Canadian College of Construction Lawyers

# LEGAL UPDATE

L.U. #159

April 11, 2021

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**Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District**, 2021 SCC 7

LU #159 [2021]

Primary Topic:
I. General
Secondary Topic:
VII. Breach of Terms of Contract
Jurisdiction:
Canada
Authors:
Phil Scheibel, Partner,
Josh Fraese, Partner,
Rose LLP

## Case Comment: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*

Construction contracts will typically afford various discretionary powers to the parties: for example, terms relating to management of change, delay, performance of the work, termination, and an owner's right to issue instructions or directions, to name a few. In recent years practitioners have grappled with some degree of uncertainty regarding the limitations, if any, imposed by the common law on the exercise of discretionary contractual powers. Must the deciding party have regard to the other party's contractual expectations? Does the doctrine of good faith impose hard limits on the exercise of discretion in addition to any express limits negotiated between the parties? If so, what are those limits? Courts have offered various answers following the Supreme Court's seminal decision in *Bhasin v Hrynew*, 2014 SCC 71 ("*Bhasin*"), in which it recognized the organizing principle of good faith and a duty of honest performance of contractual obligations.

On February 5, 2021 the Supreme Court published its reasons in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ("Wastech"). This decision follows hard on the heels of the December 2020 publication of *CM Callow Inc. v Zollinger*, 2020 SCC 45 ("*Callow*"), which also addressed issues arising out of the duty honest performance. It remains to be seen whether Wastech follows the pattern of raising more questions than answers, but it is an unmistakably important case with significant implications for the industry.

The background to the case is that Metro (a statutory corporation responsible for the administration of waste disposal for the Vancouver region) contracted with Wastech to transport waste to three disposal facilities, with payment rates conditional on the specific facility waste was directed to and the distance travelled. The contract afforded Metro absolute discretion to allocate waste between the facilities and did not guarantee Wastech a profit margin. In 2011 Metro reallocated waste from a more distant facility to a closer facility, with the effect that Wastech's rate was reduced and Wastech did not achieve its target profit for the year. Wastech referred the dispute to arbitration and sought compensation for breach of the duty of good faith, arguing that Metro was obliged to have appropriate regard to Wastech's interests in exercising its discretion to allocate waste. The arbitrator found a duty of good faith applied and awarded damages. The Supreme Court of British Columbia allowed the appeal and set aside the award. The Court of Appeal dismissed Wastech's appeal, as did the Supreme Court of Canada.

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In contrast to *Bhasin* and *Callow*, the *Wastech* case does not deal with the termination of a contract, but the discretionary exercise of contractual powers relating to the performance of the contract. In *Wastech*, the Supreme Court of Canada recognizes significant restrictions on a party's ability to exercise discretionary powers. The decision provides that discretionary powers must be exercised in a manner that is consistent with the purpose for which the discretionary power was extended in the first place. Courts are therefore now required to determine the purpose for which a discretionary power was agreed to, interpreting the contract as a whole:

> [111] Where a party to a contract exercises its discretion unreasonably, which in this context means in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith — a wrongful exercise of the discretionary power — and thus a contractual breach that must be corrected. Requiring a party to pay damages to repair such a wrong accords with the theory of corrective justice and does not amount to a reallocation of the benefits under the contract as determined by the parties or a gift from one party to another.

Even as the court recognizes what will strike many as being new limits on parties' exercise of discretionary powers, the court is careful to limit the application of this doctrine to the matters that were agreed to between the parties. The court warns us that this is not an opportunity for parties to imply new terms into the contract or to obtain benefits they did not bargain for. The court articulates these limitations at paragraphs 112 & 113. Starting at paragraph 113, the court states:

> [113] I note once again that the duty to exercise discretionary powers in good faith does not require a party to confer a benefit on the other party that was not a part of their original agreement, nor does it require a party to subordinate its interests to those of the other party. Respectfully stated, the arbitrator failed to abide by these tenets and the arbitral award extends the good faith duty at issue beyond its proper bounds. In these circumstances, Wastech's argument that Metro could not deprive it of the

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> fundamental benefit for which it bargained fails to take into account the terms of the agreement itself and the purpose for which Metro was extended the discretionary power in question. The parties saw the risk that Wastech could fail to meet the Target OR in a given year. They chose to leave that risk in the bargain and refrained from guaranteeing Wastech's profit margin. In light of this, Wastech cannot say the exercise of the discretion was unreasonable. In essence, it argues that good faith required Metro to subordinate its interests to Wastech, and to guarantee to Wastech something which the Contract they painstakingly negotiated over approximately 18 months did not. Generally speaking, this is not the role of good faith in the common law of contract in light of the requirement of justice spoken to in Bhasin and the arbitrator erred in law by giving effect to these arguments. For these reasons, I agree with the courts below that Wastech's claim must fail: the arbitrator's award cannot stand whether the standard of review is correctness or reasonableness.

*Wastech* should serve to clarify that the duty of good faith is not an opportunity to obtain rights through litigation that were not agreed to in a "painstakingly negotiated" contract. However, it certainly does not close the door on claims that an exercise of discretion was "unreasonable" or not contemplated by the parties. Perhaps this is unavoidable, as the Supreme Court attempts to strike a difficult balance between freedom of contract and restraints on that freedom. Parties are free to agree to discretionary powers, and to exercise them in accordance with the terms of the Contract but may not exercise that discretion unreasonably "in a manner not connected to the terms of the underlying contract". The difficulty arises in applying this rule to any particular situation. Discretionary powers are in part a response to future uncertainty and the unknown, so it may often be difficult to tie a specific decision back to the terms of the underlying contract or the "purpose for which" the party "was extended the discretionary power in question." One thing is certain: there will be more disputes, and more decisions, to tell us what this all means.

# Good Faith for the 2020s: *C.M. Callow Inc. v. Zollinger*

**C.M. Callow Inc. v. Zollinger**, 2020 SCC 45

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Derrick Dodgson

The seminal case of *Bhasin v. Hyrnew* redefined contract law in Canada last decade. The unanimous decision of the Supreme Court, authored by Justice Thomas Cromwell, cemented the "organizing principle" of good faith underpinning contractual relations, and recognized specifically the common law duty of honest performance borne by parties to a contract towards each other. While good faith had percolated before, *Bhasin* opened the valve – some might say the floodgates – and has led us all to wonder how far it goes now and may go in the future.

In late 2019, a substantially revamped Supreme Court (featuring only 3 justices who took part in the Court's decision in *Bhasin*), heard two appeals concerning the parameters of good faith as an organizing principle. The decision in the case of *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* – on appeal from the British Columbia Court of Appeal – was released in February 2021.

