Canadian College of Construction Lawyers

LEGAL UPDATE

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L.U. #161

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INSIDE THIS ISSUE:

Brendan D. Bowles

Program Report

CCCL Virtual Mid-Winter Seminar, January 29, 2022

The Canadian College of Construction Lawyers has always produced first rate legal education programs. One of the "silver linings" to come out of the pandemic has been the increased adoption of technology in our profession, which has allowed superior content to be presented virtually to Collegians outside of the annual conference setting. While we are all excited by the prospect of seeing each other in person again in New Brunswick this May, especially after a two-year hiatus, the ability to allow for a national education platform through virtual seminars at other times of the year is an innovation which should serve the College well for years to come.

Program Chairs, Nicolas Gagnon and Stephanie Hickman are to be congratulated for an excellent program held on Saturday, January 29, 2022.

The program was presented in two parts. For the first part, we were privileged to have an English barrister, Ms. Chantal-Aimée Doerries, Q.C., of Atkin Chambers, present to us on "Recent Developments in International Arbitration." Ms. Doerries gave a very informative talk and highlighted important trends in this important practice area that is becoming increasingly relevant to the practices of Canadian construction lawyers. Ms. Doerries summarized recent English case law of general interest, including: (1) Secretariat Consulting Pte Ltd, (2) Secretariat International UK Ltd, (3) Secretariat Advisors LLC v A Company [2021] EWCA Civ 6 which involved allegations of conflict of interest arising from an expert services practice who accepted appointments from different parties in related arbitrations; and *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, a decision from the Supreme Court of the United Kingdom involving an arbitrator's duty to disclose conflicts and the parties' ability to waive this duty.

The second half consisted of a panel discussion by Rocco Sebastiano and Chris Armstrong and was moderated by Sandra Astolfo. The panel discussion was entitled: "The repercussions of COVID for Canada's Construction Industry and the Legal Ramifications in Respect of Contract Formation and Claims." While the topic has been widely discussed it remains timely and no doubt will for some time as projects continue to deal with the impacts of Covid-related restrictions and employee absences. *Force majeure* continues to be a significant concern, and indeed Rocco remarked that in his 30

Program Report
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years of practice he has seen an unprecedented level of focus brought to this issue in the last 6 to 8 months. Both speakers and moderator did an excellent job of thoroughly reviewing current legal and business challenges to be aware of when advising clients, and helpfully placed these issues in the broader context, including managing not just on-site productivity issues but also supply-side challenges engendered by a global pandemic.

CANADA

PRACTICAL LESSONS TO BE LEARNED FROM THE DECISION OF THE SUPREME COURT OF CANADA IN THE MATTER OF *6362222 CANADA INC.* C. *PRELCO INC.*, 2021 SCC 39

6362222 Canada Inc.
c. *Prelco Inc.*,
2021 SCC 39

LU #161 [2022]

Primary Topic:
I. General
Secondary Topic:
VII. Breach of Terms of Contract
Jurisdiction:
Quebec
Authors:
Stéphane Richer and Patrice Morin, Borden Ladner Gervais LLP

QUEBEC

Stephane Richer

Patrice Morin

A recent decision of the Supreme Court of Canada dealt with the enforceability of limitation of liability clauses under the *Civil Code of Quebec*. Given the prevalence of these clauses in construction contracts, the decision is of general interest to lawyers advising construction clients, particularly in the Province of Quebec.

Facts

6362222 Canada inc. ("Createch") is a consulting firm specialized in the implementation of integrated management systems. Prelco inc. is a manufacturing company that makes and transforms flat glass. In 2008, Prelco required Createch's advice regarding its computer systems. Createch prepared a contract under which it was to supply software and professional services in order to implement an integrated management system at Prelco. The contract was concluded without Prelco requesting any change to its general conditions, which included a provision (cl. 7,) according to which Createch's liability to Prelco for damages that could be attributed to any cause whatsoever would be limited to amounts paid to Createch under the contract. The clause further provided that Createch's liability for the delivery of unsatisfactory services would be limited to the amount of fees paid in relation to these services and that Createch could not be held liable for damages resulting from the loss of data, profits or revenue or from the use of products or any other special, consequential or indirect damages.

When the system was implemented, numerous problems arose, and Prelco decided to terminate its contractual relationship with Createch. Another firm was then engaged to make the integrated management system functional. Prelco brought an action against Createch for $6,246,648.94 in damages for the reimbursement of an overpayment, costs for restoring the system, claims from customers, and loss of profits. Createch in turn filed a cross-application for $331,134.42, the unpaid balance for the project.

The Superior Court granted Prelco's application and ordered Createch to pay Prelco $2,203,400 in damages. It also granted Createch's cross-application. It concluded that cl. 7 of the contract was inoperative based on the doctrine of breach of a fundamental obligation, according to which an exoneration clause or limitation of liability clause is without effect if it relates to the very essence of an obligation. The court found that Createch, having misunderstood the scale and complexity of Prelco's operations, had committed a fault in its initial choice as to the approach to take in implementing the management system and had as a result breached its fundamental obligation. The Court of Appeal dismissed Createch's appeal, which concerned the limitation of liability clause, and Prelco's cross-appeal, which concerned the calculation of damages and the amount representing lost sales.

6362222 Canada Inc.
c. Prelco Inc.,
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Summary of the Supreme Court Decision

The Court unanimously allowed the appeal of *6362222 Canada inc.* ("**Createch**"), ruling that the trial judge and the Quebec Court of Appeal erred in law in finding that the non-liability clause in the contract between Createch and Prelco inc. ("**Prelco**") was inoperative on the basis of the doctrine of breach of a fundamental obligation. The Court agreed with Createch that the clause was valid and did limit Createch's liability.

The Court found the clause valid because neither of the possible legal basis of the doctrine of breach of a fundamental obligation, namely: (a) public order; and (b) the notion of cause of the obligation - applied in this case.

(a) Public Order

Non-liability clauses are valid in principle, as implicitly recognized by art. 1474 and 1475 of the *Civil Code of Quebec* ("***C.C.Q.***"), based on the general principles of autonomy of the will and its corollary, freedom of contract. While the validity of non-liability clauses is limited by legislative and judicial public order in specific contexts, there is no rule of general application that would neutralize a non-liability clause affecting a fundamental obligation, including in a contract by mutual agreement.

With respect to legislative public order, clauses like the one at issue in this case are permitted by the *C.C.Q.*, and none of the circumstances in which the legislature has provided that a non-liability clause would be invalid apply.

