Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #154

November 3, 2019

INSIDE THIS ISSUE:

Editor's Note

At our Annual General Meeting held this past Spring at Niagara-on-the-Lake, the College decided to make our Legal Update newsletter available more broadly to the public by publishing on the free CanLii database of Canadian legal newsletters. This decision is consistent with the College's mission to "nurture, improve and enhance the practice of construction law." We are uniquely positioned to provide a high quality, nationally-focused update on significant construction law developments, so I am pleased to confirm that Legal Updates starting with issue #151 and continuing with future issues are now available on CanLii:

https://www.canlii.org/en/commentary/newsletters/41/

This current issue #154 contains seven case comments and legislative updates from Newfoundland, Prince Edward Island, Saskatchewan and Ontario. Of particular interest, the Saskatchewan Court of Appeal has now affirmed the priority of subcontractor lien claimants to holdback funds over a third party assignee who had purchased the accounts receivable of an insolvent contractor. Murray Sawatzky provided an update on the lower court decision in *Liquid Capital v Mainline Industrial* in Legal Update #149, and has now updated us on the Court of Appeal decision in the current issue.

The roll-out of Ontario's new *Construction Act* continues; a significant milestone was reached when the adjudication and prompt payment provisions came into force on October 1, 2019. This issue contains updates on the transition to this new regime and also on the creation of the Authorized Nominating Authority who will administer the statutory adjudication of construction disputes in Ontario.

The Legal Update Committee intends to publish one more issue before the end of 2019, so please send any noteworthy developments from your province that should be shared with our fellows and with the public through CanLii. You can email your work to me at: bb@glaholt.com .

Brendan

Upcoming Changes to the Ontario *Construction Act*

LUC #154 [2019]

Primary Topic:
II Statutory Regulation
Jurisdiction:
Ontario
Authors:
Brendan D. Bowles and Madalina Sontrop, Glaholt LLP

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Upcoming Changes to the Ontario *Construction Act*

In the year since its enactment, Ontario's new *Construction Act* has already made a noted impact on the practice of construction law in the province. The amendments to the previous *Construction Lien Act* (*"CLA"*) were to be implemented in two phases: Phase 1, the modernization provisions, effective July 1, 2018; and Phase 2, prompt payment and adjudication, effective October 1, 2019.

Transition: The Number One Challenge

Since Phase 1 was implemented July 1, 2018, the transition provisions have proven to be an immediate challenge. Which statute applies? Simply put, if the contract was entered into on or before July 1, 2018, the *CLA* applies, although we have already seen cases where counsel have wrongly assumed the new *Construction Act* applies and have allowed their clients' liens to expire. Thankfully, for those who practice in Toronto the Construction Lien Masters have issued guidelines to assist counsel as to the application of s. 87.3, and determining which legislation applies. For the foreseeable future, given the gradual nature of the transition, the best advice remains to assume the 45-day deadlines to preserve and perfect liens continue to apply.

With Phase 2 of the *Construction Act* now here, transition remains a challenge. It is important for counsel to understand not only how prompt payment and adjudication work, but also how the transition provisions for Phase 2 work, so they can advise clients whether they are in fact subject to this new regime. The adjudication and prompt payment provisions came into force the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* (*"Amendment Act"*) came into force – in other words, on October 1, 2019. Subsection 87.3(4), a proposed October 1, 2019 amendment to current section 87.3 of the *Construction Act*, will determine whether prompt payment and adjudication are available to the parties governed by a construction contract. Subsection 87.3(4) states that prompt payment and adjudication are available and apply to contracts and subcontracts, if the contract is entered into or after October 1, 2019, and the contract's procurement process, if any, was commenced on or after October 1, 2019.

Simply put, counsel need to know when the contract covering the client's work was entered into or procured. Did either of these events occur prior to July 1, 2018? If so, the *CLA* applies in its entirety. Did entry into or procurement of the contract occur on or after July 1, 2018, but before October 1, 2019? If so, the modernization provisions, including extended lien preservation periods apply, but not adjudication or prompt payment. It is only for contracts that are procured, or if there is no procurement process, entered into on or after October 1, 2019 where adjudication and prompt payment

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will apply. Indeed, due to the gradual nature of these transition provisions, it will be sometime before the *Construction Act* applies universally.

Prompt Payment

Prompt payment provisions, as set forth in sections 6.1 - 6.9 of the *Construction Act*, are intended to streamline payments and thereby expedite dispute resolution. In fact, such provisions work in unison with the adjudication process, a framework which seeks to resolve disputes in a timely, less costly, and ultimately, less litigious manner.

Prompt payment will apply to all public and private sector construction contracts, including P3 agreements, the exception being any portion of P3 agreements which provide for the operation or maintenance portion of such projects. The prompt payment regime is meant to be a solution to an industry that has become burdened by elongated payment cycles. The key elements to prompt payment include: a proper invoice to trigger payment deadlines; and integration with adjudication. Under the regime, the owner is required to pay the general contractor within 28 days following the submission of a "proper invoice" or a properly documented invoice. The *Construction Act* provides specifics as to what a proper invoice should contain, however, elements of a proper invoice may be dictated by the contract as well.