Alongside *Wastech*, the Supreme Court heard the case of *C.M. Callow Inc. v. Zollinger*, on appeal from the Ontario Court of Appeal (2018 ONCA 896). *Callow* is a case about deception, and the Supreme Court decision released late last year has now made it profoundly clear that actively deceiving or knowingly misleading a counterparty concerning exercise of contractual rights is a breach of contract and will entitle the deceived party to damages.

*Facts*

In 2010, a group of ten condo corporations in Ottawa (collectively "Baycrest") managed by Condominium Management Group ("CMG"), entered into its first two-year winter maintenance agreement with C.M. Callow Inc. ("Callow"), owned and operated by Christopher Callow. Baycrest's Joint Use Committee ("JUC") was responsible for making decisions regarding shared assets, based on reporting and recommendations from CMG. The JUC and CMG oversaw the work by Callow, and in 2012 Baycrest entered into two new two-year agreements with Callow: a renewal of the winter maintenance contract (November 2012 to April 2014) and a separate summer maintenance contract (for 2013 and 2014). The key term in the winter maintenance agreement was Clause 9, which allowed termination without cause by Baycrest on just 10 days' notice in writing.

Complaints arose regarding Callow's 2012-2013 winter maintenance performance, but – as found by the trial judge – Callow's performance was not below the required standard and the complaints were primarily caused by individual owners and tenants, and nevertheless were addressed by Callow

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including at a January 2013 JUC meeting. The evidence reflected Baycrest's overall satisfaction with Callow's performance. However, in Spring 2013, Baycrest/CMG appointed a new property manager, Tammy Zollinger, who immediately advised the JUC to terminate the winter maintenance agreement. In March or April 2013, the Baycrest JUC voted to terminate the winter maintenance agreement, but Baycrest decided not to disclose its decision to terminate at the time.

As Callow performed the summer maintenance agreement in 2013, it also pursued a further renewal of the winter maintenance agreement. Callow discussed potential renewal with several JUC members, and from those conversations came to the view that a further renewal of the winter agreement was likely. Callow did work "above and beyond" what was required under the summer maintenance agreement, described as "freebie" work, including the improvement of two condo gardens. In July 2013, JUC members corresponded about this work by Callow, acknowledging that it was being performed based on Callow's expectation that he would be continuing the winter work. Baycrest still did not correct Callow's misapprehension, hoping to keep Callow performing as a "back pocket option", and Callow did not seek alternative contracts for the upcoming winter of 2013-2014.

On September 12, 2013, Baycrest finally communicated its notice of termination of the winter maintenance agreement, providing 10 days' notice in accordance with Clause 9. Callow commenced an action against the Baycrest corporations, CMG, and Zollinger, claiming $81,383.68 for breach of contract, intentional interference with contractual relations, and negligent misrepresentation.

*Lower Courts*

At trial, Justice O'Bonsawin found Callow's evidence credible, and found that the Baycrest witnesses "provided many exaggerations, overstatements" and "comments contrary to the written evidence". Justice O'Bonsawin considered the specific conclusion in *Bhasin* that the duty of honest performance did not include a freestanding "duty to disclose" but did draw a distinction for what she referred to as "active deception" by Baycrest. She found that Baycrest did not meet a "minimum standard of honesty", and intentionally withheld the information about its decision to terminate in bad faith. Justice O'Bonsawin awarded damages to Baycrest in the amount of $80,742.10, primarily comprised of an amount equal to the value of the winter maintenance agreement for one year.

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On appeal to the ONCA, Baycrest argued that Justice O'Bonsawin (1) improperly expanded the duty of honest performance, and (2) erred in assessing damages. In a unanimous decision, the Court of Appeal panel of Justices Lauwers, Huscroft, and Trotter allowed the appeal. The ONCA highlighted Cromwell's own characterization of the *Bhasin* decision as a "modest, incremental step". The ONCA found "no unilateral duty to disclose information relevant to termination". With Callow having admitted Clause 9 did not require more than 10 days' notice to terminate, the ONCA found no breach of contract by Baycrest. In any event, the ONCA decided, the summer 2013 communications by JUC members to Callow related to a new potential contract under negotiation (an extension following the winter of 2013-2014), and not the existing one being performed.

*Supreme Court – Majority Decision*

The majority opinion of the Court was authored by its newest member, Justice Nicholas Kasirer, and for it he was joined by Chief Justice Wagner and Justices Abella and Karakatsanis (the three of *Bhasin* experience), along with fellow newcomer Justice Martin. The majority disagreed with the ONCA's analysis and found in favour of Callow. As Justice Kasirer wrote, the ONCA was incorrect in finding that the misleading communications by Baycrest concerned only negotiation for an extension. In framing this inquiry Justice Kasirer stated:

> In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly.

At trial Justice O'Bonsawin found the dishonesty was related to the termination of the agreement then in-effect, not negotiation for an extension. Unlike the ONCA, the Supreme Court relied heavily on this determination, and Justice Kasirer found no error in the trial judge's findings.

Justice Kasirer found Baycrest's conduct amounted to a breach of the duty of honest performance – Baycrest had an obligation to refrain from misleading Callow in exercise of the termination clause and had "an obligation to correct the false impression created through its own actions". Justice Kasirer repeated the finding at trial that this amounted to "active deception" and found that Baycrest "knowingly misled" Callow in the manner in which it exercised Clause 9. Considering Baycrest's conduct as a whole, they were aware of Callow's misapprehension and should have corrected it.

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In *obiter*, Justice Kasirer noted:

- Baycrest was entitled to end the contract as and when it did (there was no argument of unconscionability), but the dishonesty surrounding the exercise of that right was the breach entitling Callow to damages;
- The duty of honest performance remains distinct from civil fraud and estoppel, and does not require an intention that the representation or false statement be relied upon; and
- It is "useful" to consider Quebec case law surrounding good faith and other commentary in applying the common law duty of honest performance recognized under *Bhasin*.

The majority awarded Callow its expectation damages, as flowing from a breach of contract.

*Concurring and Dissenting Opinions*

Justice Brown wrote a concurring opinion, joined by Justices Moldaver and Rowe, which agreed in the finding of a breach of the duty of honest performance, but disagreed in two notable respects with the majority opinion. First, there was disagreement with Justice Kasirer's discussion of the doctrine of abuse of right under Quebec law, finding that doing so "will only inject uncertainty and confusion" into understanding and applying the common law duty. Second, the concurring justices found that "the justification for awarding expectation damages does not apply to breach of the duty of honest performance" as the wrong in this case, like *Bhasin*, was extra-contractual misrepresentations upon which the plaintiff relied, and therefore reliance damages should be the proper measure.

