal decision in *The Guarantee Company of Canada v. Royal Bank of Canada*, should leave beneficiaries of the s. 8 trust in a good position to claim access to the trust funds in bankruptcy by excluding the funds from the property of the bankrupt and thus excluding them from the reach of other creditors.

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

LUC #151 [2019]

Primary Topic:
I General
Jurisdiction:
Ontario
Author:
Markus Rotterdam,
Director of Research,
Glaholt LLP

CanLII Reference:

2019 ONCA 66

Back to Index

ONTARIO

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

The Ontario Court of Appeal recently released another decision on when a proceeding becomes "appropriate" for the purposes of the *Limitations Act, 2002*.

Presley v. Van Dusen, 2019 ONCA 66 concerned the improper installation of a septic system on the plaintiffs' property. The system was installed in 2010. Problems arose a year later when smell began to emanate from the system. The defendant replaced a pump, which initially appeared to fix the problem. Another year later, in 2012, the smells were back, but the defendant assured the owners that they were the result of unusually wet weather and that many people were having the same problem. In 2013, the system still smelled and had also started leaking. The defendant told the owners that the problem could be remedied with a load of sand added to the septic bed and assured them that he would be back to do that work. He actually attended at the property with the sand in 2013, but the owners were not home and he could not access the property. In the spring of 2014, the property was too muddy to enter. However, the defendant kept assuring the owners that he would come back and fix the problems. In 2015, the owners called the municipal health unit, which had approved the system. After inspecting the system, the health unit condemned the system and ordered the owners to replace it. Later in 2015, the owners commenced a Small Claims Court action against the defendant contractor and the health unit.

Section 5 of the *Limitations Act* provides as follows:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

The Small Claims Court judge held that by the spring of 2013, when there was smell and effluent coming from the septic system, "any reasonable thinking individual or homeowner" would know from the smells and the lack

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

LUC #151 [2019]

Primary Topic:
I General
Jurisdiction:
Ontario
Author:
Markus Rotterdam, Director of Research, Glaholt LLP

CanLII Reference:

2019 ONCA 66

Back to Index

ONTARIO

of additional work by the contractor that (i) the injury, loss or damage had occurred; (ii) the injury, loss or damage was caused or contributed to by an act or omission; and (iii) the act or omission was that of the contractor and perhaps the Health Unit. In light of that finding, the judge declined to consider s. 5(1)(a)(iv), holding that "it is not necessary for me to make any determination under that subsection and I do not do so as I only have to find the earliest date and I have no difficulty, as I have said, in finding that that date was the spring of 2013." A judge of the Divisional Court upheld that decision, agreeing that "there was no requirement for the [trial judge] to make an explicit finding as to what [the appellants] actually knew in relation to subsection 5(1)(a)(iv)".

The Court of Appeal held that both courts below erred in law by failing to conduct a proper analysis under s. 5(1)(a)(iv):

> The analysis of both the trial judge and the Divisional Court judge of ss. 5(1)(a)(iv), 5(1)(b) and s. 5(2) of the *Limitations Act* is flawed. The trial judge explicitly stated that he was not considering s. 5(1)(a)(iv). A determination under s. 5(1)(b) as to the date a reasonable person would have discovered the claim requires consideration of all four "matters referred to in clause (a)". Similarly, the finding that there was insufficient evidence to rebut the presumption under s. 5(2) that the plaintiff knew all the matters referred to in s. 5(1)(a) cannot stand as there was no consideration of s. 5(1)(a)(iv).

Based on two recent Court of Appeal decisions, *407 ETR Concession Co. v. Day*, 2016 ONCA 709 and *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, the court held that legal proceeding against an expert professional were not appropriate if the claim arose out of the professional's alleged wrongdoing but could be resolved by the professional himself or herself without recourse to the courts, rendering the proceeding unnecessary. Importantly for construction cases, the court clarified that that principle applies not only to traditional expert professionals such as doctors, accountants or engineers, but to anyone with special training or expertise, such as a contractor specializing in septic systems in this case.

The court held that while the appellants could be criticized for not being more insistent that the contractor fulfill this assurance more promptly, the evidence established that they were engaged in ongoing discussions with him and took actions to enable him to access the property. He continued to assure them that the problem could be readily fixed and that he would fix it. The appellants reasonably relied on those assurances, which led the appellants to the reasonable belief that the problem could and would be remedied without cost and without any need to have recourse to the courts. The

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

When are Proceedings "Appropriate"? - *Presley v. Van Dusen*, 2019 ONCA 66

LUC #151 [2019]

Primary Topic:
I General
Jurisdiction:
Ontario
Author:
Markus Rotterdam, Director of Research, Glaholt LLP

CanLII Reference:

2019 ONCA 66

Back to Index

ONTARIO

evidence showed that the owners still thought the contractor would fix the system in the winter of 2014, so that that the action commenced in 2015 was well within the limitation period.