Adjudication

Adjudication and prompt payment are, in certain ways, co-dependent. Following from a process that has been in place for well over 20 years in the United Kingdom, the enactment of adjudication in Ontario will be the first of its kind in Canada. As outlined in Part II.1, section 13 of the *Construction Act*, adjudication is a mechanism that enables parties to resolve their disputes outside the court system. With a decision-making timeline of around 45 days, the adjudication will be carried out by an authorized adjudicator. Adjudication is meant to be a "quick and dirty" determination of the dispute and provides an interim binding decision.

Adjudication does not preclude a lien or a court action. It this sense, it is important to note that while lien rights are maintained, the deadline to lien is affected by adjudication under section 34.10 of the *Construction Act*. Where the matter that is the subject of a lien, which has not expired, is also the matter that is the subject of an adjudication, then, for purposes of section 34.10 only, the lien is deemed to have expired on the later of the date on which it would expire under section 31 and 45 days after receipt of documents by the adjudicator under section 13.11 of the *Construction Act*. In

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other words, adjudication has introduced a concept that was previously foreign to the lien statute in Ontario: the extension of lien right rights due to an intervening event, in this case, adjudication. It can be anticipated that this introduction of a new element to the deadlines for lien registration will be the source of some confusion and counsel relying on an adjudication process to allow more time to preserve a lien will need to carefully diarize the date of receipt of the documents by the adjudicator and the corresponding 45 day period from then to preserve the lien.

While the adjudicated decision is only binding on an interim basis, this decision may be set aside by a judge only if one of five specific factors is established by the challenger, pursuant to subsection 13.18(5) of the *Construction Act*, thereby setting a high standard for judicial review of the adjudicator's determination.

Conclusion

These two processes, prompt payment and adjudication are supposed to make the resolution of disputes in the construction industry quicker, more efficient, and inexpensive. Their true impact, however, ought to be assessed gradually in light of the transition provisions deferring the actual application of these regimes to post October 1, 2019 contracts. Furthermore, as with any other significant change to a familiar way of doing things, it will likely take some time before counsel and clients are truly comfortable resolving construction payment disputes through the new regime and there is widespread acceptance of adjudication as the preferred means of resolving construction industry payment disputes. If there is something to learn from the British equivalent, is that although change was not perfect, these two regimes were, nevertheless, an appropriate approach to a significant access to justice problem: the inability of our court system to provide timely and cost-effective resolution of construction industry payment disputes.

Authorized Nominating Authority Announces Ontario Adjudicator Application Process

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On October 1, 2019, the adjudication provisions of the Ontario *Construction Act* came into effect. As part of roll out of this new dispute resolution regime for the Ontario construction industry, the provincial government has announced that the role of the Authorized Nominating Authority ("ANA") will be carried out by ADR Chambers Canada.

Under the *Construction Act*, the role of the ANA is to develop and oversee programs for the training of persons as adjudicators; to qualify persons who meet the prescribed requirements as adjudicators; to establish and maintain a publicly available registry of adjudicators; and to appoint adjudicators for the purposes of subsection 13.9(5) of the *Construction Act*.

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ADR Chambers Canada recently released more information on the application process to become an adjudicator. The news release is accessible on ADR Chambers Canada's website. The announcement states that the adjudication body will be known as Ontario Dispute Adjudication for Construction contracts ("ODACC") and confirms that ODACC commenced operations on October 1, 2019.

The announcement contains an application process and a number of requirements for would-be adjudicators that incorporate the legislated qualification requirements set out in Ontario Regulation 306/18 (the "Regulation"). Pursuant to section 3(1) of the Regulation, anyone seeking to be an adjudicator is required to follow the process outlined by the authorized nominating authority in accordance with its procedures.

Among other things, the requirements set out by ADR Chambers include that adjudicators may not be undischarged bankrupts, may not have been previously convicted of an indictable offence in Canada (or comparable offence outside Canada), must have 10 years of relevant experience in the construction industry (including experience as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator, or lawyer), and otherwise comply with the requirements set out in section 4 of the Regulation.

Step one of the two-step application process introduced in the article is to complete a mandatory orientation program offered by ODACC. Few details are provided in the announcement about the length or cost of the program,

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other than an external link to a training provider named Stitt Feld Handy Group ("SFHG"). The SFHG website indicates that the training program is a two-day course that costs $1,124.35. At the time of writing, the orientation program was being offered in Toronto and Ottawa in September and November 2019.

Step two of the process is to submit a number of application documents to ODACC. The documents include an orientation program evaluation form, an adjudicator application form, adjudicator declarations that the applicant will comply with the *Construction Act* and regulations, a resume, and a letter of recommendation. Both the resume and letter of recommendation must support the requirement that the applicant have ten years of construction industry experience. The application form itself is available on the ADR Chambers website. It includes questions related to, among other things, the applicant's expertise, proposed geographical areas to cover "without charging travel time or expenses" and willingness to adjudicate four pre-designed adjudication processes.

The selection of Ontario's first group of adjudicators will determine the delivery capacity and geographical coverage of the adjudication regime in Ontario. The entire construction bar will be following these developments closely.

