Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #153

July 28, 2019

INSIDE THIS ISSUE:

Editor's Note

With vacation season upon us, this summer edition of Legal Update submits the following to you as worthy of a construction lawyer's summer reading list:

1. **Saskatchewan Prompt Payment Legislation:** Fellow and Legal Update Committee member Murray Sawatzky provides an excellent summary of this development in his home province, first published in *Construction Law Letter* and reprinted with the author's permission here.
2. **Builder's Risk Insurance:** The scope of coverage of a builder's risk insurance policy and its interplay with commercial general liability insurance has recently been clarified in both Newfoundland and Ontario. At least those two provinces now seem to be on the same page as to the scope of coverage of a builder's risk policy. Readers are cautioned that the law may be different in Alberta.
3. **Tendering:** This continues to be a hot issue, and this issue summarizes a case which reflects the ongoing difficulty public owners have in assessing bids which deviate in some fashion from the strict requirements of a call for tenders. Counsel advising clients dealing with such bidding conundrums, on either side, need to be able to assess when a requirement amounts to an issue of compliance or a mere irregularity or informality. The Ontario Court of Appeal has found that an owner should not have used the fact that a bidder submitted their bid in an unlabeled box instead of a sealed envelope to disqualify a bid as non-compliant. The case is interesting in that the trial judge had found the owner failed to act in good faith, and the Ontario Court of Appeal upheld this finding.
4. **Lien Survives Discharge:** "Once discharged, always discharged" always felt like "black letter law" and safe advice for a construction lawyer to provide clients and counsel in dealing with lien registration errors. "Do not discharge your own lien, or you will lose it." That advice *may* now be tempered somewhat to "you *risk* losing it" in light of *9585800 Canada Inc. v JP Gravel Construction* where it was found that a discharge registered with the intent of correcting a claim for lien containing erroneous

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dates of supply did not prevent the registration of a new lien stating the actual time period of supply.

5. **Trust Remedy:** In *Great Northern Insulation v King Road Paving*, the Ontario Divisional Court found that an unpaid subcontractor's trust claim had priority over a charging order made in favour of a law firm who had represented the trustee contractor. The Court found that an assignment of lien from a different subcontractor of the same class did not affect the unpaid subcontractor's priority trust claim and expressly rejected the law firm's argument that the charging order should have priority because but for the law firm's efforts there would have been no recovery of any funds for the parties.

The Legal Update Committee will be back in full swing in the fall. We are always happy to receive contributions from all regions of Canada, in both official languages, so please consider sending any case comments or short articles of general interest to legal update by emailing me at bb@glaholt.com .

Brendan

Legislative Update - Saskatchewan Prompt Payment Legislation

Legislative Update - Saskatchewan Prompt Payment Legislation

LUC #153 [2019]

Primary Topic:
II Statutory Regulation
Jurisdiction:
Saskatchewan
Author:
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Prompt payment has, according to the Saskatchewan Construction Association, been the number one policy priority of its members over the last two years. The Saskatchewan Construction Association indicates that delayed payments to general contractors and trade contractors have a negative impact on the economy by reducing competitiveness and efficiency. These effects are the result of financial uncertainty preventing contractors from investing in their people through apprenticeship and training, investing in new equipment and innovation, or, having the capital required to secure bonding or bid on new work.

Accordingly, the Government of Saskatchewan has announced that it will be proceeding with prompt payment and adjudication legislation with Bill 15, which will amend *The Builders' Lien Act*. The regulations have yet to be circulated, but are anticipated to contemplate that:

i) certain transactions or contracts will not fall under the amended legislation; and
ii) will specify the costs of the adjudication process.

The Bill received its first reading in the Legislature on November 20, 2018. It is anticipated that the Bill will be enacted in 2020.

