Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #157

June 30, 2020

INSIDE THIS ISSUE:

Editor's Note

We begin Legal Update #157 with two case comments arising from the law of statutory trusts. Both cases demonstrate the significant power of this remedy. First, my colleague Markus Rotterdam and I write about an Ontario Court of Appeal decision which will be of particular interest to counsel advising construction trust beneficiaries in an insolvency proceeding where the premises have been sold. Of particular note, the Court upheld the constitutionality of the Ontario *Construction Act* trust provisions. The second case comment by John Kulik and Melanie Gillis summarizes a trial level decision from Nova Scotia where trust beneficiaries pursued a personal defendant and successfully pierced the corporate veil as permitted by the statute. The defendant had energetically defended the matter over the course of 12 years. It is the only reported Canadian case I am aware of where a defendant blamed his parents for his own breaches of the statutory trust.

We then move to the world of construction liens. Michael Demers writes about a trial decision from British Columbia which ruled that lien claims could successfully attach to an owner's interest in a "run of river" independent power project. Joe Cosentino and Brad Halfin summarize a Divisional Court decision from Ontario which confirms that a master conducting a lien reference may exercise all of the powers of a judge in determining a motion for summary judgment.

We end with case comments from Ontario and Newfoundland and Labrador dealing with oft litigated issues arising from construction projects. Ron Price summarizes an Ontario Court of Appeal decision upholding the ability of all defendants to an action to rely on a limitation of liability clause equal to an engineer's insurance coverage. The Court upheld a lower court decisions which served to cap the liability of all defendants pursuant to the terms of the contract at issue and Ontario's *Negligence Act*. John Kulik and Melanie Gillis contribute a second case comment, this one a tendering decision from Newfoundland and Labrador. The case is another example of the Courts refusing to allow an owner to use a privilege clause as *carte blanche* to excuse unfair behaviour in a tendering process.

Editor's Note

Brendan D. Bowles

Some good things have come from this pandemic experience, one of which is better use of technology by lawyers as a means to serve our clients and work collaboratively. On that note the Legal Update Committee held its first meeting by Zoom in June. A great way to meet, for a Committee comprising busy lawyers from coast to coast. The first Zoom call was a success, and we are happy to welcome Jason Annibale and Phil Scheibel to this committee. Plans are underway for our next Legal Update issue in September. Contributions from across Canada are always welcome and gratefully accepted!

Brendan

Construction Act Trust Claimants in Insolvencies – A Shift in Ontario Law

Urbancorp Cumberland 2 GP Inc. (Re),
2020 ONCA 197

LU #157 [2020]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
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CanLii Reference:
2020 ONCA 197

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Brendan D. Bowles

Markus Rotterdam

On March 11, 2020 the Court of Appeal released a precedent setting decision on the *Construction Act* trust remedy that would have undoubtedly received more attention than it did, had the decision not been released on the same day as the World Health Organization declared the novel coronavirus to be a global pandemic.

Urbancorp Cumberland 2 GP Inc. (Re), 2020 ONCA 197, however, is required reading for anyone advising construction industry clients in an insolvency proceeding. Until recently, when lien or trust claimants sought advice from construction lawyers on their rights in an insolvency context, they used to be told that bankruptcy and insolvency legislation was federal, while lien legislation was provincial, that the former took precedence over the latter and that therefore they could not rely on the rights they would have had but for the insolvency.

That advice was based on case law such as *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062, in which the court held that a supplier's trust claim under the Act did not survive Atlas's bankruptcy. Section 67 (1)(a) of the *Bankruptcy and Insolvency Act* (the "BIA") provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person". The Supreme Court of Canada, *in British Columbia v. Henfrey Sampson Belair Ltd.*, [1989] 2 S.C.R. 24, held that the three elements of a common law trust had to be present before a statutory trust could fall under s. 67(1)(a) BIA: certainty of intention, certainty of subject matter, and certainty of object.

Based on that Supreme Court decision, the court in *Atlas Block* held that s. 67(1)(a) of the BIA did not extend to assets subject to a deemed trust created by provincial statute where such deemed trust did not otherwise have all the attributes of a valid trust at common law. Since the funds from the projects in *Atlas Block* were commingled with funds from other sources, there was no certainty of subject matter and consequently no common law trust.

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In the words of the court, "once co-mingling has occurred, that is the end of the matter".

The first Ontario Court of Appeal decision to breathe life back into the rights of *Construction Act* claimants in insolvency situations was *The Guarantee Company of Canada v. Royal Bank of Canada*, 2019 ONCA 9. The Court of Appeal found:

- The Supreme Court in *Henfrey* contemplated that a provincial statute could supply the required element of certainty of intention for a statutory trust.

- The trust created by the *Construction Act* does not give rise to an operational conflict with the BIA. Accordingly, the doctrine of paramountcy does not apply.

- The mere fact that trust funds are paid into the same account does not mean that certainty of subject matter is lost. That only happens once tracing becomes impossible.

- Therefore, trust funds under s. 8 of the Construction Act can satisfy the requirements of a common law trust, and they did in *GCNA v Royal Bank*.

- Consequently, the s. 8 trust funds were not property of the bankrupt and were not available for distribution to the bankrupt's creditors.

While *GCNA v. Royal Bank* concerned a contractor's trust under s. 8 of the Act, *Urbancorp Cumberland 2 GP Inc. (Re)* concerned the scope and effec-

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tiveness of a vendor's trust under s. 9(1) of the Act in an insolvency proceeding.

A condominium developer, the Cumberland Group, was granted protection under the BIA and continued under the *Companies' Creditors Arrangement Act* (the "CCAA"). It owned unsold condominium units in a project it constructed. Contractors which had supplied work and material to these units were owed just under $4 million. When the units were sold during the insolvency proceedings for more than $11 million, the contractors claimed that a s. 9 trust arose over the proceeds to the extent of the amounts owing to them.

