Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #152

May 26, 2019

INSIDE THIS ISSUE:

Editor's Note

I admittedly have not reviewed all 151 back-issues of Legal Update to satisfy myself that what I am about to say is accurate. However, I believe I am on relatively safe ground in saying that this is the first time this publication has included an update on cannabis. Of course, recreational and even medical use of marijuana as a potential job site safety hazard is nothing new, but with legal weed now being the reality in Canada it is likely that the issue of legal pot use conflicting with the health and safety requirements of construction sites will become a more frequent legal problem facing our clients. So, it seems appropriate to start Legal Update #152 with a case comment on a recent decision from the Supreme Court of Newfoundland and Labrador upholding an arbitrator's decision to dismiss a grievance filed by a union who was challenging an employer's decision not to accommodate an employee who been prescribed cannabis for pain management and had applied for a position on the Lower Churchill Falls Project.

We then move westward in this issue with case comments from Nova Scotia and New Brunswick. It may be particularly edifying for readers to discover that in New Brunswick a park is also a "highway", at least for the purposes of that province's *Mechanics Lien Act.*

We have three case comments from Ontario, one of which upholds a consultant's ability to rely on a contractual damages cap limited to its insurance coverage and extends that benefit to third parties from whom the consultant sought contribution and indemnity.

Also from Ontario we have two recent decisions dealing with the powers of a master conducting a lien reference. In one case, *Demir v Kilic*, the Divisional Court has taken a deferential approach to the master's findings at trial. By contrast, in *R & V Construction v Baradaran,* a Superior Court Judge hearing an appeal from a summary judgment motion argued before a master found that a master's jurisdiction t even in a referred matter did not in-

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clude the enhanced fact finding powers now conferred on an Ontario judge hearing a summary judgment motion. The latter decision is subject to a further appeal and bears close scrutiny. Ontario is about to undergo a significant culture shift with the onset of statutory adjudication as of October 1, 2019. If judges are not prepared to be deferential to masters conducting a lien reference, how much, if any deference is likely to be shown to an adjudicator's decision?

Last but not least, we have an interesting decision from the Alberta Court of Appeal that deals with "bread and butter" construction dispute issues of claims for extra and for back-charges. The case is also noteworthy in that the Alberta Court of Appeal upheld the trial judge's findings that payment of a proportionate share of the payer's lien bond costs was an appropriate measure of damage for an exaggerated lien.

New decisions of significance have already been released since this issue went to press, and the Legal Update Committee plans on releasing another update soon after our Niagara conference. We are always happy to receive contributions from all regions of the country, so please continue sending me your contributions to legal update to bb@glaholt.com .

Brendan

Employer's Refusal to Hire Medical Cannabis User Upheld by NL Court

International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. v IBEW, Local 1620 (Tizzard), Re
2018 CarswellNfld 198

LUC #152 [2019]

Primary Topic:
I General
Secondary Topic:
XIV Arbitration and Mediation
Jurisdiction:
Newfoundland and Labrador
Author:
Ashley Savinov, Cox & Palmer

Canlii Reference

Newfoundland and Labrador

In a closely watched decision, the Supreme Court of Newfoundland and Labrador (the "**Court**") recently upheld an arbitration decision that endorsed an employer's decision to refuse employment on the basis of an individual's medical cannabis use. In *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. v IBEW, Local 1620 (Tizzard), Re,* 2018 CarswellNfld 198, Arbitrator John Roil, Q.C. addressed the duty to accommodate medically authorized cannabis to treat a disability, finding that the employer was unable to accommodate, to the point of undue hardship. The Union applied to the Court for judicial review.

Background

Scott Tizzard (the "**Grievor**") applied for a position with Valard Construction LP ("**Valard**"), a contractor at the Lower Churchill Project (the "**Project**"). In accordance with a Special Project Order made pursuant to the *Labour Relations Act* (Newfoundland and Labrador), the Lower Churchill Transmission Construction Employers' Association Inc. (the "**Employer**") and International Brotherhood of Electrical Workers, Local 1620 (the "**Union**") were designated as the sole and exclusive bargaining agents for contractors and workers respectively, engaged in the construction of the Project. A Special Project collective agreement was also in place between the Employer and the Union.

The Grievor had been prescribed cannabis to manage pain due to Crohn's disease and osteoarthritis; other medication had been tried in the past but had not been effective. The Grievor consumed marijuana each evening after work (20% THC level, later increased to 22%), using approximately 1.5 grams through vaporization.

The Grievor was successful in obtaining a position with Valard at the Project, as a labourer, subject to passing the requisite drug and alcohol test, as was the case for all Project employees. At this time, Valard was informed of the Grievor's medically authorized cannabis use. Following the Grievor's disclosure of his medical cannabis authorization, a series of communications took place between the parties over a few months and focused on medical information and the duration of impairment experienced by the Grievor (i.e. his ability to work safely), following his evening medical cannabis use. The Grievor later applied for another position with Valard but was unsuccessful. The evidence presented at arbitration indicated that he had been "red flagged" due to his medical cannabis use which prevented him from working for any contractor at the Project. Of interest, the Grievor had previously

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worked on the Project for another contractor at the Soldier's Pond Station, without incident. The Grievor had disclosed his medical cannabis use to his prior contractor at that time.