SASKATCHEWAN

The Bill sets out a payment scheme with timelines for payment upon receipt of a "Proper Invoice" (a defined term), a dispute mechanism, and ultimately, an interim adjudication process. As with other prompt payment legislation, the requirement for a Proper Invoice from the contractor to the owner specifies the requisite information which is to be provided to the owner every month, unless the contract provides for other timelines for payment.

The provision prohibits a contract from requiring that a Proper Invoice be certified by a payment certifier or the owner before it is provided for payment. The provision does not apply where testing and commissioning of the improvement or services or materials is required.

The owner is then required to pay a Proper Invoice within 28 days of receiving the invoice from the contractor. If the owner disputes payment of all or any portion of a Proper Invoice, it must do so within 14 days by giving notice of non-payment. The notice of non-payment must be in the prescribed form and set out the amount that is not being paid and the reasons for non-payment.

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If less than the full amount of the Proper Invoice is in dispute by the owner, any amount not in dispute must be paid within 28 days of receiving the Proper Invoice from the contractor.

A contractor who receives full payment is required to pay each subcontractor for the services and materials supplied that were included in the invoice within 7 days after receiving payment.

If an owner does not make full payment, the contractor shall, no later than 35 days after getting the Proper Invoice to the owner, pay to each subcontractor who supplies, services or materials under a subcontract that were included in the Proper Invoice, the amount payable to the subcontractor, to the extent that the subcontractor was not fully paid. Essentially, the contractor must pay each subcontractor whose work is not in dispute and on a proportionate basis to those subcontractors who are implicated in the dispute.

Once a contractor receives full payment, it must pay its subcontractors and suppliers within 7 days after receiving payment from the contractor or 42 days after the Proper Invoice was given, if no payment is made by the contractor.

Where payment to a subcontractor is not being made, either because the contractor is disputing payment to the subcontractor, or because the subcontractor is disputing payment to another subcontractor, notice must be given to the subcontractor either within 7 days of receiving the notice of non-payment from the owner or before the 35 days required for payment to the subcontractor.

If requested, the contractor must provide a subcontractor with confirmation of the date on which a Proper Invoice was given to the owner.

While there is much more detail to the payment mechanisms, the entire process comes down to two alternatives, namely making the payment or serving a “notice of non-payment” within a specified time. Further, any contractor or subcontractor who serves a notice of non-payment must take the additional step of commencing the adjudication process within 21 days.

The amendments to *The Builders’ Lien Act* also create an interim adjudication scheme for addressing disputes that are the subject of a notice of non-payment, setoffs, disputes respecting the amount of reasonable costs, failure or refusal to certify substantial performance and any other matters agreed to by the parties to the adjudication.

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The adjudication must comply with any procedures set out in the contract or subcontract (provided they comply with the legislation). If no procedures are set out in the contract or subcontract, the adjudication must comply with the requirements of the Act and regulations.

The adjudication starts with a notice in writing and may provide the name of a proposed adjudicator. The notice of adjudication is to include a copy of the contract and any other documents on which the party intends to rely. These documents are then sent to the adjudicator within 5 days of the adjudicator agreeing to act.

The adjudicator can perform an onsite inspection with consent. The adjudicator shall be impartial and will determine the manner in which the adjudication will be conducted and may fix the remuneration of any person retained to provide assistance with direct payment to be provided by either or both parties.

The adjudicator shall make a determination no later than 30 days after receiving the notice of adjudication and other materials from the initiating party. The time for a determination may be extended for a period of 14 more days or upon written agreement by the parties.

A determination must be in writing and include reasons and is binding until an Order is made by the Court, a decision is made by an arbitrator, or there is a written agreement between the parties. Failure to make payment, results in interest accruing on the amount not paid. Interest is set pursuant to the pre-judgment interest rate or the contractual rate, whichever is higher. If the amount determined to be owing is not paid, the contractor or subcontractor may suspend further work and obtain payment and reasonable costs incurred as a result of the resumption of work once payment is made.