Since the owners did not know that a proceeding against the contractor was appropriate until that time, the court held that it followed that they could not know that a proceeding was appropriate against the health unit until then either.

Court of Appeal Is Tough on Homeowners in Limitation Period Case

Zeppa v Woodbridge Heating & Air-Conditioning Ltd., 2019 ONCA 47

LUC #151 [2019]

Primary Topic: I General
Jurisdiction: Ontario
Author: Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court (Trial Decision)

Ontario Court of Appeal (Appeal Decision)

Back to Index

ONTARIO

The trial decision in this case, reported at 2017 ONSC 5847, was discussed in Legal Update 145. This excerpt from that discussion sets out the basic facts and issues in the case:

"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 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

Court of Appeal Is Tough on Homeowners in Limitation Period Case

Zeppa v Woodbridge Heating & Air-Conditioning Ltd., 2019 ONCA 47

LUC #151 [2019]

Primary Topic: I General
Jurisdiction: Ontario
Author: Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court (Trial Decision)

Ontario Court of Appeal (Appeal Decision)

Back to Index

ONTARIO

the house resulting from the deficient system, including mould and damaged wood elements throughout the house.

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:

> *That an injury, loss or damage has occurred;*
>
> *That the injury loss or damage was caused by or contributed to by an act or omission;*
>
> *That the act or omission was that of the person against whom the claim is made; and*
>
> *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.

Court of Appeal Is Tough on Homeowners in Limitation Period Case

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 February 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 discover of the cause of action. The Judge did not think this extended the limitation period in the circumstances."

The majority of the Court of Appeal firmly supported the reasoning of the Trial Judge that the claim was statute barred. However, Madam Justice Feldman differed from her colleagues and provided a strong dissent.

The majority of the Court divided their reasons into four parts based on the grounds of appeal.

Firstly, they considered whether the Judge had erred in determining that it was not necessary for the homeowners to have knowledge of the fact that the boilers had been installed improperly in order for the limitation period to begin running. The homeowners had argued that while they clearly knew about problems with the system, they did not know about the improper installation until the Fall of 2010 when this was confirmed by the boiler manufacturer. Mr. Justice Brown, writing for the majority, reviewed the law that reasonable discoverability was enough to start the limitation period running. It was not necessary to have perfect knowledge but rather the test was knowledge of sufficient facts to have *prima facie* grounds to infer the Defendant's acts or omissions caused or contributed to the loss. Once the maintenance contract ran out and the Plaintiff consulted various repairmen and experts in 2009 about the continuing problems, there was a basis to conclude the claim was discovered. Accordingly, the majority of the Court considered that there was a factual basis for the Trial Judge's discoverability finding.

On this first issue, Madam Justice Feldman, in dissent, noted that there was a glaring inconsistency in the Trial Judge's findings. On the one hand he found that by 2009, the Plaintiffs were no longer relying on the Defendant and that they knew the system was not functioning properly. On the other hand he referred to evidence that the system was working prior to the Fall of 2010 when there was a meeting with the Defendant after it had failed again. She said that in her in view, knowledge of the improper installation of the boilers was an essential element of discoverability. While the Plain-

Zeppa v Woodbridge Heating & Air-Conditioning Ltd., 2019 ONCA 47

LUC #151 [2019]

Primary Topic: I General
Jurisdiction: Ontario
Author: Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court (Trial Decision)

Ontario Court of Appeal (Appeal Decision)

Back to Index

ONTARIO

Court of Appeal Is Tough on Homeowners in Limitation Period Case

Zeppa v Woodbridge Heating & Air-Conditioning Ltd., 2019 ONCA 47

LUC #151 [2019]

Primary Topic:
I General
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court
(Trial Decision)

Ontario Court of Appeal
(Appeal Decision)

Back to Index

ONTARIO

tiffs knew the system had problems, they did not know the problems were caused by the improper boiler installation until this was disclosed in the Fall of 2010. Madam Justice Feldman noted that until that information became known, the Plaintiffs did not know whether the problems were caused by the manufacturer or the installer.

Secondly, Mr. Justice Brown considered the Trial Judge's treatment of the test as to when the Plaintiffs knew that a claim was the "appropriate means" to seek a remedy. He noted that the Trial Judge had correctly held that during the time of the maintenance contract, the claim could not be considered to have been discovered, as litigation was not an appropriate means to seek a remedy. Afterwards, the majority considered there was evidence in mid to late 2009 that the Plaintiffs were no longer relying on the Defendant and on that basis, there was no error by the Trial Judge.