In her dissenting opinion, Justice Côté also criticized the majority's and Justice Kasirer's observations on the role of external legal concepts: "an unnecessary comparative exercise … under the pretext of dialogue". The seed of Justice Côté's substantive disagreement was that, in her view, *Bhasin* found that all obligations flowing from the duty of honest performance are negative, not positive. Justice Côté explained: "silence cannot be considered dishonest within the meaning of Bhasin unless there is a positive obligation to speak." In her view, there was no obligation to correct a counterparty's mistaken belief unless the party "materially contributed to it". She

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would have found that neither Baycrest's vague comments relating to potential renewal nor its purported satisfaction with services materially contributed to Callow's mistaken belief that the winter maintenance agreement would continue.

*Where do we go from here?*

The implications of the *Callow* decision are significant. While the Supreme Court stressed – like in *Bhasin* – that the duty of honest performance does imply a duty of loyalty or to forgo advantages, and nor does it revise the contractual bargain to imply additional notice requirements for termination, the decision does clearly stand for the proposition that an undisclosed decision to exercise a contractual right can amount to a breach in certain circumstances. The rights of a party to take particular actions at particular times of its choosing might traditionally have been considered to be an unfettered discretion, but that is now clearly not the case and exercise of contractual rights in the face of "active deception" or having "knowingly misled" a counterparty is a breach of the duty of honesty and will entitle a counterparty to damages.

The inquiry of whether the dishonesty is connected to performance of the contract is fact-specific, but did the facts in this case support the outcome? It is obvious from Justice O'Bonsawin's trial decision that she preferred Callow's evidence to that of the defendants' witnesses. The written evidence was similarly favourable to Callow concerning the quality of his performance but was curiously thin on the arguably central question of whether Baycrest contributed to Callow's misapprehension about future years of winter maintenance work. The determination boiled down to emails between two board members, Mr. Peixoto and Mr. Campbell, on July 17, 2013. Those emails acknowledged that the "freebie" work was being performed by Callow as an incentive for Baycrest to renew the winter maintenance contract, but they do not appear to go so far as to suggest Baycrest confirmed renewal or continuation of the contract was likely as a result. Is awareness of a misapprehension sufficient cause to require disclosure to correct that misapprehension, even if a party did not contribute to it? The Supreme Court appears to have decided yes.

It remains to be seen how significantly the decisions in *Callow* and *Wastech* will impact honesty in contractual performance and good faith exercise of contractual discretion going forward. Based on *Callow* specifically, parties to contracts should be mindful of misapprehension by their counterparties, and absolutely avoid any active deception surrounding performance of their contracts. The extent of a party's duty or obligation to disclose may hinge on the specific facts of the case, but perhaps the old adage will again become the appropriate advice: "honesty is the best policy."

# Update on Adjudication and Prompt Payment Initiatives in Canada

**Update on Adjudication and Prompt Payment Initiatives in Canada**

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## Ontario

On October 1, 2020, exactly a year after the prompt payment and adjudication provisions of Ontario's *Construction Act* came into force, Ontario Dispute Adjudication for Construction Contracts ("ODACC"), the Authorized Nominating Authority that administers and oversees adjudication of construction disputes in Ontario, released its first annual report for the fiscal year ending on July 31, 2020.

As of that date, 32 notices of adjudication had been submitted, of which only three resulted in a determination by the adjudicator. At the time of the Report, seven adjudications remained open. The low number is no doubt attributable to the rather carefully drafted transition provisions in the *Construction Act*, which make the new provisions inapplicable to many, if not most, construction projects underway during the reporting period.

The notices included 22 residential, five commercial, two public, and three transportation and infrastructure projects. The three adjudications leading to determinations were all residential projects. The total amount ordered to be paid was $35,459.40, an average of $11,819.80 per dispute. The average amount claimed in the residential sector was $22,148.87.[1]

Twenty-one adjudications were terminated, either because they were settled or because it was determined that the old *Construction Lien Act* applied to the project.

As for the adjudicators, the Report lists 65 adjudicators on ODACC's roster, the majority of which are engineers, closely followed by project managers, lawyers, quantity surveyors, arbitrators, architects, and accountants. These statistics were updated as of the end of March, 2021 as follows:

- 60 adjudications filed with ODACC to date
- 23 determinations made
- 32 adjudications arising from residential projects
- 28 adjudications from Industrial, Commercial and Institutional projects
- Between 30 to 35 adjudications settled before determinations were made
- 4 determinations involved an oral hearing

[1] For a summary of the Report, see I. Merrow, "Ontario Dispute Adjudication for Construction Contracts ("ODACC") Annual Report in Review", in *Building Insight, Adjudication: One Year in Review*, www.glaholt.com.

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In ODACC's first fiscal year ending on July 31, 2020, a total of 3 determinations were made. Since then, there have been 20 determinations indicating that adjudications are picking up speed in Ontario.

To date, no case law has been generated by adjudication. There has been no case in which an adjudicator's determination has been introduced as evidence, nor has there been an application to the Superior Court to set aside a determination.

Similar legislation to that enacted in Ontario is being contemplated or has been introduced throughout Canada, both provincially and federally. Some are in the early stages, going through a review stage, while other Acts have been drafted, gone through the Legislatures, and are only waiting for proclamation. The following will summarize the progress of these initiatives.

## British Columbia

In May, 2019, Bill M 223, the *Builders Lien (Prompt Payment) Amendment Act, 2019* was introduced in British Columbia. The Bill provides for a prompt payment regime loosely based on the Ontario *Construction Act*, but without reference to adjudication beyond an undertaking to conduct an adjudication that forms part of the notice of non-payment requirements.

A contractor will have to first provide a "proper invoice" to the owner, which triggers the owner's payment obligation. The owner is then required to pay the invoice within 28 days, unless it issues a "notice of non-payment" to the contractor in respect of some or all amounts payable under the invoice, and which details the reasons for non-payment. Any non-payment notice issued by an owner must be provided to the affected parties, along with reasons for non-payment, within 14 days of the owner receiving the invoice.

Upon receiving full payment from an owner after issuing a "proper invoice", the contractor must either pay its subcontractors within the next 7 days; or issue its own notice of non-payment to the subcontractor.

If the owner does not pay the portion of a "proper invoice" from a contractor that relates to a particular subcontractor, the contractor still must either pay that subcontractor within 35 days of delivering the invoice; or deliver its own non-payment notice to its subcontractors, and further, undertake to refer the matter to "adjudication" within 21 days of delivering the notice.