This proposed legislation may create some issues, including:

1. The timeliness of receipt all relevant evidence by the adjudicator, including expert advice, in order to make a determination;
2. Whether a financial institution will advance funds if a payment certifier values the Proper Invoice in an amount less than the adjudicator determines;
3. What will be the effect of a judgment against an owner based on an adjudicator's interim decision on the project?

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4. What is the effect if the owner does not pay or cannot obtain the financing to make the payment ordered by the adjudicator?

Needless to say, the construction industry has lobbied forcefully for a solution to protracted payment on construction projects. The construction industry's concern of carrying the financing costs of construction have been heard by the Government of Saskatchewan and this proposed legislation will hopefully assist in that regard.

Newfoundland Court of Appeal and Ontario Superior of Justice Clarify Scope of Builder's Risk Insurance Policies

LUC #153 [2019]

Primary Topic:
XIII Insurance
Jurisdiction:
Newfoundland and Ontario
Author:
Jacob McClelland, Glaholt LLP

CanLII References:

2019 NLCA 13

2019 ONSC 1700

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Newfoundland Court of Appeal and Ontario Superior of Justice Clarify Scope of Builder's Risk Insurance Policies

Overview

In *Pre-Eng v. Intact*, 2019 ONSC 1700 ("*Pre-Eng*"), the Ontario Superior Court recently confirmed the limited scope and purpose of builder's risk insurance by finding that such policies cover only damage occasioned to property being installed, renovated or constructed by the insured.

Coincidentally, around the same time as the hearing of *Pre-Eng,* the Court of Appeal of Newfoundland and Labrador released its decision in *Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated*, 2019 NLCA 13 ("*Viking Fire*"), in which it found that a limited scope was consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

These decisions all but resolve the conflicting jurisprudence with respect to the interplay between builder's risk and general commercial liability insurance (at least for Ontario and Newfoundland).

Background

Pre-Eng v. Intact

In *Pre-Eng*, a contractor was hired to do a number of renovations to a school, which included repairing a roof over the school's gymnasium. As a result of the contractor's negligent work, water leaked through the roof and onto the floor of the gym causing $250,000 in damages and losses.

The contractor had two types of insurance: builder's risk insurance from Northbridge and commercial and general liability insurance with Intact. The two policies were intended to be complementary: Northbridge would cover anything that fell within the builder's risk policy and Intact would cover everything else.

Both insurers took the position that the other's policy covered the damages and losses caused by the contractor's negligent work therefore leaving the court to decide whether the builder's risk insurance policy covered only the part of the school that the contractor was actually working on, or the entire school. The case was decided on dual motions for summary judgment.

Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated

The facts in *Viking Fire* were not that different. In *Viking Fire*, a contractor was responsible for work on a sprinkler system for hospital renovation project. During construction, when work was almost complete, water leaked

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from the sprinkler system, causing damage to not only the new property (which was directly used in and incorporated into the construction project), but also other areas of the hospital, or what the court referred to as the "pre-existing property".

An application was brought in the Supreme Court of Newfound and Labrador to determine, as a questions of law, whether the builder's risk policy of the contractor covered the damage to the pre-existing property. The applications judge held that it did. The builder's risk insurer appealed.

Conflicting Case Law from Non-Appellate Courts

Prior to the issuance of these decisions, there was conflicting case law from non-appellate courts with respect to the scope and purpose of builder's risk insurance.

For example, in *Medicine Hat College v. Starks Plumbing & Heating Ltd.*, 2007 ABQB 691 ("*Medicine Hat*"), a case involving a similar builder's risk policy to those in *Pre-Eng* and *Viking Fire*, a contractor was hired to move a gas line for the construction of an entrance to a large building. Shortly after work was completed, a faulty connection between the new and existing gas lines caused an explosion in the penthouse of the building. Notwithstanding that the contractor had not been hired to do any work in the penthouse, the Alberta Court of Queen's Bench concluded that the phrase "property in the course of construction" included the building's penthouse and as a result the damage was covered under the builder's risk policy held by the contractor.