Notably, art. 1437 *C.C.Q.* expressly recognizes the application of the doctrine of breach of a fundamental obligation where there is an abusive contract clause but limits it to consumer contracts and contracts of adhesion, which are characterized by an imbalance between the parties. The validity of a non-liability clause is also open to challenge in other cases specified by the legislature in relation to nominate contracts, but in all these cases, the purpose of the limit is also to protect parties who are weak or at a disadvantage economically, and not to implement a rule of general application.

Therefore, if an impugned clause has been freely negotiated and is compatible with the other constraints provided for in the *C.C.Q.* (including those set out in art. 1474 and 1475, which prohibit non-liability clauses where there is gross or intentional fault, and for bodily and moral injury), it cannot be excluded based on legislative public order.

As to judicial public order (i.e. the evolution of public order through judicial action), there is every reason to believe that the scheme of the *C.C.Q.* excludes such an innovation for the non-liability clause at issue here. Every-

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thing suggests that the legislature deliberately chose not to include a rule of public order of general application that would neutralize a clause affecting a fundamental obligation, preferring to leave it to sophisticated parties to themselves manage the risks of non-performance.

(b) Cause of the Obligation

As for the second legal basis for the doctrine of breach of a fundamental obligation, total absence of cause of the obligation, it stems from the requirement, spoken to in art. 1371 *C.C.Q.*, to the effect that it is of the essence of an obligation arising out of a juridical act that there be a cause which justifies its existence. In a contract of reciprocal obligations, the cause of the obligation (or "objective" cause) is the performance of the correlative obligation.

Some contract clauses that deprive an obligation of its cause within the meaning of art. 1371 *C.C.Q.* may affect the validity of the obligation, because the reciprocal nature of the contractual relationship is called into question. This is true, for example, of certain no obligation clauses that exclude all undertakings that would normally be owed by the debtor, with the result that the creditor's obligations lack reciprocal benefit.

Regarding the validity of a non-liability clause where there is a breach of a fundamental obligation, two competing views are advanced by authors. The first is that a non-liability clause cannot deprive the correlative obligation of its cause, as a debtor's obligation does not cease to exist simply because a clause limits or excludes his or her liability in the event of non-performance. There are other authors who maintain that a non-liability clause that is akin to a no claims clause, one that deprives the creditor of the obligation of any remedy to sanction non-performance, can in fact deprive an obligation of its cause. For some authors, the objective cause concept should permit a clause to be neutralized not only if the clause negates the cause, but also in cases in which the reciprocal obligation is so trivial that it can be considered to be non-existent.

The Court was of the view that this disagreement among the authors was not in issue in this case, and therefore refrained from resolving it. Indeed, this was not a situation in which the reciprocal obligation was insignificant, and even less one in which it was non-existent. The sanction for non-performance of the fundamental obligation remained, and it could not be said that the obligation was deprived of its objective cause. The Court therefore felt that it was more prudent to leave this question for another day.

Practical lessons to be learned from the Decision

There are important, practical lessons to be learned from the decision.

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In all likelihood, a non-liability clause will be found valid and applicable, even in a case of breach of a fundamental obligation of the contract, if:

- ⇒ the contract is by mutual agreement rather than of adhesion, meaning that the clause and the other essential stipulations of the contract have been freely negotiated, not imposed or drawn up by one of the parties and not negotiable (1379 and 1437 *C.C.Q.*);
- ⇒ the contract is not a consumer contract[1] (1384 and 1437 *C.C.Q.*, s. 10 of the *Consumer Protection Act*);
- ⇒ the clause does not exclude or limit the liability for material injury caused to another through an intentional or gross fault[2] (1474 *C.C.Q.*);
- ⇒ the clause does not exclude or limit the liability for bodily or moral injury caused to another (1474 *C.C.Q.*);
- ⇒ the clause is not subject to any other rules specific to certain nominate contracts, such as a sale;[3]
- ⇒ the clause only *limits* liability ("limitation of liability clause"), it does not *exclude* all liability ("exoneration clause"), all remedies ("no claims clause") or all obligations that would normally be owed by the debtor, with the result that the creditor's obligations lack reciprocal benefit ("no obligation clause");
- ⇒ the compensation ceiling provided for in the limitation of liability clause is not "insignificant".

For the sake of clarity, we add that the judgment does not say that exoneration clauses (or limitation of liability clauses providing for an "insignificant"

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[1] A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection, whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property or services as part of an enterprise which he carries on (1384 *C.C.Q.*)

[2] A gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence (1474 *C.C.Q.*)

[3] See e.g.: Lease in the residential context (1863, 1893 and 1900 para. 1 *C.C.Q.*); sale (1732 and 1733 *C.C.Q.*); carriage (2070 *C.C.Q.*); employment (2092 *C.C.Q.*); or deposit with an innkeeper (2298 *C.C.Q.*).

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QUEBEC

reparation) or even no claims clauses *are* invalid or inapplicable in respect of a breach of a fundamental obligation.

However, as the Court has refrained from deciding this issue, such clauses remain more vulnerable to a challenge. It would therefore be more prudent to rely on limitation of liability clauses that do not cap liability to an insignificant amount.

As to what could be found "insignificant", the Decision offers very few indicia, if any, beside the fact that the application of the clause at issue was held *not to* amount to an insignificant sanction. However, the Court did point out that "the clause is strict and that it significantly limits the sanctions that can be imposed", which suggests that a stricter clause might potentially be at risk.

Example of a valid limitation of liability clause

As noted above, the following limitation of liability clause, which is the clause at issue in the Decision, has been found valid and applicable, mainly because it only limits liability and the compensation ceiling provided for in it is not "insignificant":

> [TRANSLATION] Createch's liability to the client for damages that can be attributed to any cause whatsoever, regardless of the nature of the action, whether provided for in the agreement or delictual, shall be limited to amounts paid to Createch under the Agreement unless such damages result from gross negligence or wilful misconduct on Createch's part. If such damages result from the delivery of unsatisfactory services, Createch's liability shall be limited to the amount of any fees paid in relation to the said unsatisfactory services.
>
> Createch may not be held liable for any damages resulting from the loss of data, profits or revenue, or from the use of products, or for any other special, consequential or indirect damages relating to services and/or material provided pursuant to the Agreement, unless such damages result from gross negligence or wilful misconduct on Createch's part.

Indeed, the first paragraph of this clause, in case of damages that can be attributed to any cause whatsoever, provides for a potential reparation equal to amounts paid under the contract. In case of damages resulting from the delivery of unsatisfactory services, the clause provides for a potential reparation equal to the amount of any fees paid in relation to the said unsatisfactory services. These potential sanctions are not derisory or insignificant.