Similar prompt payment rules apply to subcontractors paying their own subcontractors.

The status of pay-when-paid clauses is unclear under the proposed legislation.

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## Alberta

Alberta's Bill 37, *The Builders' Lien (Prompt Payment) Amendment Act*, received royal assent on December 9, 2020. The Act has not yet been proclaimed. Proclamation is expected to occur in July 2021.

On November 4, a motion to amend Bill 37 was carried, resulting in changes to the bill's prompt payment sections. The revised prompt payment sections now mirror the prompt payment language contained in Ontario's *Construction Act*, providing for a cascading payment process once payment is made by the owner to the general contractor. The initial proposal had required all parties to be paid within 28 days of the issuance of a proper invoice, regardless of whether payment was made to the tier above.

Under the Act, proper invoices must be given to an owner at least every 31 days. The owner must pay a contractor within 28 days after receiving a proper invoice unless the owner issues a notice of dispute for all or part of the invoice. Any undisputed portion of a proper invoice remains payable 28 days after receiving the proper invoice.

If paid in full, the contractor must pay subcontractors the amount payable for the work done that was included in the proper invoice within seven days of receiving payment from the owner, unless the contractor issues a notice of non-payment. If partially paid, the contractor must pay subcontractors within seven days, in accordance with the priority rules set out in the Act, unless the contractor issues a notice of non-payment.

If the contractor issues a notice of non-payment due to non-payment by the owner, the contractor must undertake to refer the matter to adjudication within 21 days.

If the owner does not pay the contractor some or all amounts payable under a proper invoice, the contractor must pay the subcontractors the full amounts owed to them for work included in the proper invoice within 35 days after delivering the proper invoice to the owner, unless the contractor issues a notice of non-payment to the subcontractors.

A prohibition of pay-when-paid clauses was removed from the earlier version of the Act.

As for adjudication, the Alberta Act does not contain any specific timelines for adjudication. It is expected that these will be provided for in regulations.

The Act further differs from Ontario's Act in that an adjudicator's decisions will in most cases be final and binding, not interim binding. It is also unclear at this point what scope of disputes will be subject to adjudication. Here, too, it is expected that this will be prescribed by regulation.

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Finally, the Crown will not be bound by the amendments; prompt payment and adjudication will not apply to public works projects.

## Manitoba

In November of 2018, the Manitoba Law Reform Commission published *The Builders' Liens Act: A Modernized Approach*. The Commission recommends the implementation of a prompt payment regime as well as a private adjudication system akin to the adjudication system established in Ontario. In addition, a private member's bill, Bill 218, *The Prompt Payments in the Construction Industry Act* passed Second Reading on April 24, 2018 but was not proceeded with. Any new prompt payment process will be incorporated within The Builders' Liens Act and not legislated as a stand-alone statute. There have been no recent developments, to the best of our knowledge.

## New Brunswick

The Legislative Services Branch of the New Brunswick Office of the Attorney General intends to implement changes based on those in Ontario. In its Law Reform Notes #41, the Branch states as follows:

> In our view, a prompt payment scheme similar to that in Ontario should be adopted in New Brunswick. As in Ontario, it should apply to both the public and private sector, to all construction projects (from small home renovations to P3s), at all levels of the construction pyramid (with the exception of wages).

Two subsequent Law Reform Notes expand on the approach. In Note #42, issued in July of 2019, the branch states that modernization of the Act will be done in one phase, while the introduction of adjudication and prompt payment will wait for another phase.

Law Reform Note #42 points out that the Ontario model might be too complex for smaller provinces like New Brunswick, given the sheer number of specialists in Ontario and the relative lack of specialists in New Brunswick. Based on that and the fact that the number of disputes arising in New Brunswick would likely not justify the establishment of an authorized nominating authority, New Brunswick may adopt a simpler model that makes use of existing organizations and is less prescriptive. Still, according to the Note, the adjudication process should (a) be binding on all parties on an interim basis, (b) include fast-track timelines that reflect the practical reality of a monthly payment cycle, (c) accommodate contractual terms that create shorter timelines, and (d) make an adjudicator's determination as enforceable as a court order.

Law Reform Note #43, issued in April of 2020, proposes to repeal and replace the *Mechanics' Lien Act* with a new *Construction Remedies Act*, likely

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to be introduced in the next regular sitting of the Legislative Assembly. Note #43 lists in some detail the changes contemplated for the reform of the existing Act, i.e. Phase 1 of the reform, but is silent on prompt payment and adjudication. Those Phase 1 changes are incorporated in Bill 12, the *Construction Remedies Act*, which passed its first reading on November 18, 2020 and received Royal Assent a month later, on December 18, 2020.[2]

## Nova Scotia

Nova Scotia introduced a prompt payment and adjudication regime in Bill 119, which went through all readings and received Royal Assent in less than a month, receiving Royal Assent on April 12, 2019. The Act, renamed *Builders' Lien and Prompt Payment Act*, has not yet been proclaimed. Section 4J limits adjudication to disputes that are the subject of a notice of non-payment.

The payment timelines and details concerning the adjudication process are not prescribed in the Act and will be subject of future Regulations.

## Saskatchewan

On November 20, 2018, the Saskatchewan government introduced Bill 152, *The Builders' Lien (Prompt Payment) Amendment Act, 2018*. The Act received Royal Assent on May 15, 2019. The "in-force" date has not yet been announced.

On August 20, 2020, the Government of Saskatchewan filed *The Builders' Lien Amendment Regulations, 2020* for *The Builders' Lien (Prompt Payment) Amendment Act, 2018*. Neither are in effect until proclaimed by Saskatchewan's Lieutenant-Governor. Under the Regulation, the following are exempt from the prompt payment and adjudication regimes:

- persons supplying "services or materials for any improvement with respect to a mine or mineral resource" other than oil and gas;
- architects, engineers, and land surveyors,
- persons supplying "services or materials with respect to an improvement related to infrastructure in connection with the generation, transmission or distribution of electrical energy pursuant to The Power Corporation Act

[2] https://www1.gnb.ca/legis/bill/editform-e.asp?ID=1508&legi=60&num=1.

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LU #159 [2021]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Lena Wang, Partner and Markus Rotterdam, Director of Research, Glaholt Bowles LLP

CANADA

It is not entirely clear (at least to us) why architects and engineers were exempted in this fashion. The lobby registry shows that both the mining industry and contractors lobbied heavily, and there were lively parliamentary debates about the exemptions. Heavy pressure from industry stakeholders, including the Saskatchewan Construction Association, led to the inclusion of residential construction projects in the prompt payment scheme. The SCA continues to push for removal of other exemptions.

