Canadian College of Construction

LEGAL UPDATE

L.U. #160

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BOOK REVIEW: "Alternative Dispute Resolution in the Construction Industry in Canada" Harvey J. Kirsh, Editor and Contributor
LU #160 [2021]
Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Canada
Author:
Julie G. Hopkins

Julie Hopkins

BOOK REVIEW: "Alternative Dispute Resolution in the Construction Industry in Canada" Harvey J. Kirsh, Editor and Contributor

Book Review by ***Julie G. Hopkins, CIArb****. Julie is an independent arbitrator based in Calgary, Alberta with more than 25 years of experience in dispute resolution.*

In this excellent book, Harvey Kirsh assembles articles from leading Canadian alternative dispute resolution practitioners that reflect the current state of practice and thought in the area.

The book covers all forms of dispute resolution common to the construction industry (arbitration, mediation, med-arb, adjudication, reference, expert determination, and dispute boards) with a chapter devoted to each area. Every article provides a wealth of practical advice and observations from experienced practitioners. For example, the Hon. Neil Wittmann, Q.C. (former Chief Justice of the Alberta Court of Queen's Bench) writes on the origin and use of Scott Schedules; Duncan W. Glaholt provides advice on how to chair dispute boards; and John "Buzz" Tarlow (a Fellow of the American College of Construction Lawyers) discusses deception's role in mediation and the resulting ethical considerations. In addition, both the present and previous Chief Justices of the Supreme Court of Canada make contributions – the former (The Rt. Hon. Richard Wagner) has penned the Foreword to the book, while the latter (The Rt. Hon. Beverley McLachlin) authored an article on concurrent expert testimony or, as it is more commonly (and somewhat distressingly) referred to, "expert hot-tubbing".

Among my favourite articles is one written by Harvey Kirsh himself. "Pitfalls, Perceptions and Processes in Construction Arbitration" covers several potentially thorny issues that both counsel and arbitrator should consider when embarking on an arbitration. Harvey's practical advice, starting with the drafting of the arbitration clause and ending with the award of costs, is invaluable for both those new to the field and veteran practitioners alike.

This book is a welcome addition to the short catalogue of Canadian books on alternative dispute resolution. It provides a useful, practical resource for those in the construction industry and, indeed, all alternative dispute resolution practitioners. It is one to be kept close at hand.

The Insurance Market – What is Going on?

The Insurance Market – What is Going on?

LU #160 [2021]

Primary Topic:
XIII. Insurance
Jurisdiction:
Canada
Authors:
Ken Crofoot,
Goodmans LLP

CANADA

Ken Crofoot

If you have any involvement in placing commercial insurance, you will have noticed that insurance is becoming harder to obtain and premiums are rising. This affects our clients construction projects, the insurance of directors and officers of client entities and architects/engineers/lawyers professional liability coverage, among other types of insurance. So what has happened in the insurance markets?

Until 2018, insurance markets had been a buyer's dream. From peak premiums in the early 2000's, rates had been steadily declining and by 2018 professional liability coverage, for instance, could be obtained for a third of what premiums had once been. Insurers had excess capacity and the market was highly competitive. Generally insurance was obtainable below the actuarial expected loss cost, meaning that insurance was being sold significantly below the cost of the eventual claims that would be made against it. While this was great for insurance consumers, it was a situation that the market could not maintain and eventually change was inevitable.

Changes began to appear in Lloyds of London in 2017 and 2018. Lloyds syndicates are significant insurers and reinsurers behind many commercial policies. Lloyds suffered losses in two consecutive years partly as a result of major hurricanes in the US and Caribbean, typhoons in Japan and wildfires in the US coupled with the inability to cover costs in the soft market. In addition certain insurance markets experienced claims that were larger than had been typically previously. This trend impacted the professional liability market and the construction and property insurance markets. As a result Lloyds imposed significant restrictions on its syndicates requiring them to justify each line of business and its pricing. Generally, unless a business could be shown to be profitable, syndicates were to be restricted from those insurance placements. These new requirements were an attempt to reset the market. Other insurers and reinsurers were subject to the same cost and pricing issues and were not reluctant to follow suit.

As a result, there has been a steady increase in premiums across the board. Some industry sectors are more impacted than others depending on their existing risk profiles. Since the capacity has become more limited, insurers are prone to use their capacity in less risky markets with the result that high risk insurance has been difficult to obtain and has been offered with substantially increased premiums. For example, director and officer coverages typically have seen reduced insurance limits, higher deductibles and significant increased premiums. In the professional liability area, insurers have been increasing premiums for the last couple of years with a view to eventually offering insurance at pricing which generates a profit, rather than a loss. Some insurers have dropped out of this market entirely due to the risk of large claims. Lawyers, architects and engineers can all expect that these annual rate increases will continue for some time yet and placement may become an issue for some if insurance capacity is reduced too much.