The Monitor brought a motion under the CCAA for a determination by the court of whether the sale proceeds were impressed with a trust in the contractors' favour. The motion judge held that they were not, finding that he was bound by the 2005 Ontario Court of Appeal decision in *Veltri Metal Products Co., Re*, 2005 CarswellOnt 3326 (C.A.). The motion judge held as follows:

> Regardless of whether one could argue that *Veltri* does not give sufficient recognition to the position of lien claimants, the Court of Appeal has ruled that the prerequisites of a ss. 7 or 9 trust are not met where a Monitor ultimately receives the proceeds of sale to be held for creditors.

The motion judge found that the condominium sales were not made "by the owner", given the Monitor's control over the developer's activities, especially with respect to the sales process, and that the proceeds of sale were not "received by the owner" but rather by the Monitor on behalf of creditors. Therefore, according to the motion judge, there was nothing to distinguish the case before him from *Veltri* and he was bound to dismiss the trust claims.

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The contractors appealed, arguing that *Veltri* was either distinguishable or wrongly decided. They argued that each condominium sale was a sale by the developer as "the owner" because the sale agreements were entered into on the developer's behalf by the Monitor as a representative, and that the consideration from the sales was "received" by the developer as "owner" since the sale proceeds were deposited into bank accounts opened on the developer's behalf and not the Monitor's. The contractors also argued that the "value of the consideration" exceeded both the expenses of the sale and the amount of mortgage indebtedness, resulting in a positive balance that could constitute a trust fund for their benefit.

Finally, the contractors served the Court of Appeal with the following Notice of Constitutional Question:

> Does s. 9 of the CLA continue to have application following a bankruptcy or initial order under the CCAA?

Since the correctness of one of its earlier rulings was in issue, the court sat with a panel of five judges. Ruling on the constitutional question first, the Court of Appeal held that a BIA or CCAA proceeding does not prevent the recognition of a s. 9(1) trust and answered the constitutional question by recognizing the validity of a s. 9(1) trust in an insolvency.

Applying *GCNA*'s s. 8 analysis to the s. 9 context before it, the court held as follows:

> 35 In my view, the same reasoning applies to a s. 9(1) trust under the CLA. Section 9 is part of a series of provisions, including ss. 7 and 8, which provide for trusts in favour of specified persons (contractors or subcontractors) over specified funds in the hands of owners (s. 7), contractors (s. 8), and owners who are vendors (s. 9). The effect of s. 9(1) may

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> include the protection of trust beneficiaries on the insolvency of the trustee (by giving them a priority over creditors), but to the extent that it creates a trust under the general law of trusts, it may do so effectively without conflict with the BIA.
>
> 36 Subsection 9(1) of the CLA creates a trust which comports with the general law of trusts. There is certainty of subject matter: s. 9(1) identifies precisely the subject matter of the trust as the value of the consideration on a specific sale by the owner of the owner's interest, less expenses of the sale and the amount necessary to discharge mortgage indebtedness. There is certainty of object: s. 9(1) identifies precisely the object of the trust as unpaid contractors who supplied work and material to the improvement which was sold. There is also certainty of intention: s. 9(1) deems the creation of a trust and s. 9(2) requires that trust funds not be appropriated to any purpose inconsistent with the trust:
> see Guarantee, at para. 20.

Just like in *GCNA*, there was no conflict between the language or purpose of the BIA, which excluded property held in trust from the definition of property of the bankrupt, and the trust provisions of the *Construction Act*, which created the kind of trust the BIA contemplated. Therefore, the doctrine of paramountcy did not render the s. 9 trust inoperative.

After answering the constitutional question, the Court of Appeal dealt with the decision in *Veltri*. In that case, a number of lien claimants had provided work or materials to a specific property that Veltri had leased. All of Veltri's assets were sold to generate the proceeds at issue which included, but was not limited to, the leasehold interest. The leasehold interest had no value, and none of the purchase price was allocated to the leasehold interest. Finally, Veltri's lenders had security over all of Veltri's assets, and the debt to the secured creditors exceeded the purchase price of the assets. In those circumstances, the Court of Appeal rejected trust claims under s. 7 of the Act.

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In *Veltri*, no trust arose because the amounts received from the sale of all the property was less than the amount required to discharge the lenders' security over them, and no proceeds were realized from the sale of the leasehold interest. A s. 9(1) trust only arises if the value of the consideration received by the owner from the sale of premises exceeds the amount of mortgage indebtedness. No trust arises if the value of the consideration is zero, or if the mortgage debt is equal to or greater than any sale proceeds.

The court in *Urbancorp* held that the result in *Veltri* ought to be confined to those facts:

> I do not read these conclusions as turning on freestanding considerations of the Monitor having been involved in the sale, or the proceeds having been paid to the Monitor. In my view, the operative factors were that the sale in question was of assets that extended beyond the leasehold interest; that all of the assets sold were subject to the creditors' security; that the assets could not be sold without the creditors' consent; that the court order permitting the sale preserved the ability of those secured creditors to claim against the proceeds; and that the secured creditors were owed more than the amount received on the sale. Under these circumstances, Veltri "had no interest in or right to any of the net sale proceeds", and its temporary receipt of proceeds for the purpose of paying them to the Monitor (who had the responsibility of using them to pay the claims of the secured creditors) did not mean that the sale proceeds were trust monies in Veltri's hands or received by Veltri as owner under ss. 7(2) and (3) of the CLA.