Freezing Funds for Ferry Wharf: NLCA Holds that Owner's Decision to Freeze Funds Owing to Contractor Constitutes Repudiation

Freezing Funds for Ferry Wharf: NLCA Holds that Owner's Decision to Freeze Funds Owing to Contractor Constitutes Repudiation

LUC #154 [2019]

Primary Topic:
VI Termination of Building Contract
Secondary Topic:
V Payment of Contractors and Subcontractors
Tertiary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Newfoundland and Labrador
Authors:
John Kulik, Q.C. and Melanie Gillis, McInnes Cooper

CanLII References:

2019 NLCA 51

NEWFOUNDLAND AND LABRADOR

The Newfoundland and Labrador Court of Appeal recently held that an owner's decision to freeze funds constituted repudiation in the case of *RJG Construction Limited v. Marine Atlantic Inc.*, 2019 NLCA 51.

Facts

In 2013, Marine Atlantic Inc. ("Marine Atlantic") hired RJG Construction Limited ("RJG") to construct a type of ferry wharf known as a 'mooring dolphin' in Argentia, Newfoundland. CBCL Limited ("CBCL") was the consultant on the project and responsible for approving progress payments. RJG also obtained a performance bond from Western Surety Company. RJG did not come remotely close to complying with the schedule.

Marine Atlantic took the position that RJG had defaulted under the contract and froze any and all funds relating to the project unless and until RJG agreed to sign a Remediation Agreement. This included amounts owing for work already performed. RJG refused to sign the Remediation Agreement and took the position that any delay was not attributable to them.

Both parties issued Notices of Default and Notices of Termination. RJG issued its Notice of Termination on January 7, 2014, alleging that RJG's freezing of funds constituted repudiation. Marine Atlantic issued its Notice of Termination on January 10, 2014, alleging that RJG was in breach of contract by failing to complete the work on time.

RJG claimed against Marine Atlantic for breach of contract, alleging that it was entitled to terminate the contract and did so on January 7, 2014 in response to Marine Atlantic's repudiation. Marine Atlantic counterclaimed for the costs of completing the work. Marine Atlantic claimed that RJG's January 7, 2014 termination was invalid, and that their termination on January 10, 2014 was what brought the contract to an end.

Trial Decision

The trial judge held that RJG's notice of default did not comply with the strict requirements under the contract, and therefore its notice of termination on January 7, 2014 was invalid. With respect to RJG's common law right to terminate in response to repudiation, the trial judge also held that Marine Atlantic freezing funds did not amount to repudiation, but rather was required in order to comply with the terms of the performance bond. The trial judge therefore dismissed RJG's claim. The trial judge went on to allow

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Marine Atlantic's counterclaim on the basis that it was entitled to terminate the contract on January 10, 2014 due to RJG's failure to complete the work on time.

Court of Appeal Decision

Justice O'Brien for a unanimous Court of Appeal held that Marine Atlantic's decision to freeze "any and all funds related to this project" amounted to a repudiation of the contract. He grounded his decision in the definition of repudiation set down by Justice Cromwell in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 ("Potter"), which O'Brien J cited as follows at paragraph 26:

> ...a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance...

Justice O'Brien disagreed with the trial judge and held that by freezing the funds unequivocally, even funds that had already been certified by the consultant, Marine Atlantic "...deprive[d] RJG of substantially all that it had bargained for" (paragraph 52), and that the act of freezing the funds constituted repudiation.

Justice O'Brien held that freezing 'any and all funds' signified an intention to freeze funds for future work performed as well, which constituted anticipatory breach and would therefore also allow RJG to treat the contract as having ended.

Justice O'Brien dismissed the argument that Marine Atlantic was required to freeze the funds in order to comply with the terms of the performance bond. While O'Brien J acknowledged that the performance bond allowed Marine Atlantic to withhold further payment or 'deduct' funds from future payments if it had terminated the contract and had incurred costs to correct the default, he found that these conditions had not been met on the facts: the funds were frozen before Marine Atlantic purported to terminate the contract, and they had not yet incurred any costs to correct RJG's defaults.

Justice O'Brien also dismissed two other arguments that Marine Atlantic relied on at trial. First, Marine Atlantic argued that RJG was estopped from terminating the contract while discussions were ongoing about the Remedia-

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tion Agreement. Justice O'Brien held that it would be "wholly inconsistent" to find that Marine Atlantic was not estopped from freezing funds, but RJG was estopped from terminating the contract, and found no basis for such an argument in the wording of the construction contract.

Second, Marine Atlantic argued that RJG failed to strictly comply with the Notice of Default provisions of the construction contract and therefore its Notice of Termination was also invalid. Justice O'Brien relied on the Ontario Court of Appeal case of *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp (2014)*, 2013 ONCA 494 (leave to appeal to SCC dismissed), wherein the Court of Appeal held that common law repudiation still applies in the event that strict compliance with Notice of Default provisions is not achieved so long as the parties have not ousted the application of the common law in the wording of the contract. Justice O'Brien found that the language of the contract here actually expressly preserves the common law.

Significance

This case is significant for construction law practitioners, as it signifies that courts will not allow for owners to freeze funds owing to contractors on an unequivocal basis, particularly where the funds that have been frozen include funds relating to work that has already been performed, and where the decision to freeze funds was made after a declaration of default but before the owner terminated the contract. This case therefore represents a cautionary tale that should cause practitioners to carefully consider the precise wording of the termination and default provisions of their construction contract(s) as well as any bond language before advising clients to withhold funds from contractors, even where said contractors are clearly in default of their obligations under the contract.