## Québec

Quebec Bill 108, which received Royal Assent on December 1, 2017, gave the Treasury Board Secreteriat the right to implement pilot projects to streamline payments to contractors and subcontractors on public contracts. The Secretariat did so in 2018. The Pilot Project provides for payment deadlines and adjudication.

## Federal

Following another Report by Reynolds and Vogel in June 2018, prompt payment legislation was introduced on April 8, 2019 as the *Federal Prompt Payment for Construction Work* Act, a sub-section of Bill C-97, the *Budget Implementation Act of 2019*. The Act was assented to on June 21, 2019 but is not yet in force. The Act will apply to any federal real property or federal immovable.

Under the Act, a contractor must, either on a monthly basis or as specified by its contract, submit a proper invoice to the Crown with respect to any construction work that was performed by the contractor, or performed and invoiced by any subcontractor in the subcontracting chain, up to the date of the proper invoice and not yet paid for by the Crown.

Payment must be made by the Crown within 28 days of receipt of the proper invoice, subject to a notice of non-payment. A contractor who is paid by the Crown has seven days, to pay each of its subcontractors for the construction work that they invoiced and that was covered by the proper invoice and paid, again subject to a notice of non-payment. The subcontractors who are paid must pay any sub-subcontractors within a further 7 days.

A contractor or subcontractor who remains unpaid or partially paid can submit the payment dispute to adjudication. The notice of adjudication must be given no later than 21 days following the later of the day on which the contractor receives a certificate of completion with respect to the construction project from the Crown; and if any of its construction work is covered by the last proper invoice submitted with respect to the construction project, the expiry of the time limit provided under this Act for payment for that work.

**Bill 32, the *Restoring Balance in Alberta's Workplaces Act,* 2020**

LU #159 [2021]

Primary Topic:
II. Statutory Regulation
Jurisdiction:
Alberta
Author:
Andrew Wallace,
General Counsel,
PCL Construction, Inc.

***ALBERTA***

Andrew Wallace

# Bill 32, the *Restoring Balance in Alberta's Workplaces Act, 2020*

In 2020, the governing United Conservative Party (UCP) of Alberta passed Bill 32, the *Restoring Balance in Alberta's Workplaces Act, 2020* ("Bill 32"). Bill 32 introduced changes to both the *Employment Standards Code* and the *Labour Relations Code,* many of which reverse or amend changes implemented by the prior NDP government. The last of these changes came into force by Order in Council on February 10, 2021.

As its title suggests, Bill 32 reflects significant ideological differences between the current UCP and prior NDP governments of Alberta. Without engaging in any commentary of the merits or shortcomings of either ideology, this update will highlight significant changes targeted specifically towards, or relevant to, the Alberta construction industry.

Throughout this article, reference is made to "alternate unions" and "building trade unions." Both types of unions operate within the Alberta construction market. The building trade unions are typically organized by trade (carpenters, labourers, ironworkers, etc.) and operate under a highly structured and industry wide collective bargaining regime. The "alternate" unions, which at times represent more workers in the Alberta construction industry than the building trade unions, negotiate separate collective agreements with each contractor and tend to organize crews with more variability than the building trade unions.

*Early Renewal of Collective Agreements*

This change relates to all unions except building trade unions.

In Alberta, a unionized contractor has a heightened level of labour stability during the term of a collective agreement except for specified short periods referred to as open periods. During the open periods, another union with support of the bargaining unit (employees) can apply to displace the existing union. This organizing campaign of another union's members is commonly referred to as a "raid". Notwithstanding the importance of empowering employees to change their collective bargaining agent if they so choose, raids can introduce significant disruption to a craft workforce and therefore a construction project.

Prior to 2009, a practice developed whereby contractors and certain unions representing the employees would negotiate a replacement collective agreement before the open period was reached and thereby avoid the pending open period. Critics of the practice asserted that it undermined employees' right to replace their union. These concerns were partially alleviated through a ratification process. During this ratification process a majority of the bargaining unit employees would confirm their acceptance of the new agreement, and the fact that they will be waiving their right to an open period, through a secret ballot vote.

# Bill 32, the *Restoring Balance in Alberta's Workplaces Act, 2020*

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The practice, in Alberta, of negotiating and ratifying replacement collective agreements ahead of an open period was developed in response to Labour Relations Board ("LRB") decisions spanning more than 30 years. Many Alberta construction employers, and employers in other industries (such as the health care industry), aligned their business practices with the law established by these LRB decisions.

In 2009, the LRB issued a decision, the "Firestone decision", which essentially reversed the earlier LRB decisions and prohibited the practice of early renewal of collective agreements. Bill 32 essentially reinstates and codifies the law as it existed prior to the Firestone decision. This change facilitates, through careful labour management, a contractor's ability to reduce the risk of raid related disruptions on larger projects by renegotiating properly ratified collective agreement(s) in advance of the project.

*Continuation of Collective Agreements*

This change relates to all unions.

The second notable change addresses the consequences of a successful raid. Prior to Bill 32, when a raiding union successfully organized the workforce, the incoming union would have the right to terminate the existing collective agreement by providing two-months notice. In British Columbia, by comparison, the Labour Relations Code expressly provided that the existing collective agreement would remain in force until the end of its term.

The British Columbia model provided greater cost certainty for construction projects. Specifically, under the British Columbia model, a construction contractor could avoid potential circumstances where a collective agreement upon which it based its bid costs is suddenly terminated during the project and replaced with another agreement negotiated with a replacement union. This, in turn, reduced the contractor's risk on the project and potentially enabled the contractor to reduce the risk associated contingencies in its contract price. In Alberta, the contractor could include a contingency in the contract price for this risk. However, that simply increased project development costs.

Bill 32 adopts the British Columbia model and avoids cancellation of a collective agreement until the expiration of its term.

*Project Labour Agreements*

This change relates to the building trade unions.

Over many years, the building trade unions engaged in a practice where certain terms of the industry wide collective agreements were modified to suit

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the needs of a particular project through "project labour agreements." However, prior to Bill 32, the enforceability of these project labour agreements was uncertain.

Bill 32 confirms the validity of these project labour agreements. This, in turn, provides options for the applicable unions and contractors to craft collective agreement terms that best meet the project and workforce needs.

*Major Projects Designations (Division 8)*

This change relates to all unions in the construction industry.

Division 8 of Part 3 of the Alberta *Labour Relations Code* is entitled "Collective Agreements Relating to Major Construction Projects". It provides a mechanism that enables the owner of a major construction project to negotiate collective agreements that are binding upon any employer engaged on the project. Through this process, an owner can ensure labour harmony on its project.