Going forward, *Veltri* should not be read as standing for the proposition that the control by a CCAA Monitor of a sales process, or the receipt by the Monitor of the proceeds of sale, without more, prevents a s. 9(1) trust arising when the proceeds of sale of the improvement are shown to have a positive value that exceeds the mortgage debt on the property.

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GCNA and *Urbancorp* will have a profound impact on the rights of trust claimants under the *Construction Act*. There are limits of course, namely the priorities provided to mortgagees under the *Construction Act* still apply. Had there been a shortfall in the sale proceeds in *Urbancorp* the result likely would have been different. But it is clear the pendulum has swung somewhat from the days of *Veltri* and *Atlas Block*. While unpaid contractors and their counsel used to reflexively stand back as soon as insolvency intervened, they can now rest assured that their claims can survive insolvency and that the trusts funds they are entitled to will be excluded from the property of the bankrupt.

Trust in the Act: Justice Smith Slams Owner's Breach of Trust

Atlantica Mechanical Contractors et al v. Steve Tsimiklis Holdings Ltd. and Steve Tsimiklis, 2020 NSSC 76

LU #157 [2020]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Nova Scotia
Authors:
John Kulik, Q.C., Partner, & Melanie Gillis, Lawyer, McInnes Cooper

CanLII References:

2020 NSSC 76

NOVA SCOTIA

John Kulik, Q.C.

Melanie Gillis

Atlantica Mechanical Contractors et al v. Steve Tsimiklis Holdings Ltd. and Steve Tsimiklis, 2020 NSSC 76 ("Tsimiklis") was a battle of attrition. The eleven original plaintiffs dwindled down to eight over the course of the 12 years of litigation, before the matter was finally heard before Justice Ann Smith in November and December 2019.

The central question in this case was whether the Defendant Steve Tsimiklis (Mr. Tsimiklis) should be personally liable for breaches of the trust obligations set out under the *Builders' Lien Act*, R.S.N.S. 1989, c 277, as amended (the "Lien Act"). Smith J's reasoning on this and the many sub-issues that arose has advanced the law in this area, and in doing so has provided much needed insight into how the trust provisions under the Lien Act should be applied in practice.

Background

The Plaintiffs were trade contractors who supplied labour and materials to construct an apartment building in downtown Halifax (the "Project"). There was no general contractor: the Project was managed by Aecon Atlantic Group for the 'owner'. Exactly who was the 'owner' was one of the issues at Trial.

The Plaintiffs (and other contractors) were not paid in full for their work and in 2007 registered numerous liens against the Project. By that time, the registered owner of the Project was Steve Tsimiklis Holdings Ltd. ("STHL"). Mr. Tsimiklis was the sole owner, director, officer and employee of STHL. At all times he was the 'mover and shaker' behind the development of the Project.

The Project ground to a halt and was ultimately completed by Banc Properties, one of the financiers of the project.

Eleven of the unpaid contractors commenced an action against STHL for breach of contract and against both STHL and Mr. Tsimiklis, personally, for breach of the trust provisions in the Lien Act. Default judgment was quickly entered in the amount of $1,849,006.36 against STHL, which ceased operations in 2007 and had no assets.

However, the Plaintiffs continued to pursue the action against Mr. Tsimiklis personally.

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The trial evidence revealed that STHL (and a predecessor company) had borrowed from various lenders to fund the construction. However, instead of the borrowed funds being deposited in a company account and used solely for the benefit of the contractors on the project, the funds were deposited into Mr. Tsimiklis' personal account, co-mingled with other funds and then used for numerous personal and business reasons, many of which were entirely unrelated to the project. In fact, STHL did not even have its own bank account.

The Plaintiffs relied on Sections 44A and 44G(1) of the Lien Act, which state:

> 44A (1) All amounts received by an owner that are to be used in the financing of any of the purposes enumerated in Section 6, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor
>
> ...
>
> 44G (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Act,
>
> (a) every director or officer of a corporation; and
>
> (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,
>
> who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

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Reasoning

Justice Smith's basic conclusion on the evidence was as follows:

> [14]...STHL breached the trust provisions of the Act, and that Steve Tsimiklis, as the sole officer, director and shareholder of STHL, is jointly and severally personally liable for those breaches.

> [15]...this is not a case where there has been a technical breach of the trust provisions. Rather, this is a case where there have been flagrant and ongoing breaches of the trust provisions, through the diversion of trust monies which should have been used to pay the Plaintiff trade contractors, to the benefit of Steve Tsimiklis and other non-beneficiaries of the trust.

A preliminary issue was determining who the 'owner' was within the meaning of the Act. Mr. Tsimiklis alleged that in 2003, Amalthea Holdings Limited ("AHL"), a company also owned and controlled by him, acquired the Property, and that on October 22, 2004, AHL sold the Property to his parents. Mr. Tsimiklis said that on July 30, 2007 his parents then sold the Property to STHL. Mr. Tsimiklis took the position that any trust breaches *were his parents' doing*, not his, and therefore that the Plaintiffs sued the wrong person. When the Plaintiffs pointed out that all of the construction contracts in question listed STHL as the owner, and that Mr. Tsimiklis signed them on STHL's behalf, Mr. Tsimiklis blamed Aecon, the project manager, for any error in the drafting of these contracts and the fact that STHL is listed as the "owner." Also, Mr. Tsimiklis' evidence at trial was that he was acting as his parents' agent throughout the time period when they owned the Property, including when STHL signed construction projects with the Plaintiffs as "owner."