Blueberry Battles: PEI Court of Appeal Finds Implied Contract for Development of a Blueberry Farm

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LUC #154 [2019]

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CanLII References:

2019 PECA 13

PRINCE EDWARD ISLAND

The Prince Edward Island Court of Appeal upheld a trial judge's finding that an implied contract existed between a land-owner and a construction company for the development of a commercial blueberry farm in the case of *O'Neill v Kings County Construction*, 2019 PECA 13.

Facts

The Defendant O'Neill allowed the Plaintiff Kings County Construction ("KCC") to develop his land into a commercial blueberry farm. KCC incurred all the expenses for labour and materials, which they understood would be repaid in full out of the annual proceeds of the farm once it was up and running. However, O'Neill then sold the property before KCC had been reimbursed in full (they still had $101,900.90 owing). O'Neill denied owing KCC any funds. KCC brought a claim against O'Neill in contract, implied contract, and (in the alternative) unjust enrichment.

Trial Decision

The trial judge held that there was not enough clarity around essential terms to find a verbal contract. However, she did apply the test for implied contracts set out in *St. John Tugboat Company Ltd. v. Irving Refinery Ltd.*, [1964] SCR 614 (the "Tugboat Test"), which required her to determine on an objective assessment whether circumstances of this case gave rise to an inference that O'Neill's conduct, unaccompanied by a verbal or written undertaking, can constitute acceptance of an offer which binds the party contractually to the offer. Ultimately, she determined that O'Neill's conduct in allowing KCC to come onto the land and improve it demonstrated an intention to be bound, and that O'Neill breached the terms of the contract by selling his farm before KCC was repaid in full.

Court of Appeal Decision

Chief Justice Jenkins held that the Tugboat Test for implied contracts is still good law, and that the trial judge's decision was "a classic finding of silence or inaction constituting acceptance of offer" (paragraph 6). Chief Justice Jenkins went on to make some general comments about the Tugboat Test, including the fact that the scope for finding an implied contract is quite limited. In particular, he noted that the beneficiary under an implied contract must have knowledge that consideration is being provided with an expectation that it will be paid for as follows at paragraph 11:

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> ...Liabilities are not to be forced on people behind their back any more than one can confer a benefit upon a man against his will. That said, if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in it being done, taking the benefit of it when done, he will be taken to have impliedly requested it being done; and that will import a promise to pay for it.

Significance

While the Court of Appeal was quick to emphasize that the Tugboat Test should be strictly applied, Chief Justice Jenkins' decision does signify that the Tugboat Test for implied contracts is still alive and well and may be applied in the development/construction context if circumstances permit.

Photo by Abigail Lynn on Unsplash

Case Comment: Liquid Capital Prairie Corp. v Mainline Industrial Limited Partnership

Case Comment: Liquid Capital Prairie Corp. v Mainline Industrial Limited Partnership

LUC #154 [2019]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Saskatchewan
Authors:
Murray Sawatzky, Q.C. and Jenna Sambrook, McDougall Gauley LLP

CanLII References:

2019 SKCA 66

SASKATCHEWAN

A recent decision of the Saskatchewan Court of Appeal (*Liquid Capital Prairie Corp. v Mainline Industrial Limited Partnership*, 2019 SKCA 66) deals with the priority dispute involving lien claimants and an assignment relating to holdback funds pursuant to the *Builders' Lien Act,* SS 1984-85-86, c B-7.1 (the "***BLA***").

Background

In 2013, Liquid Capital Prairie Corp. ("**Liquid Capital**") entered into a Factoring Agreement (the "**Agreement**") with Mainline Industrial Ltd. and Mainline Industrial Limited Partnership (collectively, "**Mainline**") where Mainline assigned all accounts receivable to Liquid Capital. The Agreement provided that Liquid Capital would purchase Mainline's receivables at a discount.

As a result, all purchased invoices were absolutely assigned by Mainline to Liquid Capital.

Mainline entered into a contract with Saskatchewan Power Corporation ("**SaskPower**") whereby Mainline would supply labour, materials and equipment for the construction of a project (the "**Project**"). Mainline, in turn, contracted with various subcontractors.

Mainline issued six invoices to SaskPower for work done on the Project (the "**Progress Invoices**"). Each invoice deducted 10% of the builders' lien holdback SaskPower was required to withhold pursuant to s. 34 of the *BLA* (the "**Holdback**"). The total amount of the Holdback was $403,839.23. The accounts receivable represented by each of the Progress Invoices was assigned by Mainline to Liquid Capital pursuant to the Factoring Agreement.

After the Project was complete Mainline issued a seventh invoice, representing the receivable owing to Mainline by SaskPower in respect to the Holdback. Mainline assigned the Holdback receivable to Liquid Capital in accordance with the Factoring Agreement.