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In addition to the general market forces, cyber insurance has its own issues. It is a relatively new product which is now starting to react to its claims history. The early pricing of cyber insurance has proven to be significantly under the cost of claims, which have been ballooning as hacking has become a lucrative, illegal and mostly foreign generated business activity. As a result, cyber insurance is rapidly increasing in cost and its availability will become more and more limited and constrained. Those seeking cyber insurance can expect ever more detailed forms to fill out disclosing the details of their technology so that potential insurers can assess risk and price accordingly. In short order expect the cost of cyber coverage to double or triple.

Where do these insurance market developments leave those in the construction industry? Clearly, the cost of insurance has already increased and will continue to do so. However, the reach of the harder insurance market will extend beyond higher premiums. It should be expected that some risks will be hard to place altogether. Higher deductibles (self insured retentions) can be expected along with lower coverages on certain specific risks For example cyber policies provide much smaller or no limit for social engineering claims. We may see wording restrictions intended to prevent certain catastrophic claims associated with climate change as a condition of policy placement (e.g. wildfire exclusions). Entities with bad claims experience will undoubtedly experience the effect of the hard market exponentially worse with very high retentions and premiums.

Insurance will become a more significant cost in every construction project. Often the owner just imposes insurance requirements on a general contractor. In addition, there is usually much insurance coverage duplication amongst the parties on a project. Cost management dictates that there is logic in the parties doing a full analysis of the project's essential insurance requirements, where the risks should be both borne and which party is best to insure for them. Additionally, policies may be changing and require review and questioning – a policy received from a broker should not just be stuck in a file on the presumption that it is the same as the last time insurance was contracted.

We can expect that the insurance market will continue to harden for some time and feasibility planning, tendering, budgeting and project structuring should all take this into consideration.

Case Summary:

Avli BRC Developments Inc v BMP Construction Management Ltd

Avli BRC Developments Inc
v
BMP Construction Management Ltd
2021 ABQB 412

LU #160 [2021]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Authors:
Phil Scheibel and Elisa Stewart, Rose LLP

CanLii Reference:
2021 abqb 412

ALBERTA

Phillip Scheibel

Elisa Stewart

Master Robertson's recent decision in *Avli BRC Developments Inc v BMP Construction Management Ltd,* 2021 ABQB 412 ("*Avli BRC*") clarifies in what circumstances lienholders can properly register builders' liens against either the condominium sheet or individual units in condominium projects.

In 2019, two residential condominium projects were constructed in Edmonton and Calgary for two related owners. The issues addressed in this discussion relate to liens registered against the Calgary project, which was owned by Avli BRC Developments Inc. ("Avli"). A condominium plan was registered for the Calgary project on October 20, 2019, after which time work continued on the project for nearly another month. Eventually, a dispute arose between Avli and its general contractor, BMP Construction Management Ltd. ("BMP"), leading BMP and its subcontractors to file liens for amounts owing for their work on the project.

BMP and Avli agreed that an interim payment could be made from the major lien fund, which was large enough to pay all subcontractor claims. Nonetheless, Avli disputed the validity of several liens registered against the Calgary project. Avli raised two issues in particular. First, it argued that liens registered against only the condominium sheet were invalid because the condominium corporation did not request the work. Second, it argued that liens registered against a single condominium unit could only secure the amount of the subcontractor's work that was actually done on that particular unit, being a fraction of the total amount of work performed by the subcontractor. As set out below, Master Robertson disagreed with Avli on both points and upheld each of the subcontractor liens in full.

(a) When can a condominium sheet be liened?

Pursuant to section 78 of the *Condominium Property Act,* RSA 2000, c C-22 (the "*CPA*"), when work is done or material is supplied at the request of a condominium corporation, any lien registered against the common property by way of registration against the condominium sheet is deemed to also be registered against each individual unit. Section 25 of the *CPA* establishes that the condominium corporation described in section 78 is automatically created upon registration of a condominium plan. Pursuant to sections 10.1 and 29 of the *CPA*, a developer is required to appoint an interim board of directors within 30 days after registration of a condominium plan, with a permanent board to follow. The board manages the common property of a condominium unit on behalf of the condominium corporation.