No evidence was presented showing that Mr. Tsimiklis' parents had anything to do with the construction project. Overall, Justice Smith raised severe credibility concerns with Mr. Tsimiklis' evidence, describing it as "highly contrived, and not credible" (paragraph 95).
Smith J. considered the definition of "owner" under section 2(d) of the Lien Act, finding that it included not only registered owners, but also beneficial owners:

> [161] An owner includes a person or corporation who has "any estate or interest" in the land upon which services are provided or materials are placed. "Owner" also includes, as

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> per the statutory definition, any person or corporation "on whose behalf work or services or materials are placed" and "all persons claiming under him (the owner)" whose "rights are acquired after the work or service. . . . is commenced or the materials furnished."
> [162] Counsel for the Plaintiffs says that the legislative reference to a person having an estate or interest means that the definition of "owner" includes not just registered owners, but also beneficial owners. Counsel says that STHL's rights were acquired after the work or services were commenced and therefore STHL is deemed to be the owner with respect to that work or those services.
> [163] This Court agrees. The evidence clearly established that STHL's rights were acquired after the Plaintiff contractors provided work and services and accordingly STHL is deemed to be the owner with respect to those work or services.

As for the actual breaches of trust, Justice Smith held that the Lien Act requires contractors to be 'paid in full' before any payments could be issued to third parties. In the case at hand, STHL (and Mr. Tsimiklis personally) violated this obligation by issuing numerous payments out of trust funds to numerous third party non-beneficiaries, including payments to Mr. Tsimiklis' brother of approximately $1.53 million, a payment of $85,300.87 to *himself*, and payments to certain law firms for legal fees.
However, since Mr. Tsimiklis had deposited trust funds into his personal account and funds flowed in and out of that account on a regular basis, there was simply no way to account for the trust funds. Mr. Tsimiklis had made some attempts to provide an accounting prior to trial, but at trial made no real attempt to account for the trust funds. On the other hand, the Plaintiffs retained an accounting expert, whose report was not challenged at trial. The expert found that it was impossible to do a true accounting but, by reviewing the transactions in Mr. Tsimiklis' personal account, the expert opined that there should have been sufficient trust funds received from lenders to pay the contractors' claims.

Justice Smith also found that trust obligations were violated by Mr. Tsimiklis' co-mingling of trust monies with other funds and held that this was not a mere technical breach. She cited the case of *RSG Mechanical Inc. v. ABCO Construction Inc.*, [2000] OJ No 4287, (OSCJ) on this point, wherein Molloy J. stated at paragraph 36 as follows:

> This was not a technical breach. ABCO took the trust funds from Project A and put them in its bank account, along with money from other sources. It then proceeded to pay its debtors out of whatever money it had available at any given time without any regard whatsoever to the trust provisions of

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> the Act. Thus, it paid non-beneficiaries out of Project A trust monies, it paid its own overhead out of Project A trust monies, and it paid Project A beneficiaries out of money that was, at the time, held in trust for other beneficiaries. In short it juggled its funds, hoping to keep all of the balls in the air until such time as it was in a position to see everybody paid on all of the projects, with money left over for itself. ABCO breached the trust provisions of the Act, gambling that it would be able to continue to pay obligations on previous projects from money on subsequent projects. The gamble did not work. This is a clear breach of trust and flies in the face of the intention of the Act. It is not a mere "technical" problem.
> [...]
> The practice of playing fast and loose with trust monies, intermingling them with funds of all sorts of description (including other trust funds) and then paying out to all and sundry without any regard to the source of the funds or whether the recipient is a beneficiary, is a practice which is wholly inconsistent with the Act. It is no defence that "every body is doing it", Indeed, if that is the case, this is all the more reason to scrupulously uphold the provisions of the Act lest they be rendered complexly meaningless in practice and undermine the protections which the Act was designed to provide.

Justice Smith held that Mr. Tsimiklis' breaches of the trust provisions were 'flagrant':

> [245] Steve Tsimiklis committed flagrant breaches of the trust provisions of the *Act*. Each Plaintiff was put to the onerous task of suing Mr. Tsimiklis in order to recover monies which were rightfully and legally theirs. Instead, their money went to non-trust beneficiaries, including Mr. Tsimiklis himself, his father, his brother George Tsimiklis and others.

As for the scope of personal liability under section 44G(1), Justice Smith stated:

> [149] What this provision means on the facts before this Court, is that if STHL breached the trust provisions of the Act, Steve Tsimiklis, as STHL's sole director and officer, will be personally liable for such breach if he knew, or reasonably ought to have known that the conduct of STHL amounts to breach of trust. Steve Tsimiklis was the only officer, director or employee of STHL. All acts of STLH were personally carried out and directed by Mr. Tsimiklis.

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Justice Smith also issued a supplementary decision awarding the Plaintiffs 12 years' worth of pre-judgment interest and full solicitor-client costs (on a dollar for dollar basis) given Mr. Tsimiklis' conduct (none of which was attributed to his counsel), but also due partly to the fact that this was a breach of trust claim:

> [251] This Court is satisfied that this is a proper case where the Court should exercise its discretion to award solicitor-client costs throughout. The underlying action is for breach of trust provisions. The Plaintiffs should not have been put to any legal expense to recover trust fund monies that were rightfully theirs.
> [252] Further, Mr. Tsimiklis' conduct throughout led to the length of time it took (12 years) for this matter to be tried. He ignored Court orders and persistently failed to comply with the *Civil Procedure Rules*.
> [253] Although the trial took place over a relatively short period of time (four days), Mr. Tsimiklis' conduct as a witness nonetheless lengthened the trial. His evidence in cross-examination was often combative and argumentative.

In addition, Justice Smith granted a tracing order to allow the Plaintiffs to bring proceedings against four identifiable third parties who received trust funds.

This decision is full of important lessons for owners.

First, the trust provisions under the Act should be complied with strictly. This includes keeping trust funds separate and apart from other monies, keeping a stringent record of these funds, and of course not issuing any payments to third parties until all contractors are paid in full.
Second, courts will look not only to who the registered owner is, but also to who the beneficial owner is, and will not hesitate to apply the personal liability provisions.