The Grievor provided medical information to the Employer which indicated that he could work safely after four hours of consuming cannabis. In response, the Employer then obtained its own medical opinion. At arbitration, the Employer also relied upon professional guidance documents from the College of Family Physicians of Canada, Health Canada and the NL College of Physicians and Surgeons which pointed to longer impairment times than four hours. The Employer took the position that it was possible that the effects of impairment of the Grievor's cannabis use (based on the THC potency and dosage), could last for up to 24 hours.

Ultimately, the Employer refused to hire the Grievor at the Project on the basis of not being able to accommodate him to the point of undue hardship, due to the risk of residual impairment arising from his evening cannabis use. The Union filed a grievance, alleging that the employer had discriminated against the Grievor, on the basis of disability.

Arbitrator Roil found that there was a lack of reliable resources (at least in Newfoundland and Labrador) to allow an employer to accurately measure impairment. He found that the medical cannabis use created a risk of the Grievor's impairment on the job site. On the facts of the case before him, Arbitrator Roil held that while not perfect, the Employer carried out the necessary individual assessment of accommodation possibilities. The inability to measure and manage risk of harm constituted undue hardship for the Employer. The grievance was therefore dismissed.

The Supreme Court of Newfoundland and Labrador

In its judicial review Application, the Union argued that Arbitrator Roil's decision was unreasonable. The Court disagreed, and dismissed the Union's application.

Before Justice Daniel M. Boone, the Employer conceded that the Grievor suffered from a disability, protected under the *Human Rights Act, 2010* (Newfoundland and Labrador) and further agreed that the sole reason why the Grievor was denied employment was on the basis of his medical cannabis use, in particular, the risk of residual impairment following said use. While this amounted to a *prima facie* case of discrimination, prohibited by human rights legislation, the facts of this case supported a finding that to

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accommodate the Grievor, by allowing him to work in the safety-sensitive position, would amount to undue hardship on the part of the Employer. The risk of impairment in this case could not be alleviated by a reliable measure of impairment.

Justice Boone held that Arbitrator Roil properly considered the issues before him on the basis of expert and other evidence adduced by the parties. Ultimately, Justice Boone found that the evidence supported the arbitrator's conclusions and analysis, adding that the decision was not based on stigma or stereotypes attached to cannabis users, as alleged by the Union. The arbitration decision was reasonable and the Union's application for judicial review was therefore dismissed.

Takeaways for Employers:

Disclosure of medically authorized cannabis use does not give an employer an automatic license to refuse to hire or to terminate an employee. While allowing a person to work while impaired is prohibited by occupational health and safety legislation, employers are required to obtain appropriate medical information, including the dosage, dosage frequency and potency of the medical cannabis consumed, in order to conduct an individual assessment of the employee's ability to work safely in the particular work environment. Where medical evidence confirms that the effects of medical cannabis use could linger, it *may* amount to undue hardship for an employer to risk putting such an employee to work. Employers should consider however, that what amounts to undue hardship in a safety-sensitive position on a megaproject, as was at issue in this case, may not amount to undue hardship in a non-safety sensitive position and/or a different work environment.

It should be noted that this decision is under appeal.

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No Quarter for Quarry Appeal: The NSSC upholds the Environment Minister's broad discretion in Quarry Approvals

Rudderham v Nova Scotia (Environment), 2019 NSSC 86

LUC #152 [2019]

Primary Topic: I General
Jurisdiction: Nova Scotia
Authors: :John Kulik, Q.C. & Melanie Gillis, McInnes Cooper

Canlii Reference

NOVA SCOTIA

In *Rudderham v Nova Scotia (Environment)*, 2019 NSSC 86, Justice McDougall dismissed an appeal of the Environment Minister's decision to grant approval for a 3.99-hectare quarry in the Halifax Regional Municipality ("HRM"). McDougall J.'s decision underscores the Court's continued recognition of the substantial discretion afforded to the Department of Environment over such approvals. Absent a clear and obvious procedural or substantive error, the courts will be very reluctant to interfere with those decisions.

Background

In 2011, Scotian Materials applied to the NS Environment Minister seeking approval of a quarry pursuant to the *Environment Act*, SNS 1994-95, c 1 (the "Act") and the *Activities Designation Regulations*, NS Reg. 47/1995 (the "Regulations"). In response, the Department of Environment directed Scotian to seek approval from HRM for a permit and conduct public consultations. However, in 2012 a Municipal Development Officer for HRM rejected Scotian's application for a permit on the basis that the quarry would violate HRM's Land-Use By-Law.

Scotian appealed the Municipal Development Officer's decision to the Nova Scotia Utility and Review Board and contemporaneously filed an Application with the Nova Scotia Supreme Court seeking a declaration that the HRM's Land-Use By-Law was invalid. Both matters eventually ended up before the Nova Scotia Court of Appeal. Chief Justice MacDonald declared that section 2.29 of HRM's Land-Use By-Law was invalid as it trespassed upon the Province's exclusive jurisdiction over quarries (see *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 44).