According to Avli, all of the work on the Calgary project was requested by Avli in its capacity as developer before the condominium plan was registered. Therefore, section 78 was inapplicable and lienholders would have to register against each individual unit to secure their claim. Master Robertson disagreed.

Avli BRC Developments Inc
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ALBERTA

Case Summary:

Avli BRC Developments Inc v BMP Construction Management Ltd

In determining who requested the work, Master Robertson first considered who had control of the condominium corporation after the plan was registered. There was no evidence to suggest that Avli ever set up an interim board as required under the *CPA.* Yet work continued on the Calgary project after the condominium plan was registered, including work on the common property such as the roof, walls, and hallways. If Avli were not acting as the interim board, then BMP and the subcontractors' presence at the site and their work on the common property would amount to trespassing. Master Robertson found it only logical to conclude that the interim board of the condominium corporation was effectively controlled by Avli, who permitted work to continue on the project after the condominium plan was registered.

Master Robertson next considered whether all the work completed on the project prior to the condominium plan registration was also requested by condominium corporation, notwithstanding that Avli and BMP entered into the contract for that work before the condominium corporation came into existence. Specifically, he considered whether the condominium corporation had adopted the pre-incorporation contract as a post-incorporation contract capable of binding the condominium corporation.

Section 25(5) of the *CPA* provides that the *Business Corporations Act,* RSA 2000, c B-9, does not apply to condominium corporations, such that any pre- or post- incorporation contracts in respect of a condominium corporation must arise in accordance with the common law. Master Robertson relied in particular on a recent decision of the Supreme Court of Canada, *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp,* 2020 SCC 29, which confirmed that a condominium corporation can enter into a post-incorporation contract on the same terms as a pre-incorporation contract entered into by a developer and another party. Determining whether this has occurred requires consideration of the conduct of the parties and the surrounding circumstances, including the parties' reasonable expectations.

Master Robertson found that the pre-incorporation contract between Avli and BMP was adopted by the condominium corporation following registration of the condominium plan. He noted that the condominium corporation was fully within the control of Avli and that the parties must have expected Avli to cause a condominium plan to be registered so that the resulting owners and condominium corporation would enjoy the benefits of the work and materials supplied by BMP and its subcontractors. Accordingly, the condominium corporation must have requested the work done after registration of the plan and also ratified the request for work previously done by adopting the pre-incorporation contract as a post-incorporation contract. All liens registered against the condominium sheet were therefore valid in full.

Avli BRC Developments Inc
v
BMP Construction Management Ltd
2021 ABQB 412

LU #160 [2021]

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ALBERTA

Case Summary:

Avli BRC Developments Inc v BMP Construction Management Ltd

(b) It is necessary to register against each individual unit in a condominium?

Avli also argued that liens registered against only one condominium unit could not secure more than the amount of work completed on that unit in particular. Again, Master Robertson disagreed.

Master Robertson relied on the common purpose doctrine, which most often applies in respect of large projects such as oil and gas projects. This doctrine provides that, absent evidence of prejudice, a lien may be registered against land where not all work was performed as long as there is a common purpose between the land on which the lien was registered and the overall project, including geographical proximity. Master Robertson also pointed to similar case law declaring a lien valid notwithstanding that the lien was registered on title for just one of two lots comprising the lands that benefitted from the work.

In this case, there was no prejudice arising from registration against only a single unit. Avli did not behave differently as a result of the registration and there were no subsequent registrations on other titles that would be affected by allowing the lien to stand as against the entire project. If the project were sold to pay the lien claims, with each unit being sold separately, then it may be that only a reasonable share of the proceeds attributable to the liened unit could be available to the lienholder. However, in this case, security was paid into court to stand in the place of the land, such that there would be no sale. Accordingly, the liens registered against only a single unit were valid for the full amount of the lienholders' claim.

The decision in *Avli BRC* is a useful reminder for lawyers registering liens against condominium projects. While it is likely reasonable to lien only against the condominium sheet to secure a claim, parties should be cognizant of the date of registration of the condominium plan and whether there may be an issue as to whether the work was requested by the condominium corporation. Further, while liening against only some of the condominium units may be sufficient to secure a claim if security is paid into court, there is a risk that a lienholder's recovery will be limited if not all units are liened and the land is eventually sold to recover the lienholder claims. Further commentary on these issues may be forthcoming, as this decision has been appealed by the owner.

Go with the Flow – NBCA Rules in Gulf Operators v. Acciona et al that Once Security is Posted, Holdback Funds Can be Released

Gulf Operators v. Acciona et al
2021 NBCA 26

LU #160 [2021]

Primary Topic:

IX. Construction and Builders' Liens
Jurisdiction:
Canada
Authors:
John Kulik, QC, Matt Hayes, Melanie Gillis, & Haley MacIsaac, McInnes Cooper

CanLii Reference:
2021 NBCA 26

NEW BRUNSWICK


John Kulik, Q.C.