On the other hand, the Ontario Superior Court came to the opposite conclusion in *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959 (*"Osler Health"*). In that case, a contractor was hired to renovate a kitchen in a large hospital. As a result of negligence on the part of the contractor's plumbing subcontractor, flooding occurred in many areas of the hospital giving rise to significant damages. The Court concluded that the builder's risk insurance held by the subcontractor only covered damages to the kitchen itself, not to the other areas of the hospital which had been flooded.

The Ontario Superior Court Decision

In finding in favour of Northbridge, Bawden J. of the Ontario Superior Court followed the reasoning in *Osler Health*. In his view, a narrower scope of builder's risk insurance reflects the important distinction between it and general commercial liability insurance:

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> [11] A contractor may be able to do a great deal of damage to a large structure through negligence but that does not require the builder to insure the entire structure before undertaking his small task. The object of Builder's Risk insurance is to ensure that the builder has sufficient insurance to complete his work in the event of an unforeseen failure. That is what the contract between the builder and the building owner required in this case and in every other case which has been brought to my attention by counsel.
>
> [12] As Justice Firestone observed in paragraphs 27 to 29 of *Osler Health*, it would not be commercially viable to impose an obligation on the contractor to obtain Builder's Risk insurance to cover an entire building. If the builder was required to insure the entire structure while working on only one part, (even a part as potentially hazardous as gas lines), the cost of insurance for minor contractors would become prohibitively expensive.

Bawden J. went on to find that there was no ambiguity in this particular builder's risk policy and that the words "property in course of construction, installation, renovation, reconstruction or repair" were sufficiently clear to exclude the gym floor from coverage. He noted that the gym floor was not being installed, renovated or constructed and there was no evidence to suggest that it was.

Lastly, Bawden J. indicated that he was "fortified" in his conclusion by the above-noted recent decision of the Court of Appeal of Newfoundland and Labrador in *Viking Fire*.

The Newfoundland Court of Appeal Decision

In *Viking Fire*, the Newfoundland Court of Appeal applied a three-prong test from *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, and considered the competing decisions in *Medicine Hat* and *Osler Health*.

In overturning the lower court's decision, the Court concluded that the interpretation and analysis undertaken in *Osler Health* better aligns with the law respecting the function of builder's insurance:

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> [193] Having considered the conflicting authorities, and the respective analysis and conclusion in *Medicine Hat* and in *William Osler*, I am of the view that the interpretation in *William Osler* accords more directly with the functions of Builders' Risk insurance. The Court in *William Osler* also adopts an interpretation of the policy language that is consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

For these reasons, the Court found that the onus of establishing that damage to the pre-existing property at the hospital fell within the grant of coverage provided under the builder's risk policy had not been met.

Key Takeaways

It appears that the conflicting Canadian case law over the scope of builder's risk insurance policies is close to being resolved. We now have appellate authority from Newfoundland, as well as two decisions in Ontario which suggest that the scope of such policies is to be more narrowly construed than what has been interpreted in Alberta. This will undoubtedly provide greater certainty for insurers and their counsel when it comes to assessing coverage under such policies, at least in the provinces of Ontario and Newfoundland.

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

LUC #153 [2019]

Primary Topic:
XII Tendering
Jurisdiction:
Ontario
Author:
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CanLII References:

2019 ONCA 433

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The Ontario Court of Appeal's recent decision in *Reaction Distributing Inc. v. Algonquin Highlands (Township)*, 2019 ONCA 433, suggests that substance may triumph over form when it comes to compliance with the contractual requirements of a tendering process. Tenders cannot be lawfully disqualified from tender processes for irregularities if they remain substantially compliant with the tender contract's material terms. As this decision illustrates, such disqualifications may count as a breach of the underlying tendering contract and lead to a successful lawsuit for damages.