Division 8 has been used on several occasions. However, prior to Bill 32, the regime was the subject of several legal challenges. Bill 32 re-vamps the Division 8 regime to make it more accessible to project owners and less susceptible to legal challenges.

*All Employee Bargaining Units*

This change relates to alternate unions.

Prior to Bill 32, bargaining units and certifications in the construction industry were aligned with the traditional organizing model used by the building trade unions. As such, union certifications were granted trade by trade (carpenters, labourers, ironworkers, etc.). This model did not always align with the organizing philosophies or strategies preferred by alternate unions.

Alberta's regime stood in contrast with the regimes in British Columbia and Saskatchewan, where union certifications in the construction industry could be granted on an "all employee" basis. The all employee certifications, which cover all employees working for a contractor, are generally more consistent with the organizing philosophies or strategies preferred by alternate unions.

Bill 32 empowers the Alberta LRB to issue all employee certificates to alternate unions or to consolidate existing trade by trade certificates into a single all employee certificate.

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# Bill 32, the *Restoring Balance in Alberta's Workplaces Act, 2020*

*Union Discipline*

The last notable change has implications beyond the construction industry. However, due to the mobility of the construction workforce, this change warrants mention.

In the current construction environment, tradespeople frequently work in the building trade, non-union, and alternative union sectors, often switching from project to project as employment opportunities arise. However, prior to Bill 32, there were several cases in Alberta of unions forcing members to cease working for a specific contractor because the contractor was a non-union company or unionized with a competing union. These cases included examples of unions fining their members.

Bill 32 introduces restrictions on and otherwise clarifies a union's ability to discipline its members for working for a non-union company or a company unionized with a competing union. Union discipline is only permitted when the member's employment threatens the union's legitimate interests. In addition, although the pre-Bill 32 law provided that the union must be able to provide reasonable alternative employment, Bill 32 provides additional clarity by outlining criteria that the LRB must consider in making that assessment.

*Relevance of the Changes*

The relevance of Bill 32 extends beyond the realm of labour lawyers and practitioners. Labour availability and costs are the most variable aspects of a construction project and constitute the greatest risk element to a contractor or potential investor in terms of costs and completion schedules. Strategies that impact these risks will, in turn, impact the risk allocation and risk pricing exercises that are germane to the negotiation of every construction contract.

Many of the changes introduced by Bill 32 provide flexibility and strategies to reduce labour risks on construction projects. Moving forward, the industry will undoubtedly consider these labour strategies within broader project risk management strategies.

# Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes

**Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes**

LU #159 [2021]

Primary Topic:
II. Statutory Regulation
Jurisdiction:
Ontario
Author:
Andrew Wallace,
General Counsel,
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CanLii Reference:
2020 CanLii 100531

***ONTARIO***

Andrew Wallace

April 2021 finds us squarely within a new chapter of the global pandemic. In the span of several short weeks, local health authorities in the United States have ramped up their vaccination programs to unprecedented levels causing optimism that full vaccination of the adult US population is possible within a few short months. Although Canada's vaccination program has been slower due to limited vaccine supply, supply has recently increased substantially and the program is now progressing more rapidly. The relief associated with the positive advancements of vaccination programs is counterbalanced by concerns over the growth of more infectious COVID-19 variants and the potential emergence of a third wave of infections.

Against this backdrop, several Canadian governments and businesses are exploring the use of rapid COVID antigen testing to reduce transmission risk and bridge the period between current vaccination levels and herd immunity vaccination levels. This includes several potential pilot testing programs in the construction industry. As with many issues encountered the global pandemic, rapid COVID antigen testing raises novel legal issues. Unlike many issues encountered the global pandemic, a recent precedent exists to provide some guidance on at least one these novel legal issues.

In *Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes* (2020canlii 100531), a December 9, 2020 grievance arbitration decision, arbitrator Dana Rand addressed the ability of Caressant Care Nursing and Retirement Homes to implement a COVID testing program for its unionized workforce within a retirement home. The essential elements of the testing program were as follows:

1. All staff were to participate in ongoing COVID-19 surveillance testing conducted by nasal swab.
2. Testing was to be done every two weeks and include all individuals working in the retirement home (e.g., front-line workers, management, food service workers, contracted service providers, basic aids and guest attendants).
3. Medical accommodations would be addressed on a case by case basis.
4. A refusal to participate in the testing would result in the employee being held out of service, until such testing was undertaken.

The union - Christian Labour Association of Canada (CLAC) - grieved on the basis that the testing program was an unreasonable exercise of management rights under the collective agreement. That issue was decided pursuant to the well-established KVP criteria (*KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537 (1965)*, 16 L.A.C. 72), which was endorsed by

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the Supreme Court of in *C.E.P, Local 30 v. Irving Pulp & Paper Ltd*., 2013 SCC 34, an alcohol testing case. The KVP criteria provides that a workplace rule leading to discipline can only be implemented under a collective agreement if:

1. the rule is consistent with the collective agreement;
2. the rule is reasonable;
3. the rule is clear and unequivocal;
4. the rule was brought to the attention of the employee(s) affected before the employer attempted to act on it;
5. where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge; and
6. the employer enforces the rule consistently since its introduction.

The case turned on whether the rule was reasonable.

Arbitrator Rand summarized the union's position as follows:

> In sum, the Union submits that the policy is a serious invasion of employee privacy which is not justifiable. It has not been established by the Employer that the testing policy is even required, given all the safety measures in place and the absence of even one case in the Home. The policy is unfair and incoherent and can't achieve its purpose given that residents are not tested. Testing is mandatory without the requirement of symptoms as a triggering event. Testing is, itself, of limited utility. It does not prevent infection for the employee tested.

These arguments largely tracked those raised in drug and alcohol testing cases. Arbitrator Rand noted that these cases were a useful starting point for the analysis. However, in a decision that "essentially track[ed] the submissions of Employer counsel", Arbitrator Rand found that the testing program was a reasonable balance between "the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed." As such, the grievance was dismissed.

*Implications for the Construction Industry*

As noted, rapid COVID antigen testing programs may emerge in the Canadian construction industry over the coming months. Although arising in a different industry and a using a different type of COVID test, the *Caressant Homes* decision offers some guidance to those considering such programs for a unionized workforce. Even if the antigen testing programs are not

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widespread, other analogous issues may arise as the current chapter of the global pandemic unfolds. Notably, the union involved in the Caressant Care arbitration – CLAC – currently represents 30,000 workers in the Canadian construction industry. *Caressant Homes* could inform participation by CLAC and other construction industry unions in workplace rapid COVID antigen testing programs or other analogous rules, if either emerges through the current chapter of the pandemic and beyond.