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QUEBEC

In fact, this clause allowed Prelco both to keep the integrated management system and to obtain damages for unsatisfactory services, as well as to be compensated for necessary costs for specific performance by replacement (i.e. done by another firm).

Given the Decision, similar clauses included in non-consumer contracts by mutual agreement are likely to be found valid and applicable. We note however that such clauses might be more vulnerable in circumstances where paying damages is the only remaining way for the debtor's obligations to be performed. This might be the case where specific performance (including by replacement) would not be a realistic option, for instance because the contract had to be performed within a strict deadline which has passed, thereby making performance pointless. In such contracts, it may be preferable to avoid excluding the payment of damages for certain types of injury and to favour clauses that would allow reparation to be obtained for those injuries but would limit the amount of the reparation. Put another way, while clauses similar to the one at issue in the Decision should generally be found valid and applicable in commercial contracts by mutual agreement, some caution should be exercised before including them in contracts set in different contexts, as the Court's reasoning may not be entirely applicable.

Book Review
On Cold Iron, A Story of Hubris and the 1907 Quebec Bridge Collapse

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On Cold Iron, A Story of Hubris and the 1907 Quebec Bridge Collapse

LU #161 [2022]

Primary Topic:
XI. Engineers
Jurisdiction:
Quebec
Author:
Andrew Wallace,
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QUEBEC

Andrew Wallace

"On Cold Iron, A Story of Hubris and the 1907 Quebec Bridge Collapse", written by Dan Levert, tells the story of one of the worst industrial accidents in Canadian history. When the bridge collapsed just 15 minutes before quitting time on August 29th, 76 of the 86 men working on the southern span lost their lives. The project was an exceptionally ambitious endeavor for its time. The bridge was, and remains to this day, the longest clear span cantilever structural steel bridge in the world. *On Cold Iron* also recounts how the "Ritual of the Calling of an Engineer", or what is commonly known as the "Iron Ring Ceremony" came to be. The Ceremony and its symbol, the Iron Ring, were conceived by none other than Rudyard Kipling in 1923. During the Ceremony, the young engineer takes a solemn Obligation to high standards, ethics, and humility. An Iron Ring is placed on the small finger of their working hand to remind them of their Obligation. The Ceremony and the Ring are uniquely Canadian. There is a myth that prevails that the original Iron Rings were made with steel from the collapsed Quebec Bridge.

On Cold Iron is a tremendously well researched and thought-provoking work. At its core, the story involves a failure of engineers to heed the warnings from the workmen and the structure itself, and to exercise proper care. Rooted in this tragedy is the lesson of humility. Hubris on the part of the senior engineers prevented them from admitting that their design was fundamentally flawed. Kipling's Ritual and the Iron Ring have served as important reminders to generations of Canadian engineers of the need to acknowledge one's own human frailty, to welcome criticism and to remain humble.

Most of the book tracks through the story of the project, the collapse, and the subsequent inquiries assessing the causes for the collapse. Dan Levert's detailed telling of the entire project story, including the organizational culture, provides a window into the plethora of issues and decisions that contributed towards the tragedy. Importantly, many of these factors are also found in the root causes of today's troubled construction projects. As a result, through the lens of a tragedy that occurred over a century ago, Dan provides lessons that apply to modern engineers, construction managers, lawyers, and many others.

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

LU #161 [2022]

Primary Topic:
XII. Tendering
Jurisdiction:
New Brunswick
Authors:
James D. MacNeil and Katie Short, Boyne Clarke LLP

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2021 nbqb 56

NEW BRUNSWICK

James MacNeil

Katie Short

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

Introduction

On March 12 of 2021, the Trial Division of the New Brunswick Court of Queen's Bench delivered what was, likely, the fastest decision on an application for judicial review in its history. The application had only been heard two days earlier on March 10, 2021, and the first document on the file, a Notice of Preliminary Motion, had only been electronically filed on March 1, 2021, meaning the entire matter was disposed of within two weeks.

The case itself turned on an in-depth interpretation of various New Brunswick legislation, tender documents, and ultimately, whether brick and mortar offices are still required to establish that an agent for a corporation is "resident" in a certain jurisdiction. Justice Hugh H. McLellan, in the end, set out a comprehensive decision finding that a "resident agent" does not need a physical office in any specific area to be considered an agent. His decision and the speedy process for this judicial review ultimately both speak volumes about the movement towards remote work and remote court proceedings post the COVID-19 pandemic.

Facts

The parties involved in this litigation were the Province of New Brunswick (the "Province"), Pomerleau Inc. ("Pomerleau"), and AON Reed Stenhouse Inc. ("AON"). On November 27, 2020, the Province issued a public tender (the "Tender") for bids related to the completion of a major renovation to the Dr. Everett Chalmers Regional Hospital in Fredericton. The tender closed and bids were due on February 19, 2021. The Province received bids from three contractors for the project, including one from Pomerleau. Pomerleau's bid, at $64,775,799.00, was the lowest, and logically would have been selected for the tender.

However, the Tender documents that had been issued by the Province and section 11(1) of the *General Regulation,* NB Reg 82-109 (made under the *Crown Construction Contracts Act,* RSNB 2014, c 105*,)* both required that a bid bond be attached to each bid. This bid bond had to be issued by a New Brunswick "Resident Agent" of an insurance company licensed in New Brunswick. The bid bond attached to Pomerleau's bid was issued from AON and was accompanied by a letter. This letter from AON, unfortunately for Pomerleau, had a Halifax address listed at the bottom. The Province's further investigation of AON as a company demonstrated that though AON was fully registered as an extra provincial corporation doing business in New Brunswick, it did not operate a physical office anywhere in New Brunswick.

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

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NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

The Province ultimately rejected Pomerleau's tender bid on February 23, 2021. They claimed Pomerleau had provided a noncompliant bid bond, based on the assertion that AON's letter accompanying the requisite bond was not from a New Brunswick "resident agent" as required in the statute and regulations. AON was not a resident agent because it "does not operate an insurance office in New Brunswick," using "office" in the sense of a physical space staffed with its own employees. AON's letter was therefore found to be invalid.

This interpretation of the meaning of "resident agent" was disputed as incorrect by Pomerleau. They responded to the Province with a letter confirming that AON was registered to carry on business in New Brunswick and had a registered address for service within the province. They maintained that the bid was compliant with all the requirements of the tender. After the Province's insistence that AON was not a resident agent, Pomerleau sought declaratory or injunctive relief from the Courts to reverse the Province's decision. Pomerleau electronically filed a Preliminary Motion to this effect on March 1, 2021.