Based on MacDonald C.J.'s decision, Scotian re-applied to the Province for approval of the quarry, and in June 2017 obtained approval for a 3.99-hectare quarry. This approval was appealed by Shubenacadie Watershed Environment Protection Society ("SWEPS") and several individuals. The Environment Minister rejected their appeals. SWEPS and the individuals then appealed the Minister's decision to the Nova Scotia Supreme Court.

Grounds of Appeal

The grounds of appeal were both procedural and substantive in nature. On the procedural side, the appellants argued that the Minister's public consultation was insufficient and therefore breached his duty of procedural fairness. On the substantive side, they argued that the Minister erred by (1) allowing blasting to occur within 800 metres of Highway 102, weigh scales,

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and the Maritimes and Northeast Pipeline; (2) failing to order an environmental assessment, (3) failing to consider municipal planning documents; (4) in failing to consider the economic impact of the quarry on the surrounding area; (5) failing to consider the concerns raised in the appellants' blasting expert's report about flyrock and ground vibrations; and (6) failing to consider the impact on groundwater wells.

Justice McDougall's Decision

Justice McDougall started his decision by outlining the substantial discretion afforded to the Minister of the Environment under the legislative framework. In support of this reasoning, he cited the recent case of *Sorflaten v Nova Scotia (Environment)*, 2018 NSSC 55 wherein Justice Chipman held as follows at paragraph 28:

> ...I am of the view that the polycentric goals make environmental regulation subject to the greatest deference from the Court. In my view, it is for the Minister tasked with making the decision to consider the various policy choices. Such decisions require a balancing of potentially competing interests in meeting the goals of the *Act*.

In light of this broad discretion and deference, he then considered each ground of appeal in turn.

In relation to the procedural grounds of appeal, Justice McDougall noted that there was a public consultation process undertaken by Scotian and summarized in a consultation report to the Department of Environment. He held that, in relying on this process and report to grant approval, the Minister upheld his duty of procedural fairness, and made a point of noting that there is only a 'low level' duty to third parties during the application process (Rudderham, paragraph 35, citing *Margaree Environmental Association v. Nova Scotia (Environment)*, 2012 NSSC 296). Significantly, McDougall J. held that the duty was upheld even though communications to the public on a couple of changes to the quarry footprint (moving it below the water table and closer to the Maritimes and Northeast Pipeline) came at a late stage in the consultation process. McDougall J. also dismissed the appellant's argument that there were any legitimate expectations that would have altered the otherwise low-level duty of procedural fairness.

In terms of the substantive grounds of appeal, Justice McDougall carefully reviewed the record and found evidence that each of the appellants' concerns were adequately considered by the Minister in coming to his decision.

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Notably, he held that there is no requirement that the quarry be 800 metres or more from the highway, as it does not fall within the meaning of 'structure' under section IV(2)(c) of the Pit and Quarry Guidelines which requires that quarries be 800 metres away from certain structures. Additionally, he held that it would be 'nonsensical' to allow quarries to be within 30 metres of a public highway, as is allowed under the Regulations, but then require any blasting in the quarry to be 800 metres away. Justice McDougall also held that while the approval was inconsistent with the Municipal Planning Strategy, the Minister had the discretion to approve it anyway so long as he 'considered' the inconsistency. He also held that the record showed that the economic impact on the surrounding area was considered, as was the blasting expert's report (notably, the Minister considered that the report failed to consider the actual blasting plan, thus undermining the report's usefulness). Finally, McDougall J. held that it was not unreasonable for the Minister to approve the quarry without obtaining a full well survey.

Overall, Justice McDougall concluded as follows at paragraph 165:

> [165] The *Environment Act* gives the Minister substantial discretion to decide matters of environmental regulation. He is assisted by NSE staff who have the scientific and technical knowledge to oversee and regulate the environment. The court, on an appeal under the Act, does not have the benefit of similar expertise. It must assess the Minister's decisions unaided by witness testimony and cross-examination. Accordingly, where the duty of procedural fairness has been met, the court will only interfere where it is satisfied that the Minister has exercised his discretion unreasonably. That is not easy to establish, and the appellants have not established it here.

This decision reinforces the wide discretion that courts will afford Ministers of the Environment in deciding whether or not to approve quarries.

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Life is a Highway-
And So Are Public Parks in New Brunswick

Rothesay and Bird Construction v. Fundy Bay Holdings, 2019 NBCA 15

LUC #152 [2019]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
New Brunswick
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NEW BRUNSWICK

The New Brunswick Court of Appeal's decision in *Rothesay and Bird Construction v. Fundy Bay Holdings,* 2019 NBCA 15 applied well known statutory interpretation principles to find that the term "highway" as defined in New Brunswick's *Mechanics' Lien Act*, RSNB 1973, c M-6 (the "Act") – somewhat surprisingly – includes a 'common' / public park. As a result, the common / park was exempt from being liened.