Finally, the decision cautions third party recipients to exercise due diligence when receiving payments from construction project owners to ensure that those monies are truly free and clear of any trust obligations.

Case Comment: *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2020 BCSC 374

JVD Installations Inc. v. Skookum Creek Power Partnership,
2020 BCSC 374

LU #157 [2020]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
British Columbia
Author:
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CanLII Reference:

2020 BCSC 374

BRITISH COLUMBIA

Michael Demers

The British Columbia Supreme Court recently considered the application of the *Builders Lien Act*, S.B.C. 1997 c. 45 (the "Act") in the unique circumstances surrounding independent power projects in British Columbia. Run-of-river IPP's are popular projects in British Columbia. Private developers enter into long-term energy purchase agreements with the provincial electricity utility, BC Hydro, to transmit clean energy from hydro power projects into the provincial supply grid. Once a project is completed, developers often sell the project to investors such as insurance companies who are looking for a reliable, long term revenue stream, which is provided by the energy purchase agreements.

These heavy civil projects are almost always very challenging to build, given the best terrain for hydro power is often the worst terrain for construction. The vast majority of such projects are on Crown land for which no title is registered in the provincial land title system, but instead are based on licences of occupation provided by the provincial government. As a result, these projects were considered by many to be "non-lienable" because the contractor had no registered property interest against which it could claim, and then enforce, its lien. This left contractors exposed in the event the project developer was having liquidity issues or simply chose not to pay its contractor. *JVD* arose out of just such a circumstance.

The defendants in the action fell into two main groups. The first group were the true project owners who had a series of agreements between them relating to the ownership and development of the project. The contractual relationships between them were complicated, with a prominent local property developer at the centre of them. There was no registered title for the parcels of land on which any of the intake, penstock, powerhouse or substation were constructed. The second defendant, Black Mount Logging Inc., was the registered owner of two parcels of land a few kilometers away from the project on which it was doing timber harvesting. Those two parcels did have registered titles in the provincial land title system.

In order to get the electricity from the power plant to the provincial grid, the owners had built a 20 km long transmission line. Approximately 1.5 km of the transmission line went through Black Mount's property. Black Mount granted a "statutory right-of-way" to the owners to allow the transmission line to cross its property. In British Colombia, a statutory right-of-way is a charge which is registered against title to the property in favour of the owner of that charge, in this case the project owner. There were, in fact, transmission line towers built on those parcels by a different contractor.

A project specific corporation was set up to act as the general contractor on the project. The three shareholders were a company related to the original owner of the project, the plaintiff JVD and a third contractor, Mountain Lake. That special purpose corporation entered into subcontracts with the both

Case Comment: *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2020 BCSC 374

JVD Installations Inc. v. Skookum Creek Power Partnership, 2020 BCSC 374

LU #157 [2020]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
British Columbia
Author:
Michael Demers, Michel G. Demers Law Corporation

CanLII Reference:

2020 BCSC 374

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JVD and Mountain Lake for the bulk of the work necessary to build the project. JVD, in turn, entered into a sub – subcontract with its wholly-owned subsidiary, IDL Projects, under which IDL performed all of JVD's construction work on the project.

Throughout the course of the project, JVD invoiced the general contractor in accordance with the terms of their agreement. It was paid for its work into January 2014. Thereafter, JVD/IDL continued to work on the project and continued to invoice monthly as had been the practice all along, but payment had stopped. The owners stopped paying the general contractor who stopped paying JVD. When payment was not received JVD made inquiries and was assured by the project manager that payment would be made. On the strength of those representations JVD/IDL continued to work. By the end of April, 2014, JVD had still not been paid so it made formal demand for payment. At that point it was told for the first time that payment would not be made after all. Various allegations were made by the project manager as to the reasons for such nonpayment, all of them related to alleged defaults by JVD and IDL.

JVD and IDL registered claims of lien against the owner's statutory rights-of-way and against Black Mount's property itself (the "Liened Lands"). The claims of lien were cancelled upon one of the owners posting a lien bond as security, by agreement with the plaintiffs. The amount of that lien bond was subsequently reduced by agreement.

JVD and IDL's actions to enforce their lien claims were heard at the same time. Because the lien had been secured, Black Mount's property was no longer subject to sale so it took no active role in the trial even though it was a defendant. The court ultimately found that virtually all of the amounts claimed by JVD and IDL were properly due and owing under the subcontracts, taking into account amounts JVD and IDL conceded were erroneously invoiced and not actually owing. The general contractor with whom JVD had its contract was essentially "out of business" and therefore any recovery available for JVD and IDL would have to come from their liens.

The project owners raised a number of "creative" defences, all of which ultimately failed.

The first defence was that JVD did not perform any work on the improvement because it subcontracted all of its obligations to IDL, and therefore JVD was not a subcontractor and thus without lien rights. The court concluded that the Act did not require a lien claimant to personally perform work in relation to the improvement, but rather required that it "provide" work, which JVD did through IDL. The owners also tried to convince the Court they were not "owners" within the definition in the Act, which submission had the same success.