Pomerleau's Preliminary Motion was heard on March 4th, 2021. At the hearing of the motion, the Court suggested that the motion be adjourned and to allow for the Application for Judicial Review be filed. The application for judicial review was to be heard on an expedited basis so that the Court could properly address the issue of the interpretation of "resident agent" before any contract was awarded by the Province. Under the Tender, the submitted bids were only valid until the looming deadline of March 12, 2021.

An Application for Judicial Review was filed on March 8, 2021. Pomerleau asked the Court to overrule the Province's decision holding its bid as "non-compliant," and stated that it would have been awarded the contract, if not for the incorrect interpretation of "resident agent" by the Province's representative. The decision-maker's interpretation and his decision based on that interpretation was the issue to be reviewed.

Impact of COVID-19

The judicial review hearing proceeded only nine days after the first filing, on March 10, 2021. By the day of the hearing, the New Brunswick Courts had weathered almost a full year of experience continually adapting to the COVID-19 pandemic. The Court system had pivoted quickly after the initial onset of the virus, and by this time had essentially fully adapted to the new distancing and technological requirements for health and safety of participants. Hearings were being conducted again with the flexibility and resiliency required by the pandemic.

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NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

However, this is not to say that the hearing itself was not unorthodox. Counsel for Pomerleau appeared virtually from Halifax, Nova Scotia. Counsel for both the Province and AON appeared in-person with Justice Hugh H. McLellan and Court administration staff – in a meeting room inside the Fredericton Convention Centre instead of at the Justice Building in Fredericton. The Justice Building was closed, and an ersatz Courtroom had been set up in the Convention Centre.

The hybrid virtual-and-in-person submissions and relocation of the physical courtroom proved no hinderance at all. The matter progressed very quickly, and a decision was passed down only two days after the hearing.

Decision

The decision was delivered on March 12, 2021. Pomerleau was successful in their judicial review, and Justice McLellan found AON did not have to operate a physical office in the Province's jurisdiction to be considered a "resident agent."

On this issue, his decision quoted *Nova Scotia Power Inc v AMCI Export Corp,* 2005 NSCA 154 where the Court of Appeal summarized residency requirements for corporations:

> [24] In *Castel & Walker's Canadian Conflict of Laws,* Sixth Edition, Volume 2, by Janet Walker and Jean-Gabriel Castel, the authors state:
>
> > A corporation may have more than one residence for different purposes, as for instance, for liability for taxation, liability to suit, security for costs, and enemy character. Each case depends upon its own facts and on the purpose and wording of the relevant statute or rule.
>
> [25] I would consider the general proposition that a company can have more than one residence to be settled law.

He found that the Provincial official who had reviewed the bid erred in his interpretation of the language "New Brunswick resident agent" in the Tender's Instructions to Bidders. The "obvious purpose" of the requirement for the agent to be resident in New Brunswick was so that the agent could be held liable in New Brunswick (*Pomerleau v New Brunswick,* 2021 NBQB 056 ["*Pomerleau*"] at para 9). However, based on the evidence, AON had shown:

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2021 nbqb 56

NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

- They were incorporated under Canadian law,
- They were registered in New Brunswick as an extra-provincial corporation,
- They had an agent for service in Fredericton, and
- They were carrying on business through agents who lived and worked in New Brunswick.

Justice McLellan found that after review of this evidence, any concerns about legal liability were unfounded. He said the official who interpreted "resident agent" did not "consider a pertinent aspect of its … context and purpose," when considering what "residence" meant for legal proceedings in the context of *Vavilov.* He also noted that the subsequent interpretation ignored basic principles of corporate law.

The insurance letter from AON that had been sent to the Province was deemed valid for any legal liability related to the bid, despite the Nova Scotia address (*Pomerleau* at paras 10-11). There was no need for AON to have a brick-and-mortar location in New Brunswick for it to be considered a resident agent. The Pomerleau bid was compliant, and Justice McLellan concluded that the Province's interpretation of "resident agent" was unreasonable.

The new judicial review

However, this error on the part of the Province's official who incorrectly interpreted the term "resident agent" was not enough for the Court to simply overturn the Province's decision on judicial review. The standard process for judicial review has been overhauled in recent years after the decision of *Canada (Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ["*Vavilov*"] and its companion case, *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. For too long, the judicial review process and the applicable standards of review that were set out in *Dunsmuir v New Brunswick,* 2008 SCC 9 required clarification for practitioners and academics alike. *Vavilov* built on *Dunsmuir* and provided further and much-needed guidance.

Based on these more recent cases, deeming a decision from an administrative decision-maker incorrect from the perspective of the reviewing Court is insufficient for that ruling to be overturned on judicial review. The starting presumption is now that an administrative decision in question must meet the standard of reasonableness for it to be upheld (*Vavilov* at para 16). The standard of review will only change from reasonableness in the following situations:

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1. Where the legislature has indicated that it intends a different standard or set of standards to apply; and

2. Where the rule of law requires that the standard of correctness be applied. Three scenarios call for a standard of correctness based on the rule of law:

    a. Constitutional questions,

    b. General questions of law of central importance to the legal system as a whole; and

    c. Questions regarding the jurisdictional boundaries between two or more administrative bodies.

    (*Vavilov* at para 17)

There was no applicable standard of review set out in the language of the *Crown Construction Contracts Act,* and the rule of law did not require the application of a standard of correctness. Therefore, and since the correct statutory interpretation of the term "resident agent" under the *Act* is a question of law, a reasonableness standard of review was to be applied. In his decision, Justice McLellan quoted *Vavilov* at paras 13-14 and further elaborated on the threshold that is to be met for a reasonableness standard of review:

> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubberstamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.JA.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *UTL.J* 458, at pp. 467-70.

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

LU #161 [2022]

Primary Topic:
XII. Tendering
Jurisdiction:
New Brunswick
Authors:
James D. MacNeil and Katie Short, Boyne Clarke LLP

CanLII Reference:
2021 nbqb 56

NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

This means that when a judge is presented with an application for judicial review, they cannot overturn a government official's decision unless it is unreasonable. If the Court believes the decision was wrong, the analysis does not permit the Court to simply substitute the decision it may have made if in the shoes of the decision-maker. An incorrect decision will only be overturned if it was unreasonable after consideration of all the circumstances at hand. This is out of a more generally recognized respect for the "expertise" of administrative decision-makers which is inherent in the context of their specialized roles (*Vavilov* at para 27). The Supreme Court elaborated on this further in *Vavilov* at paragraph 83:

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

The Court in *Vavilov* outlined several elements which "will generally be relevant in evaluating whether a given decision is reasonable" when the reviewing courts are assessing the reasoning process and outcome in the courts below. These include (but are not limited to):

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

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CanLII Reference:
2021 nbqb 56

NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

- The governing statutory scheme,
- Other relevant statutory or common law,
- The principles of statutory interpretation,
- The evidence before the decision-maker and facts of which the decision-maker and facts of which the decision-maker may take notice,
- The submissions of the parties,
- The past practices and decisions of the administrative body, and
- The potential impact of the decision on the individual to whom it applies.