Facts

In February 2015, the Town of Rothesay entered into a contract with Bird Construction to act as General Contractor on a project which involved renovating a public park called the Rothesay Common owned by the Town. Bird sub-contracted some work to Adams Excavating and they in turn sub-sub-contracted with Fundy Bay Holdings to provide sand, gravel and related materials. Adams defaulted on their obligations in relation to the project and failed to pay Fundy Bay. As a result, Fundy Bay registered a lien against the Common.

The Town and Bird opposed the registration of the lien on the basis that the Common could not be liened. In particular, section 2 of the Act provides that the Act does not apply to a "highway". Section 1 defines "highway" as including:

> ...any road, road allowance, street, lane, thoroughfare, bridge, subway, pier, ferry, square, and public place, appropriated to the public use.

The Town and Bird took the position that the Common fell within the categories of "square and/or public place".

Trial Decision

At the trial level, Justice Christie held that Fundy Bay's lien was valid. Christie J. focused heavily on the conduct of the Town in maintaining a holdback on the Project, which he held was 'internally inconsistent' with their position that the Common was not subject to lien legislation:

> [14] ...On the one hand, the Town is pleading in (b) that it made payments to Bird, '*less the required statutory holdback.*' Yet, in (c) it is pleading that the *Act* excludes work on a highway from the application of the *Act*. These appear to be internally inconsistent. As I noted earlier, why would the Town be making *statutory deductions* based on a *statute* it says does not apply? Why is Bird accepting that holdbacks are appropriate?

Christie J also applied the *ejusdem generis* principle which stipulates "where specific words are followed by a general expression, the general expression is limited to the shared characteristics of the specific words, even though the general expression may ordinarily have a much broader meaning" (*Watt v. Trail (2000)*, 227 N.B.R. (2d) 334, at paragraph 16). Based on this principle, Christie J held that "public place" was a general expression

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such that the shared characteristic of highways being lands or routes used for public travel applied to the term public place as well. As such, he found that public place was narrowed to apply only to transportation-related public places. Since the Common would not be used for a transportation purpose, it fell outside the scope of the term "highway."

Appeal Decision

The NBCA allowed the appeal and declared the lien to be invalid. First, the Court held that for purposes of the *ejusdem generis* principle, the phrase "appropriated to the public use" was the general expression to be considered within the definition of highway, not "public place". In particular, the Court stated:

> 13…when we consider the "grammatical and ordinary sense" of the definition, we see that "public place" is not, in fact, a general term at all….Read in its ordinary grammatical sense, the term "public place," being preceded by "and," is included as another item within the list. It is rather the phrase "appropriated to the public use" which is a general term in this instance.

Therefore "public place" was not narrowed to a meaning grounded in transportation:

In support of this reasoning, the Court of Appeal looked to the French language version of the Act. Specifically, they held that "affectés à l'usage du public" was masculine and plural and therefore applicable to each descriptor in the list, not just public space, a feminine noun.

Having determined that the term 'public place' was "…not a general term to be interpreted in conformity with the other items in the list…" (at para.15), the NBCA turned to considering the meaning of the term in its own right. The Court held that while the Black's Law Dictionary definition of the term highway would appear to exclude areas such as the Common, legislators are entitled to imbue a term with a broader meaning to fit the scope and intent of legislation. Such was the case with respect to the definition of highway in the Act. In support of this reasoning, the NBCA cited the earlier NBCA decision of *Fraser v. Haines*, 2008 NBCA 59, which relied on the following passage of Professor Ruth Sullivan's text entitled "Statutory Interpretation "(Toronto: Irwin Law, 1997) at page 80:

> Because the legislature is sovereign it may assign meanings to words which bear little or no relation to their ordinary meaning. It can deem "red" to be "blue", or land to include sky and ocean. But legislatures generally have little interest in major departures from conventional usage, and most definitions incorporate or only slightly modify the ordinary mean-

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ing, or in some cases the technical meaning, of the defined words.

Based on this, the NBCA found that the Common **fell within the meaning of both public place and square** and therefore fell within the exclusion for highways under the Act. As such, the Court held the lien to be invalid. Interestingly, they did not consider the conduct of the parties with respect to maintaining a holdback and did not even mention Christie J.'s focus on that line of reasoning.

It remains to be seen whether the broad definition of highway applied by the NBCA in Rothesay will be applied in instances when the term 'highway' is used in legislation and there is no express definition in the legislation itself. In the authors' view, given the NBCA's acknowledgment that the definition here goes beyond the ordinary meaning of the term, this case will likely be distinguished in future cases in other jurisdictions applying lien legislation where the term highway is not defined (which is usually the case).

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THE POTENTIAL IMPLICATIONS OF CONTRACTUAL LIMITATIONS OF LIABILITY

Mississippi River Power Corporation v WSP Canada Inc.
2018 ONSC 6104

LUC #152 [2019]

Primary Topic:
XIII Insurance
Secondary Topic:
XI Engineers
Jurisdiction:
Ontario
Author:
Ronald W. Price, Rasmussen Starr Ruddy LLP

CanLII Reference

ONTARIO

In *Mississippi River Power Corporation v. WSP Canada Inc.* 2018 ONSC 6104, Mississippi River Power Corporation ("MRPC") entered into a contract with the defendant Wm. R. Walker Engineering Inc. ("Walker") for the provision of professional consulting services in connection with a new hydroelectric generating facility on the Mississippi River in Almonte, Ontario.