Matthew Hayes


Melanie Gillis


Haley MacIsaac

In *Gulf Operators Ltd. v. Acciona Agua Canada Inc. et. al*., 2021 NBCA 26 ("Gulf "), the New Brunswick Court of Appeal had to deal with the effect of posting security to vacate a lien on the obligation to retain holdback funds.

Background Facts

The City of Saint John (the "City") entered into an agreement with Port City Water Partners ("PCWP") as a general contractor to design, build and finance improvements to the City's existing water treatment plant and reservoirs. PCWP subcontracted Acciona Agua Canada Inc. and Acciona Infrastructure Canada Inc. ("Acciona") for the design, building, and commissioning of certain portions of the project. Acciona then sub-subcontracted Gulf to provide certain services relating to the project.

Issues arose and Gulf filed a Claim of Lien claiming $19,442,193.71. In order to remove the lien, Acciona obtained and provided a letter of credit (the "LOC") in the amount $20,000,000 as security. The LOC stated it was established as security "in lieu of an in place of the properties" described in Gulf's Lien. Acciona and Gulf consented to an Order vacating the Claim of Lien.

In New Brunswick, section 16 of the Mechanic's Lien Act (the "Act") requires an owner who receives a notice of lien create a separate holdback in the amount of the lien.

The City wrote a letter to PCWP indicating, while the LOC takes the place of the land, nothing in the *Act* specifies the security takes the place of the "notice holdback" which "remained charged" and refused to release the holdback funds. Gulf agreed with this position. Since Acciona was unable to access the holdback funds it needed to complete the project, it filed a motion seeking relief.

Gulf Operators v. Acciona et al
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NEW BRUNSWICK

Go with the Flow – NBCA Rules in Gulf Operators v. Acciona et al that Once Security is Posted, Holdback Funds Can be Released

Issue

Is the owner released from the section 16 holdback when security is posted and the lien removed?

Decision

The Motions Judge concluded posting of security discharges the owner of the section 16 notice holdback obligations under the *Act*. He held that the *Act* "is not designed or intended to bring construction projects to a standstill but rather to permit the flow of funds down the construction pyramid while providing protection to lien claimants." Gulf appealed.

The Court of Appeal held that the *Act* was a marked departure from the common law, which did not allow a party who had no contractual relationship with the owner to lien the owner's land to secure payment for work. The Court cited its earlier decision in *Emco Ltd. v. Sobeys Inc. et al (1997), 194 N.B.R. (2nd) 1* in which the Court held that giving notice of a lien "stay [s] the hand of the paymaster."[1] Thus, an owner's hands are tied once a notice of lien is filled, and all parties down the constructions pyramid suffer unless the paymaster's hand can be freed.

The Court held that s. 51 of the *Act* can free the hand of the owner to release the holdback fund if the security posted under s. 51. In particular, the Court held that:

> The security then takes the place of the land and the registration of the lien filed against that land is vacated. There can, therefore, be no continuing charge against the holdback fund.[2]

The Court ruled that once security is posted, a lien claimant must then recover from the s. 51 security and he can no longer recover from the s. 16 holdback fund. While the lien continues to exist, the security becomes the source of recovery and not the land. The purpose of the holdback fund has ceased to exist, and the owner is now free to use these funds to complete the project.[3]

Significance

While the primary purpose of the *Mechanics Lien Act* was to protect subcontractors from being unpaid, registration of a lien impacts many oth-

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[1] *Emco Ltd. v. Sobeys Inc. et al*, 1997 194 N.B.R. (2nd) 1.

[2] *Gulf, supra* note 2 at 31.

[3] Macklem and Bristow, *Construction Builders' and Mechanics' Liens in Canada,* 6th ed. (Toronto: Carswell, 1990) p. 7-14.

Go with the Flow – NBCA Rules in Gulf Operators v. Acciona et al that Once

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ers in the construction chain by stopping the flow of payments. However, once security is posted, funds can flow including payment out of the hold-back fund.

We also note that the *Mechanics Lien Act* will be replaced by the new Construction Remedies Act, SNB 2020, c. 29 on a date to be proclaimed.

Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.
2021 ONSC 3396

LU #160 [2021]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles and Megan Zanette
Glaholt Bowles LLP
CanLii Reference:
2021 ONSC 3396

ONTARIO

Brendan D. Bowles

Megan Zanette

Case Comment:
Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.