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Next, the owner defendants argued that since neither JVD nor IDL did any work on the Liened Lands, but instead did all their work on the un-lienable Crown lands, they were not entitled to a lien on the Lien Lands. This was really the main defence raised by the owners. The court applied existing case law, from both British Columbia and Alberta, to reject this argument:

> "The Act does not require a lien claimant to perform or provide work "on" the lands described in a lien; it requires the lien claimant to perform or provide work "in relation to an improvement" that is located on lienable lands. If a claimant can establish that it performed work "in relation to" an improvement, it is entitled to lien against any land that the improvement touches, regardless of where the claimant performed the work. This is true even if most of the improvement is located outside the liened lands ...
>
> Work is done "in relation to" an improvement, where it is forms an "integral and necessary part of the actual physical construction" of the improvement. ... It is not enough that the work contributes to the improvement in some way; it must be directly necessary to it.
>
> There are two ways in which a lien claimant may satisfy the "integral and necessary" test without actually performing any work on the lands it seeks to lien. First, the work a claimant performs off-site may be incorporated into and form an essential physical part of the finished improvement. Second, a claimant may perform work on one part of a single integrated improvement that is located on more than one parcel of land. Even if the claimant performs no physical work on the lienable lands themselves, it is entitled to a lien over the entire improvement, including any lienable lands the improvement touches. [Citations omitted]

Not surprisingly, the Court concluded that the project was a single integrated improvement. All of the parts, including the transmission line, were mutually interdependent and were integral and necessary to each other: "Without the intake, penstock, power house, and substation power plant, the transmission lines have nothing to transmit; without the transmission lines, the power is useless."

The owner defendants next argued that being a single integrated improvement was not enough; the plaintiffs also had to show that the work they did directly benefited the Liened Lands. The Court rejected that argument, ultimately concluding: "In summary, a lien claimant need not demonstrate that the work it performed directly benefits the land over which it seeks a lien. If

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it has performed or provided work on any part of a single integrated improvement, it is entitled to a lien over any lienable lands that the improvement touches."

Finally, the owners argued that the liens were worthless because, when they were filed, there was a mortgage on title in favour of the Bank of Montreal and there was no equity left in the Lien Lands at that time. They also argued that the Lien Lands could not be sold to satisfy the liens because they would be incapable of practical use without the rest of the improvement. In rejecting those arguments, the court noted the validity of a lien is not affected by how difficult it is to enforce, and once entitlement to a lien is found, the amount must be determined. It is only after that do questions of enforceability, and priority disputes between the lien and other charges, arise. Interestingly, the Bank of Montreal had discharged its mortgage long before the trial started, yet the owners still pursued that defence.

The Court went on to note that none of the practical difficulties relating to enforcement raised by the defendants arose in this particular case because the lien had been fully secured with a bond: "Posting substitutional security does not alter the rights of the parties … However, it does eliminate practical difficulties associated with the enforcement of a lien on a physical parcel of land. Having chosen to post the lien bond in order to obtain the benefit of cancellation of the Liens, it is not open to the defendants to argue that a valid lien in an amount determined by this Court cannot be paid out of the lien bond."

Finally, the owner defendants also argued that because they posted, by agreement, lien bond security in the amount of $4.5M initially, and subsequently, again by agreement, that security was reduced to $3.69M, they were entitled to recover from JVD and IDL $93,000 representing the cost of maintaining a lien bond in excess of the $3.69M figure. They based their argument on section 19 of the Act ("A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien) and section 45 of the Act ("A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence"). The Court rejected both bases for the claim as follows: "Section 19 does not apply here. It is about invalid liens, which do not attach to the land, not to inflated liens, which do (albeit in a lesser amount) … With respect to s. 45, there is no evidence that the plaintiffs knowingly filed a false statement. The fact that they consented to orders reducing the amount of the lien does not mean they knowingly inflated the claim at the outset."

The value of this decision is that it recognizes the "single integrated improvement" project in British Columbia, thus providing some level of lien

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protection to those working on these projects being done on non-titled Crown land. It also serves as a warning to contractors that if there is no titled property that is part of the overall project, lien rights may not be available and therefore other steps must be taken to secure payment. The project owners have appealed the decision.

Divisional Court Clarifies Powers of a Master on a Motion for Summary Judgment

R&V Construction Management Inc. v. Baradaran,
2020 ONSC 3111

LU #157 [2020]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
I. General
Jurisdiction:
Ontario
Authors:
Joseph Cosentino, Partner and Brad Halfin, Partner, Goodmans LLP

CanLII Reference:

2020 ONSC 3111

ONTARIO

Joseph Cosentino

Brad Halfin

On May 21, 2020, the Ontario Divisional Court released its decision in *R&V Construction Management Inc. v. Baradaran* ("***R&V***"). The Divisional Court clarified that a Master, to whom a construction lien action had been referred for trial, is bestowed with the full range of powers afforded to a judge under the *Rules of Civil Procedure*. These powers include the "Enhanced Powers" available to a Judge on a Summary Judgment Motion, which include weighing evidence, assessing the credibility of a deponent and drawing reasonable inferences from the evidence. The Divisional Court clarified that a Master, not acting as a referee, does not have the same powers.

While the Divisional Court clarified the scope of the Master's powers, it also found that a Master may only decide issues that were properly before her, and not use those powers to grant relief not properly before the Court.

Background and Facts.

The facts of the *R&V* decision were not complex. R&V, as contractor, entered into an agreement with the defendant, Baradaran, to repair flood damage and perform other renovations to Baradaran's home. A dispute arose and R&V registered a Claim for Lien against Baradaran's home, claiming damages in the amount of about $87,000.

In March 2018, the matter was referred to the Construction Lien Master at Toronto for trial pursuant to the Order of Justice Lederer. Following this Order, Baradaran, a self-represented litigant, brought a motion before the Master under Section 47 of the *Construction Act*[1] (the "*Act*") for an Order discharging R&V's Claim for Lien, delivering up the security posted to vacate R&V's Claim for Lien, and dismissing R&V's action.

The Master heard the motion, weighed the evidence, found that R&V had proven its lien claim and rendered her report, granting summary judgment for R&V for $78,573 plus approximately $26,000 in costs. The problem, however, was that R&V had not moved for summary judgment.