(*Vavilov* at para 106)

Reasonableness of the decision

As discussed above, Justice McLellan felt that the interpretation of "resident agent" had undermined the purpose of the *Crown Construction Contracts Act (Pomerleau* at para 22) based on the half-hearted attempt at securing liability for an agent by requiring a physical presence in New Brunswick. Liability did not turn on a brick-and-mortar establishment.

Further, it was clear that Justice McLellan felt the past practices and decisions of the administrative body, especially, pointed to the decision having been unreasonable. The official for the Province had given evidence that the Department of Transportation and Infrastructure had chosen to freeze tenders pending the outcome of the application for judicial review. Unless the Court directed otherwise, the Department intended to instruct all contractors that they were dealing with on the implications of their specific interpretation of the requirement of a New Brunswick resident agent.

Justice McLellan noted that the interpretation of the requirement of a New Brunswick resident agent was inconsistent with the Department's "longstanding practices or established internal authority." AON filed evidence that the Province had accepted multiple similar letters from them regarding other bid bonds on other New Brunswick projects. The official who decided AON's letter was not valid acknowledged that a different tender on a different project with a similar AON letter was accepted as compliant by the Province on the same day Pomerleau's letter from AON was rejected. Also, the official who made the decision had indicated that, pending the outcome of the judicial review, a memorandum would be circulated to all con-

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

LU #161 [2022]

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XII. Tendering
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James D. MacNeil and Katie Short, Boyne Clarke LLP

CanLII Reference:
2021 nbqb 56

NEW BRUNSWICK

tractors indicating the implications of their new interpretation. This plan essentially meant that he:

> … [admitted] that the outcome of his interpretation of 'resident agent':
>
> a) is inconsistent with past practice,
>
> b) has disrupted the *Crown Construction Act* tendering process,
>
> c) resulted in a freeze of tenders for weeks, and
>
> d) needs to be explained in a "memorandum to all contractors."
>
> (*Pomerleau* at para 21).

Justice McLellan suggested that this departure from the norm required the Department to satisfactorily explain the reasoning behind the change. Where they failed to do so, the decision was found to be unreasonable (*Vavilov* at para 131) based on a review of all the evidence.

Conclusion

Justice McLellan's decision was never appealed by the Province and there was no further action in the proceedings. Afterwards, and for other unrelated reasons, Pomerleau still did not get the job – even with a tender-compliant letter.

The entire court proceeding began and ended inside two weeks. In Canada's court system, such a short timeline is essentially unheard of. We have no documentary evidence to prove that this was the shortest judicial review in the history of New Brunswick's Court, but it must be among the shortest based on typical litigation timelines. Two-day turnarounds and two-week dispositions are unheard of. The case shows that there is no reason that things cannot move expeditiously when necessary and still be done well. Justice McLellan wrote a thoughtful and thorough decision disposing of the dispute fully for all parties without sacrificing a minute of time.

Further, the facts of the case and the decision have both shown us that the virtual and long-distance world is a fact of life – and here to stay in the long-term. That Justice McLellan found a brick-and-mortar presence in a certain jurisdiction is not necessary for an agent to be deemed a "resident agent" has significant implications for the new remote work world in which we are living. Corporations, their employees, and their agents can be far more intangible (and virtual) than ever before without repercussions to their business dealings.

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

LU #161 [2022]

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CanLII Reference:
2021 nbqb 56

NEW BRUNSWICK

Judicial review on fast-forward: "Resident agents" and physical office requirements in a remote world

Ironically, the Court did not even need its own brick-and-mortar location to run effectively. The hearing was held in an impromptu manner in a Convention Centre and the decision was made quickly and seamlessly with virtual submissions from over 400 km away. These factors emphasize that the Courts must continue to be adaptable to these types of hybrid arrangements for the benefit of all parties involved, as they were in this case. In the future, could such a quick and flexible turn-around be an aspirational pattern for the Courts, instead of a one-off? As parties will undoubtedly continue to navigate virtual hearings and long-distance disputes, it will remain to be seen.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.[1]

The statutory trust is a powerful remedy. A recent Ontario Superior Court of Justice decision affirms that people who own a construction business or project need to be aware that engaging in, or even allowing, the improper handling of trust funds can result in a personal judgment against them that survives bankruptcy. In this case, among other things, trust monies had been used to purchase Ottawa Senators' seasons tickets. Perhaps not surprisingly, this was ruled to be an improper use of trust funds and was one of several transactions the individual had engaged in which amounted to not only a breach of trust, but a breach of fiduciary duty sufficient such that the personal defendant was not excused by a discharge from bankruptcy.

This case deals with whether a default judgment obtained by the Plaintiff for breach of contract and breach of trust under the *Construction Act*[2], specifically the finding of breach of trust against the individual Defendant pursuant to s.13 of the *Construction Act* survived his bankruptcy pursuant to section 178(1)(d) of the *Bankruptcy and Insolvency Act*.[3] The Courts have consistently held as was noted in *Matthews Equipment Limited v. Yalda Contracting Inc.,* 2021 ONSC 1821 that "a finding of liability for breach of trust under the *Construction Act* can fit within s.178(1)(d) of the *Bankruptcy and Insolvency Act* but only if the breach was not the result of 'simple inadvertence, negligence or incompetence'."[4] In *Matthews,* the Court was not prepared on a motion for default judgment to make a declaratory order that the default judgment survived bankruptcy in advance of an actual defendant declaring bankruptcy. The Court in *Matthews* stated that "the issue of whether the defendants' breach of trust constitutes fraud or misappropriation for the purpose of s.178(1) of the *Bankruptcy and Insolvency Act* should be adjudicated on a proper record if and when the issue arises during bankruptcy or enforcement proceedings."[5] In *Yanic*, the Court was dealing with this very issue where the individual defendant who was noted in default had declared bankruptcy and the Plaintiff was looking to have the Court declare that the Default Judgment survived the individual's bankruptcy pursuant to section 178(1)(d) of the *BIA*. For the reasons as detailed herein, the Court held in *Yanic* that the Default Judgment against the individual Defendant did in fact survive his bankruptcy pursuant to section 178(1)(d) of the *BIA*.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Maria Ruberto and Neeta Sandhu, Pallett Valo LLP

CanLii Reference:
2021 onsc 6633

ONTARIO

Maria Ruberto

Neeta Sandhu

[1] *Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd., et al.,* 2021 ONSV 6633 (*"Yanic"*).