Madam Justice Feldman referred to the active concealment by the Defendant of the improper installation and found that it could not be said that a claim against the Defendant was an appropriate means until the circumstances of the improper boiler installation, that had been hidden, became known. Her treatment of this issue is tied up in her treatment of the third and fourth issues discussed by the Court.

The third issue on the appeal was whether the Trial Judge failed to properly consider the fact that the Defendant had misrepresented to the Plaintiffs that the problem was only one of maintenance. Mr. Justice Brown relied on the Trial Judge's finding that by late 2009, the Plaintiffs were no longer relying on the Plaintiff – in essence that the misrepresentation did not matter.

The Fourth Issue on the appeal was whether the Trial Judge erred in his treatment of the principle of fraudulent concealment. In this regard, the Court noted that Section 15 (4) (c) of the *Limitations Act* provides that the 15 year ultimate limitation period does not run during any period of wilful concealment or misleading but that there is no such provision applicable to the general two year limitation period. The Court noted that this was because such conduct would impact discoverability and therefore a separate provision was unnecessary. The majority therefore sided with the Trial Judge that even if there had been wilful concealment, it did not impact the running of the limitation period because the information concealed was not a necessary fact for the Plaintiffs to know in the discoverability analysis.

Madam Justice Feldman however characterized the Trial Judge's reasoning as saying that the Plaintiffs did not have to know how or why their claim arose before they had to start an action. She accepted that fraudulent concealment was to be analyzed within discoverability in considering the application of the two year general limitation period. Indeed she noted that Section 15 (4) (c), relating to the ultimate 15 year period, uses the same lan-

Court of Appeal Is Tough on Homeowners in Limitation Period Case

Zeppa v Woodbridge Heating & Air-Conditioning Ltd., 2019 ONCA 47

LUC #151 [2019]

Primary Topic: I General
Jurisdiction: Ontario
Author: Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court (Trial Decision)

Ontario Court of Appeal (Appeal Decision)

Back to Index

ONTARIO

guage as the discoverability test in Section 5. However, she considered that the Trial Judge's consideration that fraudulent concealment was irrelevant to discoverability was an error of law. Its effect was to permit the Defendant to profit from its fraudulent concealment and misrepresentation. It failed to strike the right balance between providing plaintiffs with sufficient time to commence claims and providing defendants with the peace of knowing they cannot be sued after a fixed period of time has passed. She noted that because the Trial Judge considered the concealment to be irrelevant, he failed to consider the impact of it on the actual discovery of the real cause. In her view, it did not lie in the mouth of Defendant to say what steps should have been taken and when to ascertain the causes of the problems in the face of the misrepresentations and concealment. The Plaintiffs did not know that the Defendant was responsible because the Defendant actively concealed that fact.

One has to wonder about the motivation of the Trial Judge and the majority in holding essentially that the knowledge of the existence of system problems without an understanding of cause or clarity on responsibility were sufficient to start the limitation period. The Court does not seem to consider the difficult burden they have placed on plaintiffs by a ruling that essentially finds that the existence of an apparent problem with a complex mechanical system is sufficient to ground an action without any knowledge of the actual cause of that problem. If the Plaintiffs in this case had approached a lawyer to draft a claim prior to learning about the improper installation of the boiler, the Statement of Claim would have had to either make assumptions to plead sufficient facts against the Defendant or include an alternative claim against the manufacturers of the various components, which would have added to the cost and exposed the Plaintiffs to cost claims and motions for summary judgment by those innocent parties based on the lack of factual grounding. Consider the application of this reasoning to building envelope defect cases. Does a leak around a window now start the limitation period for a defectively installed building envelope the assessment of which would normally need significant deconstruction to assess the actual cause? Does cracking drywall or a small mortar crack start the period running for a structural design error? Building professionals can perhaps be expected to make such determinations on a timely basis but normal homeowners, wishing to avoid costly expenditures are a different category of claimant who approach such problems with a mixture of ignorance, wishful thinking and trust and reliance.

The one thing that is certain is that this decision will now be used, at that very least, to challenge many homeowner claims, if not many other latent construction defect claims.