Pursuant to the professional services contract, Walker was to perform various services during the pre-construction phase of the project.

Section 1.08 of the professional services contract provided that with the consent of Walker, MRPC could *"in writing at any time after the execution of the Agreement or the commencement of the services delete, extend, increase, vary or otherwise alter the Services forming the subject of the Agreement."*

Section 1.11 of the professional services contract contained an insurance covenant which purported to limit Walker's liability to MRPC to $2 million. Section 1.11 provided as follows:

> The Client [MRPC] will accept the insurance coverage amount specified in this clause section (a) as the aggregate limit of liability of the Consultant [Walker] and its employees for the Client's damages.
>
> Comprehensive General Liability and Automobile Insurance
>
> The Insurance Coverage shall be $2,000,000 per occurrence and in the aggregate for general liability and $2,000,000 for automobile insurance. When requested the Consultant shall provide the Client with proof of Comprehensive General Liability and Automobile Insurance (Inclusive Limits) for both owned and non-owned vehicles.
>
> Professional Liability Insurance
>
> The Insurance Coverage shall be in the amount of $2,000,000 per claim and in the aggregate. When requested, the Consultant shall provide to the Client proof of Professional Liability Insurance carried by the Consultant, and in accordance with the Professional Engineers Act (RSO 1990, Chapter P. 28) and regulations therein.

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Change in Coverage

If the Client requests to have the amount of coverage increased or to obtain other special insurance for this Project then the Consultant shall endeavour forthwith to obtain such increased or special insurance at the Client's expense as a disbursement allowed under Section 3.2.2.

In 2008, MRPC entered into a CCDC 2 stipulated price contract with the defendant M. Sullivan & Son Limited ("Sullivan") as general contractor. Section 2.2 of the stipulated price contract outlined the services to be provided Walker, as consultant, during the construction phase of the project.

The design of the generating facility called for penstocks, which are large diameter concrete encased steel pipes that channel water from the river to the hydraulic turbines located downstream. Walker prepared the design of the penstocks which included a transition piece that linked the rectangular shape of the draft tubes of the old generating station with the circular shape of the new penstocks.

Sullivan subcontracted the fabrication and installation of the penstocks to the defendant Harrington Plumbing and Heating Ltd. ("Harrington"), who in turn hired the defendant Dent Engineering to assist with field measurements in connection with the transition piece. During the construction and placement of the new penstock into the old tube using the transition piece, it was determined that modifications to the design were needed. Walker refused to complete the additional design work and Sullivan contracted with the Dent Engineering to perform this work. Walker ultimately reviewed and stamped Harrington's shops drawings for the fabrication of the transition piece. The penstocks were then installed.

In 2009, a bulge was discovered on the interior flat floor of the transition piece of penstock number two resulting from external pressures on the transition piece. Sullivan contracted with Dent Engineering to prepare a design to address the issue of bulging. The generating station was subsequently commissioned and came online in April 2010.

Unfortunately, in 2012, a failure occurred in penstock number two. It was discovered that the steel liner had buckled inward and separated from its concrete encasement. MRPC commenced an action against the various defendants to recover the costs of repairing penstock number two, as well as production losses and associated costs and to recover the costs of reinforcing penstock number one.

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The defendant Walker subsequently brought a motion for partial summary judgment seeking an order limiting its potential liability to $2 million in accordance with the insurance covenant found at section 1.11 of the professional services contract. Walker also sought an order confirming that its liability to the other defendants, who claimed contribution and indemnity from Walker, was also limited to $2 million.

The remaining defendants brought motions for consequential relief in the event Walker was successful on its motion. These defendants sought orders extending the benefit of the insurance covenant to them along with a declaration that MRPC was barred from seeking any damages attributable to Walker in excess of $2 million, from the remaining defendants.

MRPC took the position that the parties entered into a second contract for the provision of Walker's services during the construction phase of the project and that therefore the insurance covenant in the professional services contract did not apply to limit MRPC's claim against Walker. MRPC also asserted that the remaining defendants were not entitled to benefit from the insurance covenant as the remaining defendants were not contemplated as being beneficiaries of that contract.

The court granted summary judgment in favour of Walker and ordered that Walker's potential liability to MRPC was limited to $2 million. The court also ordered that the potential liability of the remaining defendants to MRPC was also limited to $2 million and that MRPC was not entitled to seek any damages attributable to Walker in excess of $2 million from the remaining defendants.

In reaching this conclusion, the court found that MRPC had failed to identify key terms of any second contract which it argued existed but had not been reduced to writing. The court also concluded that the more reasonable interpretation of the interactions between MRPC and Walker during meetings and discussions, considering section 2.2 of the stipulated price contract, was that the parties had, quite simply, extended the professional services contract containing the insurance covenant.