[2] *Construction Act*, R.S.O. 1990, c. C30, as it read on June 29, 2018 ("*Construction Act"*).

[3] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("*BIA*").

[4] *Matthews Equipment Limited v. Yalda Contracting Inc.,* 2021 ONSC 1821 ("*Matthews*") at para. 16.

[5] *Matthews, ibid* at para 18.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

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CanLii Reference:
2021 onsc 6633

ONTARIO

Nature of the Proceedings

On January 25, 2019, the Plaintiff, Yanic Dufresne Excavation Inc., obtained default judgment against the Defendants, Saint Joseph Developments Ltd. ("SJD"), Albert Plant "(Mr. Plant") and Vincent Détillieux ("Mr. Détillieux") in the amount of $181,133.23 plus costs and interest for breach of contract and breach of the statutory trust provisions pursuant to the *Construction Act* (the "Default Judgment"). Mr. Plant subsequently filed for bankruptcy on February 19, 2019. Mr. Plant brought a motion to set aside the Default Judgment against him. In turn, the Plaintiff brought a cross-motion for a declaration that the debt owed by Mr. Plant pursuant to the Default Judgment survived his bankruptcy pursuant to section 178(1)(d) of the *BIA*.

Factual Background

Since January 25, 2015, Mr. Plant was a director of SJD and Saint Joseph Properties Ltd. ("SJP"). Mr. Plant was also a real estate broker for approximately 5-10 years and was still one at the time of the motion. On or about April 30, 2015, SJP and 2464065 Ontario Ltd. ("246 Ont."), a company owned by Mr. Plant's wife ("Ms. Plant"), purchased the lands and premises municipally known as 601 Limoges Street to develop a medical complex (the "Medical Complex"). SJD acted as a general contractor for the development of the Medical Complex. On or about January 12, 2016, Mr. Plant also became a director of 246 Ont. On October 3, 2016, SJP and 246 Ont. obtained construction financing, which was personally guaranteed by Mr. Plant, Mr. Détillieux and Ms. Plant (the "Construction Financing"). On September 7, 2017, Mr. Plant increased the amount of the Construction Financing.

In 2016, the Plaintiff was hired by SJD to supply various services and materials for the improvement of the Medical Complex as well as supply services and materials for two other projects (the "Projects"). Between May 2017 and December 2017, the Plaintiff delivered invoices for the work it completed for the improvement of the Projects (the "Work Performed") to SJD. The Plaintiff commenced an action to collect the balance owing to it for the Work Performed on September 6, 2018. None of the Defendants defended the action. The Plaintiff obtained the Default Judgment for the amounts owing for the Work Performed and breach of trust under the *Construction Act* against all the Defendants. The trustee in the bankruptcy of Mr. Preston was discharged prior to the hearing of the motion on May 18, 2021.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Maria Ruberto and Neeta Sandhu, Pallett Valo LLP

CanLii Reference:
2021 onsc 6633

ONTARIO

Issue

Whether the Plaintiff was entitled to a declaratory order that the Default Judgment against Mr. Plant survived Mr. Plant's bankruptcy?

The Applicable Legislation

Section 178(1)(d) of the *BIA* reads as follows:

> **178(1) Debts not released by order of discharge**: An order of discharge does not release the bankrupt from
>
> ...
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

Arguments of the Parties

The Plaintiff argued that the debt survives bankruptcy because it arose out of misappropriation or defalcation while acting in a fiduciary capacity as required by section 178(1)(d) of the *BIA*.

Mr. Plant acknowledged for the purpose of the motion that he breached the trust provisions of section 13 of the *Construction Act* giving rise to his personal liability. However, he argued that he did not breach section 178(1)(d) of the *BIA* as his liability did not arise out of one of the listed wrongs (i.e. fraud, embezzlement, misappropriation, or defalcation), nor did the wrongful conduct occur while he was acting in a fiduciary capacity. His position was that his and Mr. Détillieux's roles were clearly defined where Mr. Détillieux was responsible for managing the finances and construction aspects of the Projects and he was responsible for property management and leasing aspects of the Projects. Based on this division of responsibilities, Mr. Plant argued that it was Mr. Détillieux that was responsible for any dishonest conduct related to the corporation's finances.

Decision of Justice Kershman

Justice Kershman held that the elements of section 178(1)(d) of the *BIA* had been met and the debt Mr. Plant owed the Plaintiff survived his bankruptcy. Justice Kershman found that Mr. Plant misappropriated trust funds

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
Maria Ruberto and Neeta Sandhu, Pallett Valo LLP

CanLii Reference:
2021 onsc 6633

ONTARIO

while acting in a fiduciary capacity and that there was an element of misconduct on Mr. Plant's part in that he did not take his duties as an officer, director, and trustee seriously as required by law.

In rendering his decision, Justice Kershman reviewed Master Short's decision in *Re: Ieluzzi (#2),*[6] where the Master dealt with the issue of "acting in a fiduciary capacity" and the test to be applied for section 178(1)(d) of the *BIA* to be engaged. Master Short in following the case law on this issue noted, in part, as follows:

> "In order for a creditor to bring its claim within s.178(1)(d), it is necessary for the creditor to prove that the debtor was acting in a fiduciary capacity .... The breach of a fiduciary duty does not, however, of itself lead to the survival of a debt or liability following a discharge; there must, *in addition*, be fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.
>
> For s.178(1)(d) of the *BIA* to be engaged, there are three elements that must be proved:
>
> - the money taken to create the debt must have belonged to someone other than the taker;
> - the taking must involve a wrongful use of the money; and
> - the taker must have received the money as a fiduciary.
>
> In order for a breach of fiduciary duty by a bankrupt to constitute "misappropriation or defalcation" within the meaning of s.178(1)(d) so as to give rise to a judgment debt that survives bankrupt's discharge, there must be some improper dealing with property entrusted to the fiduciary and some element of moral turpitude in the sense of dishonesty, wrongdoing and misconduct."[7]