This dispute centered on Reaction Distributing Inc.'s ("**Reaction**"'s) tender to win work from the Township of Algonquin Highlands (the "**Township**"). Reaction submitted its tender to the Township in a box. The box was not labelled with Reaction's name, nor was it labelled with a return address. The tender delivered by way of an unlabelled box contravened the contractual tender terms because it was not delivered in a sealed envelope. Even if the box had satisfied the sealed envelope requirement, it also violated the Township's contractual tender terms that required the sealed envelope to be labelled with a name and return address.

The Township disqualified Reaction's tender on the grounds that the unlabelled box was non-compliant with the tender contract, despite the fact that the contract had a provision that permitted the municipality to waive any non-compliance. The Township awarded the contract to the only other company who submitted a tender. Had Reaction's tender been considered by the Township, Reaction's tender would have been the lowest and it would have won the work.

Reaction reacted by commencing an action against the Township for breach of the tender contract.

Reaction was successful at trial. The Honourable Justice Bryan Shaughnessy found that the unlabelled box and lack of a sealed envelope were mere irregularities. He held that Reaction's tender was substantially compliant with the contractual tender requirements and the Township's decision to disqualify Reaction breached the tender contract. The trial judge made a finding that the Township did not act in good faith when rejecting Reaction's tender. The trial judge made further findings that the price of Reaction's tender was lower than its only other competitor, and that had it been considered, Reaction would have won the work. The result was a judgment for damages in favour of Reaction for $71,063.60 in lost profit against the Township.

The Township appealed on three issues, proceeded with argument on only two issues, and lost its appeal on both counts.

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The first issue was whether the trial judge erred in finding a breach of contract. The Ontario Court of Appeal stated that: "the law is that substantial compliance is the test to be applied in considering tender requirements," referring to the Supreme Court of Canada's decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (CanLII) ("*Double N*"). In *Double N*, a four-judge panel, dissenting on other issues, stated that, "Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with. A bid is substantially compliant if any departures from the tender call concern mere irregularities [emphasis added, citations removed]."

The Court of Appeal applied *Double N* to uphold the trial judge's finding that Reaction's unlabelled box tender was substantially compliant with the contractual tender requirements. The appeal court did not consider whether the contractual requirements for a sealed envelope, labelled name, or labelled return address were immaterial. The appeal court only upheld the trial judge's finding that the breach itself—the unlabelled box—was a mere irregularity.

The second issue was whether the trial judge erred in finding that the Township did not act in good faith. The Court of Appeal decided that the trial judge's finding was "a factual one that is not to be interfered with absent palpable and overriding error." Finding no palpable and overriding error, the Township was unsuccessful on this issue as well. The appeal court did not repeat the trial judge's evidentiary basis for the apparent absence of good faith. The appeal court did state, however, that there was no evidence put before the trial judge "as to the reasons why [the Township] was not was not prepared to waive the non-compliance."

This duty to review tenders in good faith pre-dates the Supreme Court of Canada's seminal decision *Bhasin v. Hrynew*, 2014 SCC 71, where it recognized a general duty of honesty and good faith in the performance of contracts. In *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, the court found that a public body can apply its discretion to find that non-compliance is more than a formality, whether correct or not, as long as the reviewer acts reasonably and in good faith. In this case, the noted absence of evidence on why the Township was not prepared to waive non-compliance may have significantly limited the Township's ability to defend itself on the basis that it made its decision reasonably and in good faith.

The third issue was whether the trial judge erred in finding that Reaction "would have been awarded the contract for the work, if [the Township] had considered its tender." The Township did not proceed with argument on this issue at the appeal.

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

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Reaction's trial judgment was ultimately upheld by the Ontario Court of Appeal. Costs were fixed at $6,500 against the Township.