On Baradaran's motion opposing confirmation of the Master's Report, the motions judge found that the Master lacked jurisdiction to use the Enhanced Powers and therefore exceeded her jurisdiction by granting R&V summary judgment. R&V appealed the motion judge's decision to the Divisional Court.

[1] R.S.O. 1990, c. C. 30, as amended, as it read immediately prior to July 1, 2018, as the Contract for the improvement was entered into prior to July 1, 2018.

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The Divisional Court Decision

The Divisional Court disagreed with the motion judge's finding that the Master lacked jurisdiction to use the Enhanced Powers on a motion for summary judgment. The Divisional Court found that once an action is referred to the Master for trial, the Master is not confined to the jurisdiction conferred on masters in ordinary civil litigation. The Divisional Court held that section 58(4) of the *Act* statutorily imbues the Master with greater jurisdiction than an ordinary master under the *Rules* to completely try and dispose of the action. Section 58(4) states:

> A master or case management master to whom a reference has been directed has all the jurisdiction, powers, and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the Court.

The Divisional Court found that included in those powers to "completely dispose of the action" is the power to use the Enhanced Powers on a summary judgment motion in the context of a reference before a construction lien master.

Yet while the Divisional Court found that the Master had the jurisdiction to use the Enhanced Powers on a summary judgment motion, the Divisional Court ultimately dismissed R&V's appeal because R&V had not brought a motion for summary judgment, and in so granting, the Master had deprived Baradaran of procedural fairness.

The motion before the Master was Baradaran's motion under section 47 of the *Act* to discharge R&V's Claim for Lien and dismiss R&V's action. The Divisional Court held that the Master erred by characterizing a section 47 motion (where it found the Enhanced Powers are unavailable) as a motion for summary judgment. There was no motion before the Court that provided Baradaran with notice that the Court may make summary findings that would grant judgment against him. The Divisional Court found that the Master had deprived Baradaran of procedural fairness and declined to confirm the Master's report granting summary judgment. The case was remitted back to the construction lien master for disposition on the merits.

Implications

The Divisional Court's clarification of the powers of a Master in a reference, relative to the ordinary powers of a Master under the *Rules*, provides helpful clarification to the construction bar. By confirming that a Master in a con-

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struction lien reference has the same powers as a Judge on a summary judgment motion, litigants are provided with a powerful tool to have their construction matters heard by a Master on a summary basis. Litigants should be cautioned, however, that a summary judgment motion remains an interlocutory motion which is not granted, as of right, in construction lien proceedings, and requires the permission of the Master under section 67(2) of the *Act.*

Implicitly, the Divisional Court's decision suggests that other forms of relief, normally unavailable to Master's under the *Rules,* may become available in a reference under section 58 of the *Act.*

Yet the *R&V* decision raises certain practical concerns by distinguishing a section 47 motion under the *Act* from a summary judgment motion under the *Rules.* The Divisional Court held that the Enhanced Powers are unavailable on a section 47 motion. Section 47 motions allow a Court to, among other things, discharge a Claim for Lien, and dismiss an action because the claim for lien is frivolous, vexatious, an abuse of process, or any other proper ground. The serious nature of this relief, and the basis on which the relief may be granted, may require a Master to use certain of the Enhanced Powers available to the Master on a summary judgment motion. The Divisional Court's finding that the Enhanced Powers are unavailable on a section 47 motion may potentially impact a litigant's ability to secure the relief sought on a section 47 motion if a Master cannot use, some or all, of the Enhanced Powers available to it under the *Rules.*

It will be interesting to see where the jurisprudence further takes this decision in the months that follow.

THE POTENTIAL IMPLICATIONS OF CONTRACTUAL LIMITATIONS OF LIABILITY

Mississippi River Power Corporation v. WSP Canada Inc., 2019 ONCA 771

LU #157 [2020]

Primary Topic:
III. Building Contract
Secondary Topic:
XIII. Insurance
Jurisdiction:
Ontario
Author:
Ronald W. Price, Rasmussen Starr Ruddy LLP

CanLII Reference:
2019 ONCA 771

ONTARIO

Ronald W. Price

In *Mississippi River Power Corporation* v. *WSP Canada Inc.* 2019 ONCA 771, the Ontario Court of Appeal dismissed an appeal by Mississippi River Power Corporation ("MRPC") from a summary judgment motion decision of Justice Ryan Bell which restricted all defendants' liability to the $2 million dollar limit set out in the contract between MRPC and the defendant Wm. R. Walker Engineering Inc. ("Walker").

As the reasons of the Court of Appeal are brief, the following review of Justice Ryan Bell's decision is necessary.

MRPC entered into a contract with Walker for the provision of professional consulting services in connection with a new hydroelectric generating facility on the Mississippi River in Almonte, Ontario. Walker was to perform various services during a pre-construction phase of the project.

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

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

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

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b) Professional Liability Insurance

The Insurance Coverage shall be in the amount of $2,000,000 per claim and in the aggregate. When requested, the Consultant shall provide to the Client proof of Professional Liability Insurance carried by the Consultant, and in accordance with the Professional Engineers Act (RSO 1990, Chapter P. 28) and regulations therein.

c) Change in Coverage

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

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

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

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

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stamped Harrington's shops drawings for the fabrication of the transition piece. The penstocks were then installed.