In citing the Court of Appeal's decision in *Simone v. Daley (1999)*,[8] Master Short in *Ieluzzi* went on to explain that for a breach of fiduciary duty by a bankrupt to constitute "misappropriation or defalcation" there must be some improper dealing with property entrusted to the fiduciary and some element of moral turpitude in the sense of dishonesty, wrongdoing or misconduct."[9]

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[6] *Re: Ieluzzi (#2),* 2012 ONSC 1474 ("*Ieluzzi*")
[7] *Yanic, supra* at note 1, paras 131; see also *Ieluzzi, ibid* at paras.30-40.
[8] *Simone v. Daley* (1999), 1999 CanLII 32081 (*"Simone"*).
[9] *Ieluzzi*, *supra* note 6 at para. 38.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
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CanLii Reference:
2021 onsc 6633

ONTARIO

Justice Kershman goes through the relevant case law in great detail to set out the test for fiduciary duty, "misappropriation and defalcation" in determining that Mr. Plant was acting in a fiduciary capacity at SJD. Further, Justice Kershman in making his decision relied on the fact that dealing with trust funds and being a fiduciary were not new to Mr. Plant, given the fact that he was a real estate broker. Justice Kershman found that Mr. Plant had

> "the requisite knowledge of the requirements to operate a trust account. Following the reasoning set out at para. 55 of the *Campoli* case, the court finds that the test for breach of trust is a subjective one, and that the officers and directors' level of sophistication is relevant. The court [found] that Mr. Plant was highly sophisticated and that he 'ought reasonably to of known of a breach of trust' and that a breach of trust occurred in this case."[10]

Overall, Justice Kershman found that Mr. Plant was acting in a fiduciary capacity at SJD and found that the three elements that must be proven for engaging s.178(1)(d) of the *BIA* were proven based on the following facts:

1. The money taken by SJD belonged to either the lender who lent the money, to people who invested money with the debtor or as in the case of suppliers of goods and service to the property;
2. Some of the monies taken were used to purchase season tickets for a hockey team, payment to a church and sponsorship of a festival. None of these uses of the money were for the purposes intended and were improper uses; and
3. Mr. Plant acknowledges that he was a fiduciary and that he breached that fiduciary duty.

The Court did not accept Mr. Plant's statements that he had no knowledge of the corporations' finances, finding that Mr. Plant "conscientiously chose to ignore the requirements of his fiduciary duties".[11] The Court found that as a fiduciary Mr. Plant had a positive obligation to ensure he properly carried out his fiduciary duties, and this duty cannot be delegated to others without reviewing that person's work. Mr. Plant did not review the work of Mr. Detillieux. Thus, Mr. Plant's attempts to pass off the obligation to Mr. Detillieux amounted to willful blindness and misconduct and/or wrongdoing on his part. The obligation to comply with his fiduciary duties arose from

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[10] *Yanic, supra* note 1 at para 141.
[11] *Yanic*, *supra* note 1 at para 147.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

Case Summary - Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.

LU #161 [2022]

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CanLii Reference:
2021 onsc 6633

ONTARIO

the time he became a fiduciary, i.e. when he became a director of the corporation, not from when he discovered a problem.

The Court found that despite Mr. Plant's role within the corporation, he had "effective control of the corporation". He was a part of management and therefore controlled how the corporation was run. Mr. Plant made a choice to relinquish any financial responsibility within the company, Mr. Plant was not simply negligent or incompetent. There was an element of misconduct in Mr. Plant's part as he did not take his duties as an officer, director, and trustee seriously as required by law. Therefore, Justice Kershman held that the Default Judgment against Mr. Plant as awarded by Justice Kane survived Mr. Plant's bankruptcy.

Significance

The decision of Justice Kershman is useful for practitioners trying to obtain declaratory relief that the breach of trust by an individual defendant under the *Construction Act* survives the bankruptcy of the individual defendant pursuant to s.178(1)(d) of the *BIA*, in situations where default judgment or even judgment for breach of trust was obtained. The decision goes through the key tests and the case law in assisting in understanding what one must prove to obtain this type of relief. That being said, it is also important to note that the Courts will not grant such declaratory relief prematurely, there must be an actual bankruptcy or enforcement proceeding as was the case in *Yanic* but was not the case in *Matthews*. Further, this case is of assistance when advising clients about their potential liability for breach of trust under the *Construction Act* and how it could survive their personal bankruptcy. It is important that not only officers and directors of a corporation, but any persons who have effective control of a corporation or its relevant activities understand their fiduciary duties and do not assent to or acquiesce in the use of trust funds for purposes inconsistent with the *Construction Act*. The question of whether a person has effective control of a corporation, or its relevant activities, is one of fact and the Ontario Court's have found that in addition to signing authority, a person has *de facto* control of a corporation where they order materials, approve quotations and invoices, and enter into contracts.[12]

[12] See *Muralis Architectural Products Inc. v. Envelope Inc.*, 2021 ONSC 7793 https://www.canlii.org/en/on/onsc/doc/2021/2021onsc7793/2021onsc7793.html?resultIndex=1

Notice of Claim Provisions in Construction Contracts and Summary Judgment: *Elite Construction v. Canada (Attorney General)*

Notice of Claim Provisions in Construction Contracts and Summary Judgment: Elite Construction v. Canada (Attorney General), 2021 ONCA 803

LU #161 [2022]

Primary Topic:
III. Building Contract
Jurisdiction:
Ontario
Author:
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(Partner)
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Canlii Reference:
2021 ONCA 803

ONTARIO

Brendan D. Bowles

Matthew DiBerardino

Introduction

Generally, notice of claim provisions in construction contracts must be strictly complied with to successfully claim for additional compensation such as delay damages.[1] One might think that in the absence of strict compliance with a contractual notice requirement that a motion for summary judgment by the owner would be appropriate. However, the case law has historically been inconsistent in allowing for such relief.[2] The Ontario Court of Appeal's decision in *Elite Construction v. Canada (Attorney General)*[3] provides guidance on the circumstances where a summary dismissal due to non-compliance with notice requirements will be granted. *Elite Construction* follows the Court of Appeal's prior decision in *Technicore Underground Inc. v. Toronto (City)*,[4] which also granted a summary dismissal where the contractor had failed to give timely notice of a claim. This may support that in Ontario the trend is towards strict compliance.

Overview: *Elite Construction*

In *Elite Construction*, the Government of Canada (the "**Owner**") contracted with Elite Construction Inc. (the "**General Contractor**") to construct an addition to a federal penitentiary in Kingston, Ontario. Following substantial completion, the General Contractor sought compensatory and punitive damages, based on negligence, breach of contract, *quantum meruit* and unjust enrichment, in respect of alleged delays and extra work.