The decision serves as a warning to procurement staff who may consider rejecting tenders for strict non-compliance with contractual tender requirements. Where tender contracts provide for the discretion to waive non-compliance, courts may later scrutinize why a party refused to exercise that waiver. To satisfy the court's test from *Double N*, a tender ought not be disqualified if it remains substantially compliant with the tender contract. Lawful grounds for disqualification should refer to non-compliance with a material condition that exceeds mere irregularity. Where tender contracts permit public bodies to exercise discretion to waive non-compliance, tender reviewers ought to be prepared to provide evidence that supports a good faith and reasonable basis for any refusal to exercise that discretion. Otherwise, the evaluating party risks significant exposure to damages, costs and legal expense.

Case Comment: 9585800 Canada Inc. v. JP Gravel Construction

Case Comment:
9585800 Canada Inc. v. JP Gravel Construction

LUC #153 [2019]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Ontario
Author:
Brendan Bowles and Markus Rotterdam, Glaholt LLP

CanLII Reference:

2019 ONSC 3396

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In 1877, an article on the new Ontario *Mechanics' Lien Act* appeared in the *Canada Law Journal*, commenting that "the enactment is in itself unnecessary and illogical, the wording is obscure and its provisions unintelligible and contradictory".

While the wording has become clearer since then, at least to those who practice construction law on a regular basis, even today not too many things in the world of construction liens are crystal clear. One thing that *had* been crystal clear for the last quarter of a century was that the discharge of a lien is irrevocable. Ever since Master Sandler's decision in *Southridge Construction Group Inc. v. 667293 Ontario* (1992), 2 C.L.R. (2d) 177, aff'd (1993), 2 C.L.R. (2d) 184 (Div. Ct.), section 48 of the *Construction Act* has been interpreted to the effect that once a lien is discharged, a claimant cannot lien again for services performed prior to the date of the perfection of the first, discharged lien.

Section 48 of the *Construction Act* (unchanged from the *Construction Lien Act*) provides as follows:

> A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by the person subsequent to the preservation of the discharged lien.

In *Southridge*, a lien claimant liened for certain work done over a period of time, then realized that it had under-liened, discharged the first lien and registered a second lien for the same work. In discharging the second lien, Master Sandler pointed to two aspects of s. 48. First, the section clearly makes the discharge "irrevocable". Second, the section provides that the discharge does not affect the claimant's rights to lien for services supplied *after* the preservation of the discharged lien, which must mean, conversely, that the discharge does affect the right to claim for work done *before* the preservation.

The Divisional Court upheld the master's decision, holding that "although in equity the result appears harsh I agree with the decision of the master".

That decision has since been uniformly applied,[1] until the recent decision in *9585800 Canada Inc. v. JP Gravel Construction*, 2019 ONSC 3396 (S.C.J.). In that case, a lien claimant registered a lien in the amount of $662,100.48 on May 15, 2018, then proceeded to discharge that lien and registered a

1 See, for example, *Ben Air Systems Inc. v. Toronto Transit Commission*, 2018 ONSC 2375 (S.C.J.); *Khalimov v. Hogarth*, 2015 ONSC 6244 (Master); *Carpenters' Local 27 Benefit Trust Funds (Trustee of) v. Embee Properties Ltd.*, 2003 CarswellOnt 5535 (Master); *N.K.P. Painting v. Polygrand Developments Inc.*, 1995 CarswellOnt 417 Master).