This case involved the Eglington Crosstown LRT and focused on the effect and operation of the transition provisions in the *Construction Act.* Specifically of issue was the effect of ss.87.3(1) and (2) in the context where a prime contract for an improvement was entered into before July 1, 2018 but a relevant subcontract was entered into after July 1, 2018.

Facts

On July 21, 2015, Crosslinx Transit Solutions General Partnership entered into a prime contract with Crosslinx Transit Solutions Constructors ("Crosslinx") for the design and construction of the LRT system.

In 2019, Crosslinx entered into two subcontracts with 10760919 Canada Inc. (o/a Harbels) for the supply of formwork and concrete to Avenue and Leaside stations in the LRT system. Harbels in turn entered into two sub-subcontracts with Form & Build Supply (Toronto) Inc. ("Form & Build").

On December 11, 2020, 56 days after Form & Build's only and last stated date of supply at both stations, Form & Build registered two claims for lien against title to the lands of the two stations. On January 14, 2021, both liens were vacated upon Crosslinx posting lien bond security into court.

Subsequently, Crosslinx sought orders declaring that the two liens Form & Build had preserved were already expired; and returning the two lien bond securities Crosslinx posted to vacate them. Form & Build opposed such, requesting a declaration that its liens were in fact preserved in time.

The Applicable Legislation

S.87.3 of the *Construction Act,* RSO 1990, c C.30 contains the transition provisions which govern the continued applicability of the *Construction Lien Act*. Specifically, ss.87.3(1) and (2) read as follows:

> **87.3** (1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,
>
> (a) a contract for the improvement was entered into before July 1, 2018;
>
> (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
>
> (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July

Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.
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2021 ONSC 3396

ONTARIO

Case Comment: *Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.*

1, 2018 and before the day subsection 19 (1) of Schedule 8 to the Restoring Trust, Transparency and Accountability Act, 2018 came into force.

Same

(2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

Arguments of the Parties

Form & Build argued there was ambiguous wording in ss.87.3(2) and its intent was focused on preventing contractors who had entered into a contract before July 1, 2018 from benefitting from the *Construction Act*. Thus, s.87.3 should only apply to subcontracts entered into before July 1, 2018. As Form and Build's subcontracts with Harbels were entered into after July 1, 2018, Form and Build was entitled to the 60-day lien preservation period under the *Construction Act.*

Crosslinx disagreed, arguing there was no ambiguity in ss.87.3(1) and (2). Further, Crosslinx cited Court decisions that interpreted s.87.3 such that the *Construction Lien Act* continues to apply to an improvement (and liens and lien actions arising from it), where the construction contract was entered into before July 1, 2018. Thus, as the prime contract for this improvement was entered into on July 21, 2015, Form & Build was only entitled to the 45-day lien preservation period under the *Construction Lien Act*.

Master Robinson's Decision

The Master first reviewed the Court decisions cited by Crosslinx. The Master agreed with Form & Build that the cases were factually distinguishable (they did not involve a prime contract entered into before July 1, 2018 and a subcontract entered into after July 1, 2018, nor were the transition provisions of issue), but held that the general statements made regarding s.87.3 remained accurate in this situation.

The Master then addressed Form & Build's argument of ambiguous wording in ss.87.3(2). The Master found no genuine ambiguity when reading s.87.3(2) in its grammatical and ordinary sense, in the context of both s.87.3 and the *Construction Act* in their entirety. The Master held there is only one plausible meaning of ss.87.3(2) and it is clear: ss.87.3(1)(a) and (c) apply regardless of when a subcontract was entered into. Further, ss.87.3(2) does not clarify or vary the preamble to ss.87.3(1), which connects the applicable act and regulations to "an improvement", as opposed to a "contract" or "subcontract".

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The Master emphasized that ss.87.3(1)(b) must also be read harmoniously with the rest of s.87.3 and the *Construction Act*. Form & Build was unable to adequately explain how ss.87.3(1)(b) would operate if the Court accepted its argued interpretation (that the date a contract or subcontract was entered into governs which act and regulations applies), given the terms "contract" and "subcontract" are not used. Further, referencing "commencement of a procurement process prior to July 1, 2018" would then become superfluous when assessing which act applies – a statutory interpretation the court is to avoid.

Ultimately, Master Robinson stated:

> "s.87.3 provides that a single legislative scheme applies to the entirety of "an improvement". All rights, obligations and remedies of all persons involved in that improvement are governed commonly and consistently by the same version of the act and regulations. That consistent application of the act and regulations is reasonably achieved by reference to the date of the procurement process for the improvement, where there is one, or a prime contract."