Eventually, six subcontractors (the "**Subcontractors**") filed liens for labour, materials and equipment supplied to the Project. SaskPower paid the Holdback into Court under the *BLA.* Commercial Sand Blasting and Painting ["**Commercial**"] applied for an order that the Holdback be distributed *pro*

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2019 SKCA 66

SASKATCHEWAN

rata to the Subcontractors. In response, CRA and Liquid Capital claimed priority over the Holdback.

The Chambers Decision

The Chambers judge determined that Liquid Capital had priority to the Holdback over the claim of CRA. As between Liquid Capital and the Subcontractors, the Chambers judge concluded that the assignment of the Holdback fell within the scope of s. 70(2) of the *BLA* which provides that no assignment by a contractor of any monies that "may or become payable under or in respect of any contract… is valid as against any lien arising under [the *BLA*]". From this the Chambers judge drew the further conclusion that the Subcontractors had priority to the Holdback over Liquid Capital.

The Appeal Decision

The Appeal addressed whether the assignment by Mainline to Liquid Capital of the Holdback had priority over the Subcontractors' claim to the Holdback.

Liquid Capital argued that it took priority to the Holdback as it had an absolute assignment of the Holdback receivable, for which it had made payment in full to Mainline pursuant to the Factoring Agreement. Liquid Capital asserted that the Chambers judge erred in his interpretation of s. 70(2) of the *BLA* in that the terms "assignment" and "all general and special assignments" cannot be interpreted to include absolute assignments.

In response, Commercial, with support of the other Subcontractors, took the position that the Chambers judge was correct in his analysis of the priority dispute.

The dispute between the parties was reduced to the appropriate interpretation of s. 70(2) of the *BLA.* On appeal, the Court relied on the modern principles of statutory interpretation as articulated in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 (SCC) and stated that the words of the *BLA* "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the Legislature".

Read in its grammatical and ordinary sense, s. 70(2) sets three precondi-

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tions to its application, all of which were met: (i) the Holdback must be payable under or in respect to a contract to which the *BLA* applies; (ii) the Subcontractors must have a lien which is a charge on the Holdback and on the project land; and (iii) the claim must be based on an assignment of the Holdback. Therefore, s. 70(2) led to the conclusion that the assignment made by Mainline to Liquid Capital did not take priority over any lien arising under the *BLA*.

The Court looked next to whether there was something in the scheme and objectives of the *BLA* that should cause the Court to deviate from the ordinary meaning of s. 70(2). Construction lien legislation exists to provide protection to those who offer services and materials on credit to construction projects. Therefore, the Court held that the primary purpose of the *BLA* is met if s. 70(2) is given its ordinary meaning.

Liquid Capital argued that including absolute assignments in s. 70(2) will have a "chilling effect" on commercial factoring in the construction industry by restricting contractors, subcontractors and suppliers from access to a form of financing. The Court rejected this argument holding that the scheme of the *BLA* protects the commercial interests of others, including the owner and the financier (the secondary purpose of the *BLA*) by providing confidence to subcontractors and suppliers to supply services and material on credit, and providing certainty to owners and others to allow for the orderly flow of money in respect of construction projects. As such, Liquid Capital's proposed interpretation of s. 70(2) would leak monies from the construction pyramid and undermine the security that subcontractors and suppliers expect to have under the *BLA*. The interpretation of s. 70(2) favoured by Liquid Capital would frustrate, rather than promote, the legislative purposes and run counter to the statutory regime designed to achieve those objectives.

The Court held, because of s. 70(2) of the *BLA,* the assignment of the Holdback given by Mainline and taken by Liquid Capital was invalid as against the liens of the Subcontractors. As a result, the Subcontractors were entitled to the Holdback and the appeal was dismissed.

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Take Away

The decision provides certainty in Saskatchewan regarding priority disputes involving lien claimants and assignments. The Court of Appeal decision means that, on its face, s. 70(2) of the *BLA* renders ineffective against lien claimants any assignment of monies that may be or become payable under or in respect to any contract or subcontract to which the *BLA* applies.

How Far Does Your Duty of Candour Go? Case Comment: *Kapoor v The Law Society of Saskatchewan*

How Far Does Your Duty of Candour Go? Case Comment: Kapoor v The Law Society of Saskatchewan

LUC #154 [2019]

Primary Topic:
I General
Jurisdiction:
Saskatchewan
Authors:
Murray Sawatzky, Q.C. and Nicole Krupski, student-at-law, McDougall Gauley LLP

CanLII References:

2019 SKCA 85

SASKATCHEWAN

A recent decision of the Saskatchewan Court of Appeal (*Kapoor v The Law Society of Saskatchewan*, 2019 SKCA 85), while not a construction case, deals with a lawyer's duty to be candid pursuant to s. 401(1) of the Saskatchewan *Code of Professional Conduct* ["***Code***"], which may in certain circumstances, require a lawyer to disclose non-binding case authority that is contrary to the position for which the lawyer is advocating.

Background

The appeal addresses a guilty finding by a hearing committee of the Law Society regarding a formal complaint that arose from a case on March 14, 2014, in which Ajit Kapoor represented a client charged with the offence of driving while disqualified. After the Crown closed their case, Mr. Kapoor requested a non-suit on the basis that the Crown failed to prove an alleged essential element of the offence. Namely, that the accused was not enrolled in an alcohol ignition interlock program.