The court also held that MRPC and Walker intended to extend the benefit of the insurance covenant to the remaining defendants and that these defendants were involved in the activities contemplated by the professional services agreement. In reaching this determination, the court held that:

> [41] In this case, I find that MRPC and Walker intended to extend the benefit of the insurance covenant to the remain-

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ing defendants. To do otherwise would subvert the allocation of risk established by the parties in s. 1.11 of the professional services contract, including clause (c). The insurance covenant required Walker to maintain professional liability insurance and limited Walker's liability in respect of such claims to $2,000,000. If MRPC had wanted to increase the amount of coverage, it could have done so at its own expense; Walker's obligation in this regard would have been limited to endeavouring to obtain the increased coverage. Having allocated the risk beyond $2,000,000 to itself and away from Walker, MRPC cannot, at the same time, have intended to allocate the risk to the remaining defendants who were engaged in work contemplated by the professional services contract. Given this, and absent a provision indicating that persons whose negligence is alleged to have caused the loss are intended to be excluded from the benefit of the insurance covenant, I imply that MRPC and Walker intended to extend the benefit of the insurance covenant to the remaining defendants. (*Sanofi*, at para. 59)

[42] Objectively, it would make no sense for Walker to agree to the bargain set out in s. 1.11 of the professional services contract limiting liability, without extending the benefit to other parties who assisted or were involved in fixing the problem with the penstock transition piece. To not extend the benefit of the insurance covenant would expose Walker to claims for contribution and indemnity by third parties in the position of the remaining defendants and would render the protection of s. 1.11 meaningless.

[43] Not extending the benefit of the insurance covenant to the remaining defendants would also render an injustice to those defendants. The other defendants would not be able to claim contribution and indemnity from Walker for claims by MRPC in excess of $2,000,000 (*Negligence Act*, R.S.O. 1990, c. N.1, s. 2 and *Dominion Chain Co. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346). Not extending the benefit of s. 1.11 to the remaining defendants would have the effect of imposing liabilities on them which they would not otherwise have (*Sanofi*, at para. 63).

It should be noted that this decision is currently under appeal.

Divisional Court Reins in Judge Second Guessing Master's Reference Decision

Demir v Kilic,
2018 ONSC 7279

LUC #152 [2019]

Primary Topic:
IX Construction and Builders' Liens Secondary
Jurisdiction:
Ontario
Author:
Ken Crofoot,
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CanLII Reference

ONTARIO

In this case, the Divisional Court was asked on appeal from a Motions Court Judge to consider the standard of review to be afforded a Master's decision on a reference.

The Plaintiff had performed renovations to a recently purchased single family home for the Defendant. The Plaintiff requested more money for the work, including a claim for a 20% management fee, and when this was disputed, he filed a lien for the claim. The dispute proceeded to trial by reference before Master Albert in which evidence in chief was filed by affidavit and cross-examinations were held. There was also an agreed statement of facts in which the parties agreed on the amounts the Plaintiff had paid to contractors ($202,719) and workers, the amounts that the Defendant had paid to the Plaintiff ($329,664) and the amount the Defendant was out of pocket ($32,006) as well as the quantification of disputed deficiencies.

At the trial the parties agreed they had entered into a contract but there was disagreement as to the terms of the contract and whether the Plaintiff was liable for the deficiencies. The Defendant argued the contract was for a fixed price capped at $250,000 and the Plaintiff argued that the contract was for time and materials plus a 20% management fee. The Master found that there was a contract based on an offer and acceptance to perform the work but that their oral evidence was not reliable as to the financial terms of the contract. She found no evidence to support a fixed price contract because the amounts paid were inconsistent and the Defendant had considered cost when selecting materials, which made no sense in the context of a fixed price. She also found that there was no evidence that the parties had agreed on a management fee.

In the result, the Master determined that there was no need for her to consider the Plaintiff's argument of *quantum meruit* and she awarded the Plaintiff his unpaid construction costs of $32,006 less $450 she determined for allowed deficiencies. The Defendant was awarded legal costs of $5,000.

The Plaintiff opposed the confirmation of the reference report and asked that a new trial be ordered before a different Master. Mr. Justice Perell granted the motion and set aside the Report. In doing so, he expressly accepted and deferred to all the Master's findings of fact. He said that although there was a "strong evidentiary basis" for the Master to conclude there was a contract, he did not agree that one had been proven as the parties had not agreed on essential terms. He found that the Master had made a palpable and overriding error in determining there was a contract. In light of this, he found her decision to be unreasonable and reversible. He then went on to make a determination based on *quantum meruit* that the Plaintiff was entitled to $106,060 plus costs of $38,000 for the action and $6,000 for the motion.