This interpretation allows ss.87.3(3) and (4) to also be read harmoniously. It also eliminates conflicts in legislative operation, and consequent uncertainty and administrative burdens to all parties, which would ensue if variant versions of the act and regulations applied to different contractors and subcontractors in the same improvement (given the differences between the *Construction Lien Act* and *Construction Act*).

The Master further emphasized that because subcontract work, by definition, is a portion of the work to be performed under a prime contract, it logically follows that the same legislative scheme governs both the prime contract and any subcontracts. An interpretation of s.87.3 that allows variant lien rights for different parties (i.e. contractors vs. subcontractors) in the same improvement would require clear legislative wording that is absent in the provision.

Application to the Facts

Per ss.87.3(1)(a), as the prime contract was entered into before July 1, 2018, the *Construction Lien Act* continued to apply to the involved improvement. Thus, Form & Build had 45 days from its last stated date of supply to preserve its liens. As the liens were preserved after 56 days, both liens had expired when Form & Build registered its claims. Accordingly, Crosslinx was entitled to both of its sought orders.

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Conclusion

The date a subcontract was entered into is not relevant in determining whether the current *Construction Act* or former *Construction Lien Act* applies to an improvement. The date the prime contract was entered into or procured determines which statutory regime applies to all liens in respect of the improvement. Given there are still a number of significant infrastructure projects in Ontario where the prime contract was procured prior to July 1, 2018, it remains vitally important for practitioners to be familiar with these transition provisions. The best counsel continues to be to apply the more conservative test if representing a lien claimant.

Crosslinx v. Ontario Infrastructure:
Turns out the Pandemic is an Emergency...

LU #160 [2021]

Primary Topic:
III. Building Contract
Jurisdiction:
Ontario
Authors:
Julie Han,
Jason J. Annibale,
Tim Murphy,
and Ahsan Mirza
McMillan LLP

CanLii Reference:
2021 ONSC 3567

ONTARIO

Crosslinx v. Ontario Infrastructure: Turns out the Pandemic is an Emergency...


Julie Han


Jason Annibale


Tim Murphy


Ahsan Mirza

On May 17, 2021, the public sector's hardline view of risk allocation in public-private partnership (P3) contracts suffered a serious setback with the release of the Ontario Superior Court of Justice's decision in *Crosslinx v. Ontario Infrastructure*.[1] In his reasons, Justice Koehnen ruled that the private sector partners of the Eglinton Crosstown LRT Project were entitled to forward a relief claim under the Emergency provisions set out in the Project Agreement due to the impact of the COVID-19 pandemic on the Project's construction schedule.

Justice Koehnen's decision raises three important points parties should consider in assessing the contractual obligations in a P3 project:

1. While all parties to P3 contracts are sophisticated entities with independent legal advice, the words of the agreement need to be read with the project process in mind – namely, the "partnership" part of a P3 means that collaboration should play a role in addressing new issues and disputes.
2. Once-in-a-lifetime events like a global pandemic should not be seen as a "normal" risk allocated to a party through general risk language.
3. While the logic of deferring disputes until Substantial Completion may make sense for certain types of matters, deferring disputes about rights related to Substantial Completion itself should be dealt with as they arise.

Justice Koehnen's decision is presently under appeal. At least for the moment, however, private sector participants in the P3 market see the decision as a vindication of arguments they have been making for some time.

Background: The Case

On July 21, 2015, Crosslinx Transit Solutions General Partnership ("**Project Co**") and Ontario Infrastructure and Lands Corporation and Metrolinx (collectively, the "**Authority**") entered into a project agreement (the "**Project**

[1] 2021 ONSC 3567.

Crosslinx v. Ontario Infrastructure: Turns out the Pandemic is an Emergency...

LU #160 [2021]

Primary Topic:
III. Building Contract
Jurisdiction:
Ontario
Authors:
Julie Han,
Jason J. Annibale,
Tim Murphy,
and Ahsan Mirza
McMillan LLP

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Agreement") to design, build, finance, maintain and rehabilitate a new light rapid transit line known as the "Eglinton Crosstown LRT Project" (the "**Project**").[2] Project Co, together with its primary construction contractor, Crosslinx Transit Solutions Constructors (collectively, the "**Project Parties**"), essentially assumed the obligations under the Project Agreement for the design and construction of the Project on a fixed price and fixed schedule basis (subject to limited relief available under the Project Agreement).