In support of his argument, Mr. Kapoor referred to two cases which he drew from Alan D. Gold's text *The Practitioner's Criminal Code*, 13th ed (Markham: LexisNexis, 2012) ["***Gold's Code***"]: (1) *R c Larivière*, 38 CR (5th) 130 (Que CA) ["***Larivière***"] and (2) *R v Liptak*, 2009 ABPC 342, 481 AR 116 ["***Liptak***"].

Mr. Kapoor began by identifying *Larivière* in support of his position. The trial judge indicated he was surprised the case stood for the principle advanced by Mr. Kapoor and suggested he would need to read the case. The trial judge then asked if Mr. Kapoor had anything else to add, to which he offered *Liptak* as another case supporting his position from Alberta. Both cases in the passage were supported by the following footnote, which also included a contrary case (*Gold's Code* at 438):

> *R. v. Lariviere (2000), 38 C.R. (5th) 130, [2000] Q.J. No. 3086 (Que. C.A.); R. v. Liptak,* [2009] A.J. No. 1271 (Alta. Prov. Ct.); ***Contra R. v. Whatmore,*** *2011 ABPC 320, [2011]* A.J. No. 1147 (Alta. Prov. Ct.) (onus on accused to prove registration and compliance with interlock program).
>
> [Emphasis added].

The trial judge continued to express his skepticism while Mr. Kapoor made reassuring statements, such as he was not "making it up" and that he was

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I General
Jurisdiction:
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Authors:
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"not, Your Honour, misleading you". In response, the trial judge requested Saskatchewan cases in which the principle had been followed, suggesting that the argument "just absolutely does not make sense" to him otherwise.

During a break, the trial judge requested to see Mr. Kapoor's copy of *Gold's Code* and noticed the contrary case, *R v Whatmore*, 2011 ABPC 320, [2011] AJ No. 1147 [***"Whatmore"***]. He confronted Mr. Kapoor about his failure to bring the case to his attention and Mr. Kapoor's response was that he "honestly intended to bring this contra up" but that he "could not say anything." This led to a formal complaint against Mr. Kapoor alleging that he:

> Failed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application on March 18, 2014.

Mr. Kapoor was found guilty by a hearing committee of the Law Society of conduct unbecoming a member because he failed to bring "relevant and adverse case authority" to the attention of a judge of the Provincial Court of Saskatchewan (*Law Society of Saskatchewan v Kapoor*, 2016 SKLSS 13 (CanLii) at para 2 ["***Hearing Committee Decision***"]). This decision was based on the finding that Mr. Kapoor deliberately chose not to bring the case to the attention of the trial judge. The committee also concluded the following:

> (1) the specific obligation to disclose binding authority on point does not subsume the more general duty of candour; and (2) in the circumstances of this case, Mr. Kapoor's failure to bring the *Whatmore* case to the trial judge's attention constituted conduct unbecoming.

Mr. Kapoor was ordered to pay $6,192.50 in costs. He then appealed the decision.

The Appeal Decision

The Court of Appeal case dealt with two key issues: (1) whether it was unreasonable for the hearing committee to conclude that the failure to bring relevant and adverse but non-binding case law to the attention of a court or tribunal can constitute conduct unbecoming a lawyer; and (2) whether it was unreasonable for the hearing committee to conclude that the failure to

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bring the *Whatmore* decision to the trial judge's attention was a breach of the duty of candour. A third, less significant issue regarding the costs award was also raised on appeal.

The *Hearing Committee Decision* was reviewed by the Court on a standard of reasonableness. In reviewing the decision, the Court considered two provisions from the *Code* that were at the heart of the appeal: (i) s. 4.01(1) outlining the general duty of an advocating lawyer; and (ii) s. 4.01(2) which contained a list of acts a lawyer must refrain from doing. The provisions are as follows:

> **4.01 (1)** When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
> **4.01 (2)** When acting as an advocate, a lawyer must not:
> ...
> (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
> ...

The first decision the Court reviewed was the hearing committee's choice to base Mr. Kapoor's conduct under s. 4.01(1), not s. 4.01(2). The Court found it was reasonable for the hearing committee to find that nothing listed in s. 4.01(2) limited other more general duties described in the *Code*. Thus, it was reasonable for the hearing committee to find Mr. Kapoor's failure to bring relevant and adverse but non-binding case law to the attention of the court was capable of breaching the duty of candour and fairness under s. 4.01(1).

In coming to this conclusion, the Court rejected several of Mr. Kapoor's opposing propositions. First, that s. 4.01(2)(i) exhaustively outlined when a lawyer is obligated to disclose authorities. This argument was found to be too narrow in light of the *Code's* preface which outlined the impossibility of establishing exhaustively what might constitute conduct unbecoming a lawyer.

Second, Mr. Kapoor pointed to earlier versions of the *Code* with equivalents to s. 401(2)(i) referring to "any *pertinent adverse* authority", as opposed to "binding" authority. He argued this represented the intention of legislature in drafting the current *Code* to limit the types of authority requiring disclo-

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sure. The Court dismissed this argument finding there was no historical record evincing this intention to limit other conduct.