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The Divisional Court noted that the standard of review on appeal from a judge's motion is as follows:

> *On questions of law, the standard is correctness, on questions of fact, the standard is palpable and overriding error and on questions of mixed fact and law, there is a spectrum. Where there is an extricable legal principle, the standard of review is correctness. However, with respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error*[1]*.*

The Divisional Court first noted the standard of review on a contested confirmation of a report from a reference as follows:

> *The standard of review on a contested confirmation of a report from a reference is that on a true appeal and not on the basis of a hearing de novo. The result should not be interfered with unless there has been some error in principle demonstrated by the master's reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence: Rosedale Kitchens Inc. v. 2114281 Ontario Inc., 2014 ONSC 7143 (CanLII) at para. 7 (Div. Ct.); RSG Mechanical Inc. v.1398796 Ontario Inc., 2015 ONSC 2070 (CanLII) at para. 22 (Div. Ct.). Further, an award should not be disturbed unless it appears unsatisfactory on all the evidence: RSG, at para. 22*[2]*.* (emphasis added)

The Divisional Court noted that while the Motions Court Judge had deferred to the Master's findings of fact and accepted them as well founded, he came to a result completely inconsistent with those findings. The Plaintiff had not disputed the existence of a contract but rather argued that the contract included a management fee which the Master had found was not proven by the evidence. The Motions Court Judge nevertheless found there was no contract and failed to defer to the Master's decision in then awarding an amount to the Plaintiff that included a $65,932 management fee. The basis of this determination was that it would be unjust for the Defendant to receive all the work of the Plaintiff without a fee for it. The Divisional Court found two issues with this. Firstly, the Master had not found that he had received nothing for his work – only that there was no agreement on a management fee. Secondly, the Motions Court Judge had accepted the evidence of the Plaintiff as to the amount of his work while the Master had specifically found him to be an unreliable witness. In doing so he failed to defer to the Master's assessment of credibility.

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[1] Paragraph 22

[2] Paragraph 24

Divisional Court Reins in Judge Second Guessing Master's Reference Decision

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The Divisional Court characterized the Motion Court determination as a *de novo* trial with a re-weighing of the evidence and a *quantum meruit* determination. This was an error of law.

This case is a message to Judges that Masters' determinations after reference trials are to be accorded respect and deference. While Mr. Justice Perell obviously considered that there could not be a contract for renovations without an agreement on price and that a contract for costs was unlikely as it failed to remunerate the Plaintiff for his efforts, the Divisional Court was nevertheless not prepared to let him treat the Master's factual and credibility determinations as dispensable to reach a different result, however fair it might it have seemed to him. The Master, who heard the parties and determined what could be believed, was entitled to more respect.

Case Comment – *R & V Construction v. Baradaran*, 2019 ONSC 1551

R & V Construction v Baradaran, 2019 ONSC 1551

LUC #152 [2019]

Primary Topic: IX Construction and Builders' Liens
Jurisdiction: Ontario
Authors: Madalina Sontrop, Glaholt LLP

CanLII Reference

ONTARIO

Rule 20 of Ontario's *Rules of Civil Procedure* ("*Rules*") was amended in 2010 with a view to improve access to justice. In its 2014 landmark decision, *Hryniak v. Mauldin,* the Supreme Court of Canada affirmed that the new R. 20.04(2.1) granted judges "enhanced fact-finding powers".[1] On a similar note, section 58(4) of the former *Construction Lien Act* ("*CLA*") grants masters or case management masters "… all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all maters and questions arising in connection with the action …".

While it is trite law that judges may employ "enhanced powers" in the interests of justice, do construction lien masters benefit from these statutorily created powers? This question was considered, and answered in the negative, by Justice Belobaba in *R & V Construction v. Baradaran*.

The matter before Justice Belobaba arose out of the defendant's motion for summary judgment seeking to dismiss the plaintiff's lien action. Upon review of affidavit evidence and parties' submissions, Master Albert dismissed the defendant's motion for summary judgment and awarded the plaintiff the balance of $78,573.70 owed on the home renovation project. In reaching her conclusion, Master Albert noted that she had all the powers of a judge to determine the summary judgment motion, including the aforementioned enhanced powers.

On appeal, Justice Belobaba determined otherwise. Justice Belobaba commenced his analysis by considering the case law at the masters' level, which he found to be divided. The learned judge established that the 2010 decisions of Masters Polika[2] and Sandler[3], and 2016[4] and 2017[5] decisions of Master Albert relied on s. 58(4) of the *CLA* to justify their enlarged jurisdiction to use the enhanced powers. However, Justice Belobaba determined that these four decisions contrasted with the 2012 judgment of Master MacLeod, now Justice MacLeod, which determined that the enhanced powers could only be employed by judges, and not by masters. This train of thought was approved by Master Short, whom held that masters "did not have access to the enhanced fact-finding role in Rule 20.04(2.1) or the mini trial process in (2.2)".[6]

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[1] [2014] SCC 7.

[2] *6007325 Canada Inc. v. LPQ 18 Yorkville Avenue Inc.*, 2010 ONSC 2844.

[3] *DCL Management Limited v. Zenith Fitness Inc. et al.*, 2010 ONSC 5915.

[4] *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, 2016 ONSC 5107.

[5] *Walsh Construction/Bondfield Partnership v. Chartis Insurance Company of Canada*, 2017 ONSC 3985.

[6] *Campoli Electric Ltd. v. Georgian Clairlea Inc.*, 2017 ONSC 2784.