Case Comment: 9585800 Canada Inc. v. JP Gravel Construction

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second lien for the same amount and using substantially the same information as contained in the May 15, 2018, lien. That should have brought the case squarely within *Southridge*. However, the court distinguished *Southridge* on the following basis:

> I find that this matter is distinguishable from *Southridge* in which the error related to the amount listed in the lien. The second registered lien encompassed the work completed in the first lien. Consequently, s. 48 of the *CLA* applied. In this matter, the error related to the year in which the work was performed. As per article 4.1 of the Subcontract, the "*Subcontractor* shall perform the *Subcontract Work*: . . . 3 starting on or about 30/10/2017 and substantially perform the *Subcontract Work* by, on or about 31/01/18." In the First Lien that was registered, the document noted under the heading "Statements": "Time within which services or materials were supplied from 2017/10/30 to 2017/05/09." This timeframe is clearly incorrect since the work was not performed during this period. I find the First Lien to be a nullity since it was a lien for non-existent work. Consequently, I find that the Second Lien is an appropriate lien. Since the Second Lien is valid, s. 48 of the *CLA* does not apply in this matter.

The main distinction therefore seems to be that the error in *Southridge* concerned the amount of the lien, while the error in *JP Gravel* concerned the date for the supply. The fact that the claimant in *JP Gravel* had used the wrong timeframe was held to have turned the lien into a "nullity".

With respect, there are at least two issues with that conclusion. To begin with, nothing in section 48 would seem to indicate that the basis on which a lien is discharged matters. If a lien is discharged, it is discharged and precludes liening again for work done before the preservation. Why it was discharged should not matter. A third party reviewing title should not have to guess at motives or speculate as to whether the lien may re-appear. A discharge is irrevocable.

Secondly, in *David J. Cupido Construction Ltd. v. Humphrey Funeral Home & Chapel Ltd*., 2008 CarswellOnt 4382, Master Albert held that where a claim for lien contains erroneous dates, the claim can be amended at trial if the court is satisfied that evidence proved that materials or services were supplied on different dates. Both the Nova Scotia and Saskatchewan Courts of Appeal have similarly held that wrong dates in a claim for lien are curable under the lien legislation in those provinces: *Garden Crest Developments Ltd. v. W. Eric Whebby Ltd*., 2003 NSCA 59; *Imperial Lumber Yards Ltd. v. Saxton*, 1921 CarswellSask 163 (C.A.).

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Bristow, Glaholt, Reynolds & Wise, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed. (Toronto: Carswell, 2005) at 6.3.5 state that "if the wrong date is stated in the claim for lien, the lien should not be invalidated where no person has been prejudiced", and that "if some prejudice can be shown, the lien will be invalidated only to the extent of the prejudice".

In other words, a lien containing wrong dates is not a "nullity".

If the first lien registered in *JP Gravel* was not, in fact, a nullity, then the discharge of that lien triggered section 48. Following the long line of cases that have applied *Southridge*, it is respectfully submitted that the second lien in *JP Gravel*, being for the very same work and the very same amount as the first lien, ought to have been discharged as well.

It is well-settled law that an unsuccessful motion to discharge a lien is interlocutory in nature, so it is likely that the motion judge's decision in *JP Gravel* will be the final word as between the parties. It will be for future cases to determine whether the court's distinguishing of *Southridge* was valid. In the meantime, the court's finding in *JP Gravel* that the first lien was a nullity could in fact have unintended consequences which on the whole could harm, not assist, future lien claimants where an error is made in the description of the timeframe in which services were provided.

Case Comment: Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.

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LUC #153 [2019]

Primary Topic:
V Payment of Contractors and Subcontractors
Secondary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Ontario
Author:
Lena Wang, Glaholt LLP

CanLII Reference:
2019 ONSC 3671

ONTARIO

In *Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.*, 2019 ONSC 3671, the Divisional Court overturned a trial judge's decision that granted a charging order in favor of a contractor's solicitor priority over a subcontractor's trust claim.

Facts

Agostino and Giuseppina Plati (the "Platis" or "owners") entered into a contract with King Road (the "contractor") to renovate a barn in Schomberg, Ontario. King Road entered into subcontracts with Great Northern and Webdensco. Great Northern and Webdensco both registered timely liens in respect of their claims, but the contractor did not. At some point, Webdensco and the contractor settled and Webdensco assigned its lien to the contractor pursuant to s. 73 of the *Construction Lien Act* ("*CLA*").