Third, Mr. Kapoor quoted a passage from a case which seemed to suggest some rules of the *Code* are expressed in mandatory terms. In response, the Court quoted a passage in the same case immediately before the one quoted by Mr. Kapoor which suggested, to the contrary, that the rules are not all inclusive. The Court pointed out the irony of Mr. Kapoor's misrepresented passage to the circumstances to his case.

The next decision the Court reviewed was the hearing committee's decision that Mr. Kapoor's actions amounted to conduct unbecoming a lawyer under s. 4.01(1) of the *Code* in the particular circumstances of his case. The Court reviewed the facts of Mr. Kapoor's case in great detail and found that it was not unreasonable for the hearing committee to reach this conclusion in the particular circumstances.

Mr. Kapoor disagreed stating that his particular circumstances could not amount to conduct unbecoming a lawyer because the trial judge made it clear he was not persuaded to follow cases from outside Saskatchewan. Mr. Kapoor contended the trial judge's insistence on Saskatchewan cases made *Whatmore*, a case from Alberta, irrelevant. This argument was rejected by the Court for several reasons, including the skepticism of the trial judge, timing of the information provided, and language used surrounding the cases.

The Court pointed to the trial judge's degrees of skepticism and requests for other authorities from Mr. Kapoor as heightening the relevance of *Whatmore*. The Court also found it reasonable the hearing committee placed emphasis on the timing of Mr. Kapoor's introduction of *Liptak*, as it was introduced after a request for more information from the trial judge, with no reference to *Whatmore*. This was of particular import since Mr. Kapoor was aware that *Whatmore*, a later decision of the same court as *Liptak*, reached the opposite conclusion. Finally, the confident language used by Mr. Kapoor in describing *Larivière and Liptak* also played a role in determining the hearing committee's decision was reasonable.

As a result, the Court concluded the hearing committee's decision that Mr. Kapoor breached his duty of candour when he failed to draw *Whatmore* to the attention of the trial judge was reasonable based on the very specific facts. However, at paragraph 52 the Court suggests that it may not have amounted to misconduct for Mr. Kapoor to have "simply referred the trial

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judge to *Larivière*." The Court proposed that the hearing committee could have reasonably inferred that citing *Liptak* alone implied the case represented the law in Alberta – a representation which was known to Mr. Kapoor to be untrue. Although there was nothing directly mentioning this consideration in the *Hearing Committee Decision*, the Court put forward this representation could have played a role in determining Mr. Kapoor's conduct was unbecoming a lawyer.

Mr. Kapoor made one last argument that he acted both reasonably and in good faith as per *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772 [*Groia*], a case not considered by the hearing committee as it was decided after the *Hearing Committee Decision*. In dismissing this argument, the Court found contrarily that *Groia* suggested good faith and reasonableness was not the end of an inquiry into professional misconduct, and that regardless, findings made by the hearing committee reflect that it did not believe Mr. Kapoor acted reasonably.

Finally, the Court reviewed the hearing committee's decision that the hourly rate applied for the investigation of discipline matters was reasonable. The Court found the decision was reasonable because Mr. Kapoor did not provide a reason to the committee as to why an assessing officer is in a better position than the hearing committee to determine what hourly rate is reasonable in the circumstances.

Conclusion

For the above reasons, the Court dismissed the entirety of Mr. Kapoor's appeal, with costs in favour of the Law Society.

Take Away

Section 4.01(2) of the *Code* does not limit a hearing committee's ability to find other conduct unbecoming a lawyer under section 401(1). The *Code* is not an exhaustive list.

A lawyer's failure to disclose non-binding case authority known to be contrary to the position for which the lawyer is advocating can be grounds for conduct unbecoming a lawyer, but it is *very dependent upon the circumstances and facts* of each specific case.

In *obiter*, the Court implied that representing the law of a province to be one way by introducing a case, knowing that another contrary case existed, could breach the duty of candour.

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LUC #154 [2019]

Primary Topic:
I General
Secondary Topic:
III Building Contract
Jurisdiction:
Ontario
Authors:
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2019 ONSC 3101

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When counsel approaches a client's case to analyze it, they usually do a careful review of each of the aspects of the case that will ultimately have to be proven with respect to both liability and damages. This analysis sometimes produces a conclusion that in some particular area, the result appears to be indisputable. The next thought is that if something is that clear, why not avoid the hassle and cost of production and discovery relating to that issue and seek to have it determined on a summary basis so as to go forward with only the remaining issues needing to proven. In theory, such an approach should shorten proceedings and make early settlement more likely. Unfortunately, practice usually has not accorded with theory. Cross-examinations get substituted for the discovery sought to be avoided and counsel and court scheduling results in the matter dragging on interminably before the court can rule on the merits of the summary determination being sought. Nevertheless, partial summary judgment is an option available to counsel under the procedural rules. It makes sense that it should be available where it can be shown that there is no genuine issue for trial with respect to either liability or damages.

A judge has a different perspective. The judge wants to hear everything at once and make a decision based on considering all issues. Judges are nervous about making a binding determination on a certain issue in the absence of a complete consideration of all the issues in the case.

As we will see in *H.R. Doornekamp Construction Ltd. v Attorney General of Canada*, partial summary judgment is difficult to obtain and the bar is very high to convince the Court it should be granted.