In March 2020, the Province of Ontario declared a state of emergency under the *Emergency Management and Civil Protection Act*[3] as a result of the COVID-19 pandemic. In response, the Project Parties identified and proposed to the Authority a number of safety measures to mitigate the spread of the COVID-19 virus at the Project site. The Ontario Ministry of Labour subsequently issued health and safety protocols for construction sites (the "**Construction Protocols**"), many of which overlapped with the earlier proposals made by the Project Parties. The Project Parties implemented the Construction Protocols which inevitably caused delays to the Project, as none of these additional measures were contemplated in the original Project schedule.

The Project Parties sought schedule relief under the Project Agreement for the delays stemming from implementing COVID-19 safety measures (including the Construction Protocols). They accordingly requested that the Authority recognize the pandemic as an "Emergency" (as defined in the Project Agreement), and that it direct the Project Parties to implement the Construction Protocols as "additional or overriding procedures", which would permit the Project Parties to claim for a schedule extension under the Project Agreement's Variation procedure. The Authority denied the Project Parties' request for relief.

It is worthwhile to note why the Project Parties did not pursue what one might consider a more straightforward path of relief through a force majeure clause. There is a key difference between a standard force majeure clause as found in the CCDC form of construction contracts and that within the Project Agreement. The force majeure clause in the CCDC forms affords constructing parties schedule relief for a number of enumerated items and, by virtue of a basket clause, any cause beyond their control. However, the force majeure clause within the Project Agreement was limited to a finite list of events and with no basket clause. Like many project agree-

[2] A redacted version of the Eglinton Crosstown LRT Project Agreement can be found at Infrastructure Ontario's website and can be accessed here: https://www.infrastructureontario.ca/WorkArea/DownloadAsset.aspx?id=34359739088

[3] RSO 1990, c. E.9.

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ments in the pre-pandemic world, such list did not include pandemic or epidemic events, effectively barring Project Co from claiming schedule relief via the more straight forward force majeure claims process.

Entitlement to a Variation Claim

The heart of the Project Parties' claim was that the pandemic constituted an Emergency under the Project Agreement. As such, the additional safety measures (including the Construction Protocols) that the Project Parties implemented at the Project site were "additional or overriding procedures" for which schedule relief could be sought under the Variation procedure.[4]

The Authority did not dispute that the pandemic constituted an Emergency under the Project Agreement. However, the Authority argued that it did not *require* Project Co to comply with "additional or overriding procedures" which was essential to the Project Parties' entitlement for a Variation. As this element was missing, the Authority claimed that no Variation could be sought. The Authority also argued that the Construction Protocols were "Applicable Laws" (as defined in the Project Agreement) and the Project Parties are required to comply in all respects with such laws. Therefore, any direction that the Authority may have made requiring Project Co to comply with the Construction Protocols was simply a reiteration of Project Co's existing obligations under the Project Agreement.

The Court rejected the Authority's arguments and, on the facts, determined that

i) the COVID-19 pandemic was an Emergency;

ii) the Authority did require Project Co to comply with the Construction Protocols; and

iii) such Construction Protocols were "additional or overriding procedures" and not Applicable Laws.

Accordingly, the Court held that the threshold for the Variation procedure was triggered, permitting the Project Parties to claim for an extension of the Substantial Completion Date.

The Court's decision rested partly on the finding that the Construction Protocols were not Applicable Laws. While not discussed in Justice Koehnen's reasons, the ultimate outcome of the case may not have differed even if the

[1] See Section 62.1 of the Project Agreement.

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Construction Protocols were determined to be "Applicable Laws" as understood under the Project Agreement. While the Project Agreement requires Project Co to comply at all times with Applicable Laws, this assumption of risk does not preclude Project Co from claiming relief through other provisions of the Project Agreement, where new Applicable Laws or changes to Applicable Laws are a direct consequence of an underlying Emergency or supervening event.

Who Takes Health and Safety Risks?

Justice Koehnen discussed at length the Authority's argument that the Project Agreement allocates all health and safety risk to the private partner including, by extension, any Emergency. In other words, schedule delays or cost overruns as a result of Project Co's compliance with health and safety laws are risks borne by the Project Parties. However, in rejecting the Authority's argument, His Honour noted that a narrow and "stark" reading of the Project Agreement's provisions was not reasonable; the entitlement to seek relief for delays and the interpretation of risk allocation between the parties must be read in light of the purpose of the contract. The broad definition of Emergency and the existence of mechanisms in the Project Agreement to allow extensions to the Substantial Completion Date as a result of Emergencies do not support the argument that the private partner is expected to take on all health and safety risk. In fact, the inclusion of these provisions and mechanisms to adjust project schedule and price as a result of an Emergency suggests that there are certain health and safety matters that are not intended to be passed fully to the private sector.