Strict Adherence to Dispute Resolution Provisions not Required According to NLSC in Labrador-Island Link v. General Cable Company, 2019 NLSC 6

LUC #151 [2019]

Primary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Newfoundland and Labrador
Authors:
John Kulik, Q.C. and Melanie Gillis, McInnes Cooper

CanLII Reference:

Supreme Court of Newfoundland and Labrador

Back to Index

Newfoundland and Labrador

Strict Adherence to Dispute Resolution Provisions not Required According to NLSC in *Labrador-Island Link v. General Cable Company*

The Defendant General Cable Company ("GCC") made an application to strike out Labrador Island Link Limited's ("Labrador") Statement of Claim on the basis that since Labrador failed to comply with the dispute resolution clause under the contract between the parties, the action constituted an abuse of process.

Labrador is (in part) the owner and operator of the Muskrat Falls Project. It contracted with GCC to design and install a transmission line conductor. The main action involves Labrador's claim for rectification costs currently calculated to be $57,552,556.00 as well as other damages to be assessed.

In particular, GCC alleged that Labrador failed to comply with Article 34 of the contract, which set out the notice requirements and timelines for raising an issue under the mandatory dispute resolution process under the contract. Specifically, Labrador supposedly: (1) failed to provide written notice of the dispute to GCC within 30 days as required under Article 34; and (2) none of the mandatory meetings between project executives required by Article 34 took place.

Justice Butler dismissed the application, finding that Labrador's actions were in line with the spirit and intent of the notice provision, and that any errors made were matters of form and trivial in nature.

In interpreting Article 34, Butler J first identified the purpose of the provision stating that Article 34 was "…a means by which the parties…could address disputes that would inevitably arise, in good faith and in a commercially reasonable manner." [at para. 36]

Butler J then analyzed the use of the words "shall" and "must" and determined at paragraph 43 that the word "shall" was used in Article 34 in a directory sense, as opposed to a mandatory sense.

Butler J determined that the parties did not intend for there to be strict adherence. He based this finding on 6 key reasons [at para.61]:

a) Labrador would be caught be surprise should a strict interpretation of the contract be enforced, whereas GCC had notice that there was a problem, and had at least one representative at five meetings that were held to discuss the problem;

Strict Adherence to Dispute Resolution Provisions not Required According to NLSC in Labrador-Island Link v. General Cable Company, 2019 NLSC 6

LUC #151 [2019]

Primary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Newfoundland and Labrador
Authors:
John Kulik, Q.C. and Melanie Gillis, McInnes Cooper

CanLII Reference:

Supreme Court of Newfoundland and Labrador

Back to Index

Newfoundland and Labrador

Strict Adherence to Dispute Resolution Provisions not Required According to NLSC in *Labrador-Island Link v. General Cable Company*

b) the parties' actions in attempting to resolve the issue were within the spirit of Article 34,
c) a strict interpretation would result in the elimination of Labrador's rights and that would constitute a commercially unfair and unreasonable result;
d) a non-strict interpretation was consistent with the agreement as a whole;
e) the non-compliance that occurred was trivial and did not result in any prejudice; and
f) despite their technical non-compliance, Labrador took steps to resolve the dispute in good faith and in a commercially reasonable manner.

Butler J went on to find that in the event that the parties' intent was for strict compliance, the appropriate remedy would be to stay the proceedings.

This case demonstrates that courts will be loath to hold parties strictly to the notice provisions of the dispute resolution section under a commercial contract if their conduct demonstrates a good faith and commercially reasonable attempt to follow the spirit and intent of the dispute resolution process and the result would be to unreasonably and unfairly eliminate one party's rights.

NBQB Leaves for Trial Questions of Personal Liability of Directors under the Trust Provisions of the NB *Mechanics' Lien Act*

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
New Brunswick
Authors:
John Kulik, Q.C. and Melanie Gillis, McInnes Cooper

CanLII Reference:

Court of Queen's Bench of New Brunswick

Back to Index

NEW BRUNSWICK

NBQB Leaves for Trial Questions of Personal Liability of Directors under the Trust Provisions of the NB *Mechanics' Lien Act*

In *Darim Masonry Ltd. v. Maricon Construction Management Ltd.*, 2019 NBQB 7, the Honourable Justice Rideout allowed an application by Darim Masonry Ltd. ("Darim") to add two Directors of the Defendant company Maricon Construction Management Ltd. ("Maricon") to Darim's claim for breach of trust. The motion raised interesting questions about the scope of the trust provisions in New Brunswick's lien legislation.

Maricon was the general contractor on the construction of the Southeast Correctional Centre in Shediac, New Brunswick, which is owned by the Province of New Brunswick. After commencing a delay claim action against Maricon, Darim learned that Maricon settled its own delay claim against the Province (which *included* Darim's claim against Maricon). Maricon received funds from the Province and converted those funds for their own use. Darim says those funds are subject to the trust provisions under the *Mechanics' Lien Act*, RSNB 1973, c. M-6 ("MLA").