In this case. the Plaintiff was contracted to demolish and replace the concrete face of a canal lock. While the contract contained estimated quantities, the work was to be paid on a unit price basis. The contract contained a provision (GC 6.4.3) which provided that if the estimated contract quantity varied from the estimate, the contractor was to perform the work and submit certain records to support the quantity claimed. Payment was then to be made based on the actual quantity performed. After completing the work, the Plaintiff claimed an additional $1.5M on this basis.

In addition, the contract contained a dispute resolution provision (GC 2.2 and GC 8.3.1) requiring notice of a claim and a procedure for its resolution. The Defendant took the position that this procedure had not been followed

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and therefore the Plaintiff had no right to sue for the extra payment. The Plaintiff took the position that GC 6.4.3 was a complete code to asserting a claim for additional quantities and that the dispute resolution provisions and notice requirement were not applicable.

The Plaintiff brought a motion for partial summary judgment that the Defendant was liable with damages to be determined at a subsequent trial. The Defendant moved for summary judgment to dismiss the claim for failure to give notice and comply with the dispute procedure.

The Defendant only filed an affidavit of a legal assistant with no knowledge of the work and accordingly the Plaintiff took the position that the Defendant had not filed sufficient evidence or put its best foot forward. The Defendant argued that the Court had to first interpret the contract to deal with either motion and determine if the Plaintiff's claim was extinguished. The Defendant also argued that to bring a claim under GC 6.4.3, the Plaintiff had to prove the alleged excess supply was in relation to approved work and alternatively that there had been an agreement that there was in fact an excess supply, neither of which it had done.

The Honourable Justice Pollak noted that the Plaintiff had not satisfied its burden to prove what work was performed and that the preconditions to payment under GC 6.4.3 had been met before moving to consider the Defendant's motion to dismiss the action. In this regard, the Plaintiff argued that there was some evidence that the Defendant had in fact started the claims process in response to the Plaintiff's claim but had not acted consistently with the requirements of GC 6.4.3. It argued that it had understood that the claims process had been engaged under G.C. 6.4.3 and that it was not necessary to follow GC 8. Having not followed the strict contract terms, the Defendant could not revert to those terms when it suited them. In answer to this, the Defendant argued GC 14.1, a standard boiler plate provision that the contract terms could not be amended except in writing, nor could they be waived by the failure of a party to require performance in accordance therewith.

The Judge then considered the appropriateness of partial summary judgment in the circumstances. Referring to *Butera v Chown, Cairns LLP*, 2017 ONCA 783, she noted that the Ontario Court of Appeal had made it clear that partial summary judgment should be considered a rare procedure that

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is reserved for issues that can be easily bifurcated from the main action and that can be dealt with expeditiously and in a cost effective manner. In particular, she referenced paragraphs 26-34 of that decision where the Court referred to some of the considerations, such as:

- Is the issue on which judgment is sought clearly severable from the balance of the case?
- Is there a risk of duplicative or inconsistent findings at trial?
- Is partial summary judgment advisable in the context of the litigation as a whole?
- Does partial summary judgment delay the resolution of the action?
- Does partial summary judgment increase the costs rather than reduce them?
- What impact does partial summary judgment have on the availability of judicial resources?
- Will the record from partial summary judgment be less expansive than trial increasing the risk of inconsistent results?

With these considerations before her, the Justice Pollak said at paragraph 51,

"On the motion for summary judgment brought by Canada, I must consider if I can reach a fair and just determination on the merits. I must be able to make the necessary findings of fact, apply the law to the facts, and the motion must be a proportionate, more expeditious and less expensive means to obtain a just result, than a trial. I must determine whether on the basis of the evidentiary record alone, are there genuine issues that require a trial."

She then found that there were two genuine issues for trial being whether the Plaintiff properly invoked and relied on GC 6.4.3 and whether the Defendant's conduct affected the rights of the Plaintiff with respect to its claim.

She then noted at paragraphs 55 and 56,

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"Second, I must determine if the need for a trial can be avoided by the use of my fact-finding powers. I must ask if it would be in the interest of justice to do so. Will the use of these powers that I have led to a "fair and just result" that will serve the goals of timeliness, affordability and proportionality in light of the litigation as whole?"

In my view, the answer is no. The triable issues in dispute are significant and can not be easily segregated from the others in a trial. To resolve this case justly and fairly, I would need to use the additional fact-finding powers to conduct a large portion of this trial. That would not be in the interests of justice.

Lastly on the merits, the Judge said,

"As well, I find that it would not be appropriate to consider Doornekamp's motion for partial summary judgment, in light of my findings with respect to the genuine issues for trial and because the facts of this case are so interrelated and intertwined. Most importantly, I find that the concerns raised by our Court of Appeal, referenced to above, would be applicable and further find that Doorenkamp's indirect evidence is not sufficient for it to discharge its burden of proving that the requirements of GC6.4.3.1. have been met."

This case illustrates the great difficulty of achieving partial summary judgment. The Court has clearly set out the factors that counsel will need to address to convince it that such relief is just and equitable in the context of the overall action. While there may nevertheless be strategic reasons for an attempt at partial summary judgment, counsel should proceed down the road knowing it is a difficult hill to climb and the costs consequences associated with failure are a real possibility.

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