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

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

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

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

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

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

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

> [41] In this case, I find that MRPC and Walker intended to extend the benefit of the insurance covenant to the remaining defendants. To do otherwise would subvert the allocation of risk established by the parties in s. 1.11 of the professional services contract, including clause (c). The insurance covenant required Walker to maintain professional liability insurance and limited Walker's liability in respect of such claims to $2,000,000. If MRPC had wanted to increase the amount of coverage, it could have done so at its own expense; Walker's obligation in this regard would have been limited to endeavouring to obtain the increased coverage. Having allocated the risk beyond $2,000,000 to itself and away from Walker, MRPC cannot, at the same time, have intended to allocate the risk to the remaining defendants who were engaged in work contemplated by the professional services contract. Given this, and absent a provision indicating that persons whose negligence is alleged to have caused the loss are intended to be excluded from the benefit of the insurance covenant, I imply that MRPC and Walker intended to extend the benefit of the insurance covenant to the remaining defendants. (*Sanofi*, at para. 59)
>
> [42] Objectively, it would make no sense for Walker to agree to the bargain set out in s. 1.11 of the professional services contract limiting liability, without extending the benefit to other parties who assisted or were involved in fixing the problem with the penstock transition piece. To not extend the

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

MRPC appealed the decision.

The Court of Appeal did not accept the argument of MPRC that the motions court judge had erred in her interpretation of the consulting services contract:

> [5] ... The motion judge's interpretation of the contract is entitled to deference. We are not persuaded that the motion judge made an error in principle or any other reviewable error. We will not interfere with this determination".

The Court of Appeal also refused to accept the appellant's position that the motion judge had somehow erred in extending the benefit of the limit on liability to the remaining respondents.

The appeal was dismissed.

Clash of the Triton: A Cautionary Tale for Owners Relying on Privilege Clauses in Tenders

Triton Hardware Limited v. Torngat Regional Housing Association, 2020 NLSC 72

LU #157 [2020]

Primary Topic: XII. Tendering
Jurisdiction: Newfoundland and Labrador
Authors: John Kulik, Q.C., Partner, & Melanie Gillis, Lawyer, McInnes Cooper

CanLII Reference: 2020 NLSC 72

NEWFOUNDLAND AND LABRADOR

John Kulik, Q.C.

Melanie Gillis

Triton Hardware Limited v. Torngat Regional Housing Association, 2020 NLSC 72 is a cautionary tale for owners wondering whether privilege clauses in tenders provide them with *carte blanche* when it comes to choosing contractors. In this decision, Justice Knickle of the Supreme Court of Newfoundland and Labrador answers that query with a resounding "NO".

The Plaintiff Triton Hardware Limited ("Triton") brought an application for summary trial under Rule 17 of the Supreme Court Rules of Newfoundland and Labrador. This helpful rule not only provides the typical summary judgment function but goes even further and allows a judge to conduct an expedited trial when the necessary findings of fact and law right can be made right then and there.

In April 2018, Triton submitted a bid to the Defendant Torngat Regional Housing Corporation ("Torngat") with respect to a tender for the supply of materials for housing construction. Despite Triton being the lowest bidder, Torngat awarded the job to White's Construction Limited ("White's"), a company with whom Torngat had worked in the past and whose work they trusted. Specifically, the affidavit Torngat filed on the application stated that Torngat was "very satisfied" with White's past performance, and that it was "on this basis" that Torngat relied on the privilege clause to award them the contract.

Torngat's first argument was that Triton's bid was not compliant because they included HST in their total bid amount. Justice Knickle quickly dispended of this argument, finding that the Instructions to Bidders required that costs shall include the 'total cost' and 'all taxes'.

Torngat's second argument was that, even if Triton was the lowest compliant bidder, they were entitled to rely on the privilege clause in the Instructions to Bidders, which stated as follows in bold:

> **The awarding of the contract will be based on the lowest average price for quality material. *The Lowest of Any Quotes Will Not necessarily Be Accepted.**

Justice Knickle rooted his analysis in the core principles arising out of the well-known jurisprudence surrounding privilege clauses. He cited *Martel Building Ltd., v. R.,* 2000 SCC 60 ("Martel") and held that the privilege clause must work harmoniously with the rest of the contract terms, and the owner must treat all bidders fairly and equally, which includes not applying a form of preferential treatment that is not expressly allowed for in the ten-

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NEWFOUNDLAND AND LABRADOR

der documents. Knickle J cited *Health Care Developers Inc. v. Newfoundland (1996)*, 29 CLR (2d) 237 (NLCA) ("Health Care") for the principle that "[t]he whole point of requiring fair treatment is to ensure that everyone is bidding on the same contract and that there are no hidden preferences" (paragraph 44). Specifically, Justice Knickle also held at paragraph 60 that "… in adhering to the duty to act in good faith, a party issuing the call for tenders cannot rely on a privilege clause to consider criteria not known to all bidders…"

Justice Knickle held that while the privilege clause as written would support Turngat's decision to turn down *all* bidders if they so wished, it did not allow them to select White's on the basis that they had worked with them before, as this criterion was not spelled out in the tender documents:

> [63] In my view, the scope of the privilege clause as worded cannot extend to preference for previous contracted suppliers. At most, the wording supports that the intention of TRHC was to award the contract to the lowest compliant bidder or not award the contract at all. If TRHC intended to take into consideration preference for previously hired suppliers, as per *Martel* and *Health Care Corporation*, it was incumbent upon TRHC to make clear to all bidders of this preference. This TRHC did not do.

Based on this reasoning, Justice Knickle awarded Triton their claim for loss of profits (15 percent of the contract price, or $126,852.14). Knickle J dismissed Triton's claim for the costs of preparing their bid, which he held would have been incurred in any case.

This decision highlights the importance of ensuring transparency in bidding documentation around what criteria the owner wishes to rely upon in assessing bids. It also emphasizes the dangers in placing too much stock in a blanket privilege clause, which must still contend with the principles of good faith, fairness, and transparency and be read harmoniously with the bidding documents.

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