The Emergency provisions in Section 62 of the Project Agreement and its related defined terms are not unique to the Project; they appear in most, if not all, recent forms of project agreements involving Metrolinx and Infrastructure Ontario. Thus, the finite list of force majeure events in similar project agreements may not be so fixed after all. The definition of "Emergency" in the Project Agreement is broad and includes "any situation, event, occurrence or circumstances that constitutes or may constitute a hazard to or jeopardizes or may jeopardize or pose a threat to health and safety of any persons."[5] It is conceivable that other "force majeure-like" events could fall within this definition. It then stands to reason that upon the occurrence of an event that threatens health and safety, and under the right circumstances, the private partner can rely on the Emergency provisions to claim relief for schedule delays, notwithstanding that such event may not be an express "force majeure" event as set out in the project agreement.

[5] Section 1.178 of Schedule 1 (Definitions and Interpretation) to the Project Agreement.

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Dispute Resolution Procedure: No Stay of Proceedings and Waiver of Privilege

The Authority had also brought a preliminary motion for a stay of proceedings, on two grounds:

i) that the Project Agreement expressly provides for a postponement of all proceedings until Substantial Completion; and

ii) that Project Parties failed to comply with preconditions prescribed in the Project Agreement's Dispute Resolution Procedure to advancing the application.

The motion for a stay was dismissed by the Court.

On the first argument, the Court pointed to other provisions of the Project Agreement which makes an exception to the general postponement of proceedings rule, in each case where a delay of claims would cause irreparable harm to one of the parties. The Court expressly noted that delaying a dispute related to schedule relief to the Substantial Completion Date would cause irreparable harm to the party claiming such relief.

In addition to the tangible adverse consequences identified in his decision (including payment of liquidated damages, loss of financing, termination of the contract, insolvency and loss of reputation), Justice Koehnen also noted that irreparable harm would come to Project Co through the loss of its contractual rights. In other words, postponing disputes about the Substantial Completion Date to Substantial Completion cuts across the very mechanisms within the Project Agreement that are intended to be used for schedule extensions. A dispute regarding the Substantial Completion Date may make achievement of Substantial Completion impossible before termination of the contract.[6] In such cases, the parties may be postponing a matter to a date that will never arrive – true irreparable harm.

In respect of its second argument, the Authority argued that the Project Parties were not entitled to advance the dispute to litigation proceedings because they failed to participate in the prescribed preceding step of negotiations with Senior Officers. In rejecting the Authority's argument for a stay, the Court noted that the Authority refused to attend a negotiation with Senior Officers until the Project Parties provided the Authority with detailed information, which the Authority claimed it required in order to adequately assess Project Co's claims. Moreover, the Court also considered evidence of an offer to settle that the Authority had made to Project Co. With such an

[6] All forms of project agreements in Ontario prescribe a "Longstop Date" – a date by which Substantial Completion must be achieved before the project company is in an event of default.

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offer to settle having been made, the Authority's position that it required additional information to consider Project Co's claims could not be accepted.

The Authority argued that the settlement offer was subject to settlement privilege and should not have been produced. While in the normal course such offers to settle are protected by a settlement privilege, implicit waiver of privilege is possible, rooted in the underlying principle of fairness and consistency. In this case, the Court held that the Authority, regardless of its intent, had implicitly waived such privilege by voluntarily putting its state of mind at issue: "By taking the position that they had inadequate information to proceed to Senior Officer discussions, the respondents put their state of mind at issue."[7] As such, Project Co was permitted to test the Authority's position of the sufficiency of the documents by admitting the offer to settle into evidence.

The Court also noted that excessive requests for document production could be used to create roadblocks to what ought to be a speedy advancement of the dispute under the Project Agreement. Justice Koehnen suggested that a preferable approach to document requests would be to ask the Independent Certifier to order further documentation or to argue before the Independent Certifier that the Project Parties' disclosed information was insufficient.[8]

[7] Supra Note 1 at 32.

[8] Under the Dispute Resolution Procedure, the dispute would have been determined by the Independent Certifier following unsuccessful resolution of the dispute by the Senior Officers.

Contact the Legal Update Committee:

c/o **Brendan D. Bowles**
Glaholt Bowles LLP
Construction Lawyers
141 Adelaide St W, #800
Toronto, Ontario, M5H 3L5
Phone: (416) 368-8280
Fax: (416) 368-3467
E-mail: bb@glaholt.com

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Nicholas J. Dasios

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