R & V Construction v Baradaran, 2019 ONSC 1551

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Case Comment – *R & V Construction v. Baradaran*, 2019 ONSC 1551

In spite of the disagreement among masters as to whether they may utilize the enhanced powers, Justice Belobaba held that no such disagreement exists between judges of the Divisional Court – that jurisprudence at this level clearly delineated that the enhanced powers may only be used by judges. The learned judge agreed with this case law, and determined he was bound by the court's commentary in *RSG Mechanical Inc. v. 1398796 Ontario Inc.*. Pursuant to the *RSG Mechanical* a master "… does not, for the purpose of the reference, obtain the standing of or become a judge".[7]

Justice Belobaba, although thoroughly convinced of the limits of masters' powers, continued his analysis by looking at the provisions of the *CLA*, and ultimately concluding there was nothing in Act "to suggest that a master may assume all the powers and authority of a 'judge' when hearing a summary trial, let alone when hearing a summary judgment motion". The learned judge therefore found that had s. 58(4) of the *CLA* intended to bestow upon masters "all the powers and authority of a judge when hearing motions for summary judgment, it could easily have said so". The fact that no amendments were made under the new *Construction Act* was further proof that no changes were intended to the relevant provisions.

Should masters, who are now referred to as "Your Honour" continue to be limited or should their Honours be entitled to employ the same enhanced powers that judges are afforded? This will certainly be a question to be determined on the upcoming appeal of Justice Belobaba's judgment.

[7] *RSG Mechanical Inc. v. 1398796 Ontario Inc.,* 2015 ONSC 2070 (Div. Ct.), para. 37.

Impact Painting Ltd v Man-sheild (Alta) Construction Inc, 2019 ABCA 57

LUC #152 [2019]

Primary Topic:
IV Subcontracts
Secondary Topic:
VIII Bonds and Sureties
Tertiary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
E. Jane Sidnell, Rose LLP

CanLII Reference

ALBERTA

Impact Painting Ltd v Man-sheild (Alta) Construction Inc

This recent decision of the Alberta Court of Appeal relates to a relatively small painting subcontract, but contains some helpful remarks about dealing with following aspects of construction claims:

- when extras should be allowed;
- what is required to prove a back charge; and

what portion of the lien bond cost can be assessed against the lien claimant who has liened for more the ultimate judgment?

The Process for Dealing with Extras

The Alberta Court of Appeal deal with the issue of extras, at paragraph 18, by adopting the reasoning in two other cases:

> [18] In deciding what extras ought to be allowed, the trial judge noted at paras 19-20 that both parties accepted as correct the law as stated in ***Ridge Rock Construction Ltd v Beckmyer Builder Ltd***, 2006 ABQB 850 (CanLII) at para 30, 58 CLR (3d) 143, adopting dicta from ***Kei-Ron Holdings Ltd v Coquihalla Motor Inn Ltd***, [1996] BCJ No 1237 (SC) at para 41, 29 CLR (2d) 9:
>
> > In determining liability for the cost of extra work, the first question to be answered is whether the work performed was, in fact, extra work; that is, it did not fall within the scope of the work originally contemplated by the contract. If so, did the owner give instructions, either express or implied, that the work be done or was the work otherwise authorized by the owner? Next, was the owner informed or necessarily aware that the extra work would increase the cost? Finally, did the owner waive the provision requiring changes to be made in writing or acquiesce in ignoring those provisions? If the plaintiff can establish these elements, the defendant is liable to pay a reasonable amount for the extra work. These elements must be proved with respect to each extra claimed.
>
> This statement of the law is correct.

Back Charges

In relation to back charges as between a contractor and a subcontractor, at paragraph 19, the Court of Appeal upheld the trial judge's position that the onus is on the claiming party to prove that:

Impact Painting Ltd v Man-sheild (Alta) Construction Inc

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ALBERTA

- the back charge is for an expense actually, necessarily and reasonably incurred by the party claiming the back charge;

- by the terms of the subcontract, or by some other agreement between the parties, the charge is one, or is in relation to some task, for which the subcontract undertook responsibility;

- the general contractor incurred the expense because the subcontractor defaulted on its responsibility to which the charge relates; and

prior to incurring the back charge, the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it.
As to the last point, many contracts expressly address notice and the obligation to provide an opportunity to cure, and, presumably, where contractual provisions are applicable, they override a general statement of the law such as provided in this case.

Lien Bond Costs

In this case, the lien claimant filed a lien for $237,676.12 and ultimately was entitled to a judgment in the amount of $57,397.86, which equates to 24% of the amount claimed in the lien. As a result, the trial judge awarded the general contractor 76% of the cost that it paid for the lien bond premium, which amounted to $14,903.60. Referring to sub-section 40(a) of the Alberta *Builders' Lien Act*, the Court of Appeal reviewed whether or not the lien had been registered in a "excessive amount" and found that since the lien was valid only to the extent of 24% of the amount registered, there was no reason to overturn the trial judge's determination that the general contractor was entitled to recover 76% of the bond premium it had paid.

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