# Old Act, New Trick: NS Court Finds Novel Solution for Owners under Lien Legislation

**Old Act, New Trick: NS Court Finds Novel Solution for Owners under Lien Legislation**

LU #159 [2021]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Nova Scotia
Authors:
John Kulik, Partner and Melanie Gillis, Lawyer
McInnes Cooper

CanLii Reference:
2020 NSSC 388

***NOVA SCOTIA***

John Kulik, Q.C.

Melanie Gillis

The facts underlying the Nova Scotia Supreme Court decision in *Blackhawk Construction v. Martin*, 2020 NSSC 388 are pretty routine. Contractor builds a new home; homeowners become concerned about the quality of the work; the working relationship sours, the contractor refuses to remedy deficiencies and litigation ensues. Contractor files lien. Homeowners counterclaim for deficiencies.

What made this decision novel is that the homeowners sought and obtained an order for security for costs. They had gotten wind of the contractor selling off some construction equipment and decided not to leave their payday to chance in the event they were successful at trial. However, the contractor did not post the required security and apparently became insolvent – and potentially judgment proof.

The ordinary remedy for non-compliance with a security for costs order is to bring a motion to dismiss the action. In a lien action, this would result in the lien being discharged. However, the homeowners did not want to risk their counterclaim being extinguished if the action was dismissed, in the event the contractor ever emerged from insolvency. Furthermore, getting a Court to dismiss a proceeding on purely procedural grounds is always a dicey proposition.

At the same time, the homeowners were trying to get the deficiencies completed on their home. This required them to retain other contractors. However, the lien on their house was interfering with their ability to obtain financing to cover these costs.

In short, the owners were between a rock and a hard place. They needed the lien vacated but without risking their counter-claim and/or the chance that the Chambers Judge would not want to dismiss the Plaintiff's claim entirely on a procedural basis.

Therefore, instead of going the ordinary route and bringing a motion to dismiss the contractor's claim for failing to post security, the homeowners brought a motion for lesser relief: *they applied to have the lien against their home vacated, but leaving the balance of the action intact*. In particular they relied on section 29(4) of the *Builders' Lien Act*, RSNS 1989, c 277, which states:

> Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate

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***NOVA SCOTIA***

> the registration upon any other proper ground and a certificate of the order may be registered.

Justice Wright was tasked with considering the meaning of the words "upon any other proper ground'. Given that he had no precedent to work from, he instead had to "…balance the respective interests of the parties…" (para. 13). In doing so, Wright J. found that it would be unfair to allow the contractor to be advantaged by their non-compliance with a court order:

> [14] There is no question but that the defendants now find themselves in a disadvantaged position with the litigation now in limbo. The lien prevents them from obtaining financing for the cost of repairs to the house and will do so indefinitely under the status quo, with the proceeding now stayed unless the lien is vacated. Under the present scenario, Blackhawk is in a position to tie up the property indefinitely, and continue to hold the upper hand by maintaining its lien interest all the while, notwithstanding its failure to comply with the order of the court for payment of security for costs.
>
> [15] Failure to comply with a court order carries consequences. Those consequences should not preserve the advantaged position of the party in default of the order, to the prejudice of the position of the successful party on the motion.

Justice Wright then granted an order vacating the defaulting contractor's lien. However, in a move that truly illustrates that costs are still very much in the discretion of the Court, he refused to award costs to the successful homeowners on the basis that they had been severely bad-mouthing the contractor over the internet and therefore were not coming to the Court with clean hands.

This decision may provide a useful precedent for owners who seek to have liens vacated without having to incur the cost of posting security. If the Owner can show some sort of non-compliance by the lien holder with the Rules of Court - even if not directly related to the lien itself - that might be viewed by a Judge as a "proper ground" for vacating a lien.

It also illustrates that a bit of creativity from counsel and common sense from the Court can result in a new remedy under an old Act.

# Too Much of a Good Thing?
# Wrap Up Insurance Trumped by Indemnity Provisions

**Crosslinx Transit Solutions Constructors v Capital Sewer Serving Inc.,**
2021 ONSC 1091

LU #159 [2021]

Primary Topic:
XIII. Insurance
Secondary Topic:
IV. Subcontracts
Jurisdiction:
Ontario
Author:
Ken Crofoot, Partner, Goodmans

Canlii Reference:
2021 ONSC 1091

***ONTARIO***

Ken Crofoot

Crosslinx Transit Solutions Constructors ("Crosslinx") was contracted through its parent company to build the Eglinton Crosstown Light Rail project (the "Project') in Toronto for Metrolinx and Infrastructure Ontario ("Metrolinx'). Capital Sewer Serving Inc. ("Capital") was a subcontractor working on sewer lines in connection with the Project. A sewer backup occurred damaging neighbouring properties which then brought claims against a number of parties, including Crosslinx.

Crosslinx demanded that Capital assume the defence of these claims and indemnify them pursuant to provisions in the subcontract. Capital took the position that it had no obligation to indemnify based on the obligation of Crosslinx to provide wrap up construction insurance in the construction contract. Both parties applied to Superior Court for a ruling as to their obligations.

The Court reviewed the various contractual obligations in play. The Project Construction Contract (the " Construction Contract') required Crosslinx to obtain certain insurance coverage which included " 'Wrap Up' Commercial General Liability" coverage which was to include all subcontractors as Named Insureds "without right of contribution of any other insurance by any Named Insured". The subcontract between Crosslinx and Capital (the "Subcontract") expressly incorporated the provisions of the Construction Contract and expressly provided that the subcontractor [i.e. Capital] was entitled to receive the benefit of any entitlement of the Contractor [i.e. Crosslinx] under the Construction Contract. Oddly the decision does not state whether Crosslinx actually obtained the wrap up CGL policy it was obligated to put in place under the terms of the Construction Contract.

The Court noted that the Subcontract also required Capital to obtain its own CGL policy which named Crosslinx and others as additional insureds with respect to any liability arising out of the Subcontract.

The Court also considered the indemnity provisions contained in the Subcontract, which provided that the subcontractor should be liable for and hold harmless the Construction Contractor from and against all claims in the widest terms, including indemnification for any deductible it would have to pay on its insurance.

Relying on cases in the landlord and tenant context, Capital argued that the obligation to obtain insurance was an assumption of that risk by Crosslinx and that therefore Crosslinx could not claim that Capital was required to defend and indemnify. Capital also argued that the Subcontract provisions prevented contribution from any other insurance and that therefore Crosslinx was not capable of looking to it. The Court summarily dismissed this argument on the basis that it was not a contest between competing insurers but a claim on a contractual indemnity.