It further appears that Maricon was no longer carrying on business and may have distributed the settlement funds to its shareholders. Therefore, Darim sought to amend its Statement of Claim to add Maricon's two registered Directors as Defendants in order to claim against directly them for breach of trust in allowing the trust funds to be disbursed.

Rideout J. first determined that pleadings should be amended unless prejudice or injustice would result. He found that there would be very little prejudice to the parties, since costs may be awarded in the event that a trial judge found the amendment to be frivolous, and because the Directors would likely be called as witnesses in any case in relation to Maricon's defence (paragraph 20).

Justice Rideout then held at paragraph 15 that adding the Directors would raise the issues of "whether officer of the Defendant can be included under the trust provision of the Mechanics' Lien Act" and "whether any of the money arising out of damages being awarded for breach of contract fall within the trust provisions." He went on to find at paragraph 19 that "an amendment shall be granted even if new issues are raised." He went on to find that even if Darim's chances of success in proving these two new issues at trial were low, these issues still deserve the "full airing of a trial" (paragraph 20).

Rideout J. considered that the interpretation of the words "on account of the contract price" would be key to determining the issue of whether damages recovered from an action for breach of contract would fall under the scope of the trust provisions under the MLA (paragraph 9). Rideout J. also held that, even if it could be said that this was the case, it would still have to

NBQB Leaves for Trial Questions of Personal Liability of Directors under the Trust Provisions of the NB *Mechanics' Lien Act*

LUC #151 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
New Brunswick
Authors:
John Kulik, Q.C. and Melanie Gillis, McInnes Cooper

CanLII Reference:

Court of Queen's Bench of New Brunswick

Back to Index

NEW BRUNSWICK

NBQB Leaves for Trial Questions of Personal Liability of Directors under the Trust Provisions of the NB *Mechanics' Lien Act*

be determined whether section 3 of the MLA contemplates piercing the corporate veil and imposing trust obligations on directors.

It should be noted that there are no personal liability provisions currently in the NB Act.

While these issues were not determined on the motion before Justice Rideout, they are no doubt interesting questions that, should this matter proceed to trial, will be important to all players in the construction industry in New Brunswick, as well as all jurisdictions with legislation containing similar wording to section 3 of the NB Act.

Contact the Legal Update Committee:

c/o **Brendan D. Bowles**
Glaholt LLP
Construction Lawyers
141 Adelaide St W, #800
Toronto, Ontario, M5H 3L5
Phone: (416) 368-8280
Fax: (416) 368-3467
E-mail: bb@glaholt.com

Legal Update Newsletter Design and Desktop Publishing:
Nicholas J. Dasios

Next Legal Update — watch for it!

CCCL Fellows-Only Website Board of Governors Website EDIT LINKS

Legal Update Document Database

Home
Upcoming Events
Announcements
Groups
All Fellows - Actions
Board of Governors
Website Committee
More...
Legal Update Document Database
Experts Database
Important Documents
Annual Conference Docs
Group E-mail + Links
Pictures
Recent
EDIT LINKS

new document or drag files here

All Documents

Name	Year	Issue	Details	1st Topic
LegalUpdate123	2014	123	Full text of newsletter	I. General
LegalUpdate122	2014	122	Full text of newsletter	I. General
LegalUpdate121	2014	121	Full text of newsletter	I. General
LegalUpdate120	2014	120	Full text of newsletter	I. General
LegalUpdate119	2014	119	Full text of newsletter	I. General
LegalUpdate118	2013	118	Full text of newsletter	I. General
LegalUpdate117	2013	117	Full text of newsletter	I. General
LegalUpdate116	2013	116	Full text of newsletter	I. General
LegalUpdate115	2013	115	Full text of newsletter	I. General
LegalUpdate114	2013	114	Full text of newsletter	I. General
LegalUpdate113	2013	113	Full text of newsletter	I. General
LegalUpdate112	2013	112	Full text of newsletter	I. General
LegalUpdate111	2012	111	Full text of newsletter	I. General
LegalUpdate110	2012	110	Full text of newsletter	I. General
LegalUpdate109	2012	109	Full text of newsletter	I. General
LegalUpdate108	2012	108	Full text of newsletter	I. General
LegalUpdate107	2012	107	Full text of newsletter	I. General
LegalUpdate106	2012	106	Full text of newsletter	I. General
LegalUpdate105	2012	105	Full text of newsletter	I. General
LegalUpdate104	2012	104	Full text of newsletter	I. General