Sutherland Law represented the contractor in the litigation and obtained a charging order in its favour. The trial judge held that the charging order had priority over subcontractor Great Northern's claim. While the granting of the charging order was not appealed, Great Northern did appeal the trial judge's finding that the charging order had priority over Great Northern's claim.

Justice Corbett, writing for a panel which included Justices Myers and Sheard, held that while the trial judge correctly stated the law that a charging order in favor of the contractor's solicitors could not take priority over *CLA* trust funds, the trial judge erred in finding that the amount payable to Great Northern did not constitute trust funds.

Issue on appeal

The primary issue was whether the funds paid to the contractor on account the assigned Webdensco lien constituted trust funds. The trial judge held that Webdensco's *pro rata* share of owners' holdback was not trust funds for the benefit of Great Northern. The Divisional Court held that the trial judge erred in this finding.

Section 8(2) of the *CLA* requires contractors to use funds it receives from owners on account of the contract price to pay all its subcontractors before using those funds for other purposes.

In this case, the owners had previously paid the contractor $105,800 "on account of the contract price", rendering this money trust funds for the benefit of subcontractors. At some point, the contractor settled with Webdensco. The court reasoned that if the contractor used any portion of the $105,800 to pay the settlement, then Webdensco's trust claim would be extinguished, but the contractor would not be entitled to retain funds now paid to it by owners without first paying the trust entitlement of Great Northern. If the contractor used non-trust funds to settle with Webdensco, section

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11(1) of the *CLA* allows the contractor to retain, to the extent of that payment, trust funds payable to it under the judgement.

The court held that there was no evidence that contractor used non-trust funds to pay Webdensco and section 11(1) is not triggered. The money payable to the contractor on account of Webdensco's assigned lien was money payable "on account of the contract price" between owner and contractor, and therefore trust funds for the benefit of subcontractors, including Great Northern. The court noted that if Sutherland Law's argument was correct, contractors could settle lien claims for less than 100%, shield the discount on the settlement from trust claims, and retain trust funds without paying outstanding trust claims, which would be contrary to the decision of *Minneapolis-Honeywell v. Empire Brass*, [1955] SCR 694.

Sutherland Law argued that section 8 of the *CLA* creates "separate trusts with separate and distinct beneficiaries" and that a successful trust claim requires the claimant to prove it is the beneficiary of a specific trust. Justice Corbett rejected this argument:

This argument is wrong. Section 8 creates one trust fund for a contractor under its contract with owner in respect to all of its subcontractors under that contract. There is one trust, and all of the unpaid subcontractors and suppliers in "privity of trust" with the contractor are beneficiaries of that trust. All are entitled to assert their trust claims against the entirety of trust proceeds until their trust claims have been paid in full or until trust funds are exhausted.

Sutherland Law's argument that it should have priority because it was only through its efforts that the funds were available for distribution was also rejected by the court. Providing legal services to the contractor does not mean Sutherland Law could avail itself of monies impressed with a *CLA* trust.

The court also clarified that interest on trust funds is impressed with the same trust as the trust funds themselves. While the *CLA* is silent on this, basic principles of trust law provide that earnings on trust property are trust property and are payable in accordance with the terms of the trust.

In this case, the total amount owed to Great Northern was $54,809.76, of which $51,065.39 was the interest calculated in accordance with the subcontract. The court noted that there may be circumstances where the interest owed to a contractor may be greater than interest that accrues on trust funds owing to a contractor. However, this does not create an anomaly.

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Conclusion

The court allowed the appeal and varied the trial judge's decision to provide that Great Northern's trust claim had priority over Sutherland Law's charging order. Great Northern's trust claim exceeded the trust funds available and all available trust funds were ordered to be paid to Great Northern. This well reasoned decision by Justice Corbett is a rarely seen application of the trust remedy as well as the wide ranging implications of the trust regime under the *CLA*.

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