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The Court distinguished the landlord tenant cases as relating to specific different provisions in the leases in question and found that the language in the indemnity provision of the Subcontract was specific to that relationship and essentially overrode the "more general" provisions requiring wrap up insurance in the Construction Contract. Furthermore, the Court found reinforcement for its conclusion in the ranking of the priority of documents found in the Subcontract which placed the Subcontract provisions significantly ahead of the provisions in the Construction Contract.

Accordingly, the Court found that Capital was obligated to defend and indemnify.

There are a number of observations that can be made from this case. It is a situation where each document seeks to pass on all risks without regard for the provisions in other relevant documents. It can be observed that there is no point in having a requirement to obtain wrap up CGL insurance if the parties required by the contract to be named insureds under that insurance are also obligated to provide their own full CGL insurance naming the others as named insureds. Aside from the obvious confusion that results when a claim event occurs, there is a lot of wasted insurance premium being paid. The case illustrates the need for a more holistic, less self focused, approach to insurance and indemnity provisions on a project to save overall costs. At the very least, thought should be given to the interaction between insurance obligations and obligations to indemnify. The judge's observation that the reference to other insurance was not applicable because the claim was a claim on an indemnity makes little sense in the real world since the same damage invokes both the insurance and the indemnity provisions.

The whole purpose of wrap up insurance is that it provides full coverage for the risk insured to everyone in the construction pyramid. Where there is such insurance, claims between named insureds are not supposed to be permitted because the insurance is to answer to the claim. It is unclear in this case if the insurance was actually put in place and if Capital or Crosslinx attempted to claim on it. Perhaps the insurance was not placed which explains why Capital found itself arguing that Crosslinx had assumed the risk that would have been covered by the insurance. If that is the case, it is hard to understand how Crosslinx's failure to fulfill its contractual obligation ended up benefitting it and costing Capital (or more likely, its insurer).

The judge stated that the provision in the Subcontract providing the benefit of the Construction Contract provisions to Capital and preventing a claim for contribution "from any other insurance" was not applicable because this was not an issue of priority between insurance carriers. One wonders how he reached that conclusion since it is not clear that Capital's CGL insurer was not behind its position and/or Crosslinx insurer was not behind its position.

# Too Much of a Good Thing?
# Wrap Up Insurance Trumped by Indemnity Provisions

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Admittedly, the contractual provisions are conflicting and confusing. However, the way in which the Court resolved the conflict and essentially ignored the provision requiring the placement of wrap up CGL coverage with Capital as a named insured is not a self-evident conclusion flowing from the circumstances, and it will therefor be interesting to see if this case is appealed.

# Rough Justice: Quantum Meruit Award for Contractor

***RNL Construction Ltd. v. R.J.G. Construction Limited***, 2020 NLSC 158

LU #159 [2021]

Primary Topic:
III. Building Contract
Jurisdiction:
Newfoundland and Labrador
Authors:
John Kulik, Partner and Melanie Gillis, Lawyer
McInnes Cooper

CanLii Reference:
2020 NLSC 158

## Newfoundland and Labrador

John Kulik, Q.C.

Melanie Gillis

In *RNL Construction Ltd. v. R.J.G. Construction Limited*, 2020 NLSC 158, the plaintiff RNL performed excavation work and provided heavy equipment to the defendant general contractor RJG on a few projects. RNL then apparently felt safe to enter into a verbal agreement to do further work for RJG. Never a good idea.

The principal of RNL testified that he offered to rent his heavy equipment to RJG on the condition that RJG would buy the equipment at the end of the year. He testified that the principal of RJG told him that if they were the successful bidder on a certain upcoming project, RJG would indeed agree to rent RNL's equipment and buy it at the end of the year.

The principal of the RJG testified that he thought they agreed to split the profits on the job 50/50, and that he was shocked by the contents of an invoice for equipment rental that he received from RNL. He denied any agreement to buy RNL's equipment.

RNL's position was that, as there was no meeting of the minds, RNL should be compensated on a *quantum meruit* basis:

> [55] Counsel for RNL submitted that Mr. Fennell and Mr. Giovannini both left with their own ideas regarding compensation and there was no meeting of the minds. He argued that RNL should receive compensation on a quantum meruit basis – which would mean compensating RNL at a reasonable rate for the use of its equipment.

Justice Khaladkar held that there was no meeting of the minds on the essential terms such as timing and amount of payment, the type or nature of the equipment to be supplied, and therefore there was no enforceable contract:

> [68] It is clear from these very different ideas about what was being agreed to that the essential elements of a contract did not exist. The parties never reached a consensus ad idem concerning who was doing what and for how much. There is no legally enforceable contract between them insofar as the provision of equipment was concerned.

Nonetheless, Khaladkar J. held that RNL was entitled to be compensated on a quantum meruit basis for work performed, citing the seminal text of G.H.L. Fridman, in The Law of Contract in Canada, 6th ed. (Toronto: Carswell), at page 10, which states as follows regarding restitutionary *quantum meruit:*

# Rough Justice: Quantum Meruit Award for Contractor

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2020 NLSC 158

**Newfoundland and Labrador**

> ...Where no contract exists between the parties, or such contract as there is cannot be recognized or enforced, the courts have allowed a deserving party to recover something on *a quantum meruit* basis, which is not the same as what might have been recovered if there had been a valid, enforceable contract upon which the successful party could have sued....

The Court did not award RNL an hourly rate for equipment rental because it found that RNL's project manager delayed the project substantially and RNL should not benefit from such delays. Instead, damages were calculated on the basis of the percentage of profit-sharing that RJG had initially said was the basis for the agreement:

> [74] A fair measure of the restitution would be based upon a percentage of the gross profit before applying the cost of depreciation. And, in my opinion, that should be based upon what Mr. Giovannini originally decided that he was going to pay RNL, namely 50/50 – and not a shifting figure that occurred to him when pressed in cross-examination.

This is an odd result: damages in quantum meruit cases are supposed to be based on the *restitutio in integrum* principle – to restore the wronged party to the position they were in before the events in question occurred. However, in an attempt at rough justice, the Court instead awarded damages on the basis as if a bargain had been struck.

The lesson to be learned from this case is that even if a contractor succeeds in a quantum meruit claim, they could be faced with a scenario where the court will determine the value of the work performed on a basis that perhaps no one anticipated. Yet another good reason to always put agreements in writing.

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*Nicholas J. Dasios*

# Next Legal Update — watch for it!

CCCL Fellows-Only Website | Board of Governors Website | EDIT LINKS

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