The Owner moved for summary judgment alleging that, among other things, the General Contractor's claims were barred because the General Contractor did not provide a proper notice of intent to claim as required by the contract.[5] Citing to *Hryniak v Mauldin*[6] and Rule 20 of Ontario's *Rules of Civil*

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[1] *Corpex (1977) v. The Queen in Right of Canada*, 1982 CanLII 213 (SCC) [hereinafter *Corpex*]. See also *Clearway Construction Inc. v. The City of Toronto*, 2018 ONSC 1736 ("the purpose of the Notice Provision is to allow the [owner] the opportunity to decide whether to have the additional work performed by the same contractor or by another, and also allows for an opportunity to monitor the work" at para 37) [hereinafter *Clearway*].

[2] See generally Brendan D. Bowles & Madalina Sontrop, "Update on the Law of Notice" (2019) 1 J Can College of Construction Lawyers (WL Can).

[3] 2021 ONCA 803 [hereinafter *Elite Construction*].

[4] 2012 ONCA 597 [hereinafter *Technicore*].

[5] *Elite Construction Inc. v. Canada*, 2021 ONSC 562 at paras 6, 31–32 [hereinafter *Elite Construction (Motion)*].

[6] 2014 SCC 7 (there will be no genuine issue requiring a trial where the motion for summary judgment process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious

Notice of Claim Provisions in Construction Contracts and Summary Judgment: *Elite Construction v. Canada (Attorney General)*

Notice of Claim Provisions in Construction Contracts and Summary Judgment: Elite Construction v. Canada (Attorney General), 2021 ONCA 803

LU #161 [2022]

Primary Topic:
III. Building Contract
Jurisdiction:
Ontario
Author:
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& Matthew DiBerardino
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Canlii Reference:
2021 ONCA 803

ONTARIO

Procedure,[7] the motion judge granted the motion for summary judgment and stated that "there are no material facts in dispute"[8] and that "[b]oth parties presented extensive material on the motion and there are no issues requiring a trial."[9]

On appeal, the Ontario Court of Appeal upheld the summary judgment. The Court found no palpable and overriding error in the motion judge's finding that the General Contractor "had not provided the notice required under the contract for any claim for extra expenses or losses"[10] and "never issued a Notice of Dispute as required by the contract regarding any Change Orders."[11] The Court noted that these findings of fact were grounded in an extensive motion record.[12] Accordingly, and citing to *Hryniak*, the Court of Appeal found that "[i]t was open to the motion judge [...] to conclude that he could reach "a fair and just determination" of the issues raised by the parties, especially the effect of the terms of the contract on the [General Contractor]'s claims".[13] In dismissing the General Contractor's alternative claims on the equitable bases of *quantum meruit* and unjust enrichment, the Court of Appeal stated that "there was no room for either of those equitable principles to apply where the parties were operating pursuant to a contractual agreement between them."[14]

On its face, the Court of Appeal's decision in *Elite Construction*, appears to indicate that where a party to a construction contract fails to comply with the claim notice requirements included therein, that party's claims may be decided on summary judgment where no material facts are in dispute. Such a finding is strengthened where the Court has the benefit of an extensive motion record. Generally, equitable principles will not be available to save such claims that are summarily dismissed.

State of the Law: Notice of Claim Provisions and Summary Judgment

In respect of the law related to the enforcement of notice provisions in construction contracts, the motion decision in *Elite Construction* cited primarily

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[7] R.R.O. 1990, Reg. 194 under *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[8] *Elite Construction (Motion)*, *supra* note 5 at para 57.

[9] *Ibid*.

[10] *Elite Construction*, *supra* note 3 at para 3.

[11] *Ibid*.

[12] *Ibid* at paras 2–3.

[13] *Ibid* at para 2.

[14] *Ibid* at para 4.

Notice of Claim Provisions in Construction Contracts and Summary Judgment: *Elite Construction v. Canada (Attorney General)*

Notice of Claim Provisions in Construction Contracts and Summary Judgment: Elite Construction v. Canada (Attorney General), 2021 ONCA 803

LU #161 [2022]

Primary Topic:
III. Building Contract
Jurisdiction:
Ontario
Author:
Brendan D. Bowles
(Partner)
& Matthew DiBerardino
(Student-at-Law),
Glaholt Bowles LLP

Canlii Reference:
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to: *Corpex (1977) v. The Queen in Right of Canada*,[15] *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*,[16] and *Technicore Underground Inc. v. Toronto (City)*.[17] Per Justice Pinto, *Corpex* and *Doyle* stand for the general principle that "compliance with a notice provision is a condition precedent to maintaining a claim in the courts", which was applied and enhanced in *Technicore* such that "an owner does not need to prove prejudice in order to rely on failure to comply with the notice provision as a bar to the claim." Additionally, Justice Pinto referred to the 2001 decision of the British Columbia Supreme Court in *Northland Kaska Corp. v. Yukon Territory* for the principle that "[t]he "grumblings of a contractor" are not sufficient to constitute notice". One pertinent case not cited in Justice Pinto's decision is the Ontario Court of Appeal's decision in *Ross-Clair v. Canada (Attorney General)*. *Ross-Clair* enhances the general principle of strict compliance with contractual claim notice provisions by requiring the submission of "detailed information" where a description of the facts and circumstances surrounding the claim are required to be included in the notice.

The outcome in *Elite Construction*, a granting of summary judgment against a contractor as a consequence of its failure to comply with a claim notice provision, was also reached in *Urban Mechanical v. University of Western Ontario* and *Tower Restoration v. Attorney General of Canada*. However, and notwithstanding that this line of cases appears to set Ontario precedent for an owner's entitlement to summary judgment, there are established and surviving exceptions that may operate to disentitle an owner from strict reliance on a notice of claim provision and, accordingly, preclude summary judgment.

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[15] *Corpex*, *supra* note 1.

[16] 1988 CanLII 2844 (BC CA) [hereinafter *Doyle*]. See also *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, 2004 CanLII 34321 (ON SC) (applying and following *Doyle*).

[17] *Technicore*, *supra* note 4.

[18] *Elite Construction (Motion)*, *supra* note 5 at para 67.

[19] *Ibid* at para 68.

[20] 2001 BCSC 929.

[21] *Elite Construction (Motion)*, *supra* note 5 at para 122.

[22] 2016 ONCA 205 [hereinafter *Ross-Clair*].

[23] *Ibid* at paras 33, 61.

[24] 2018 ONSC 1888 [hereinafter *Urban Mechanical*].

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Exceptions

First, where the owner has actual or constructive knowledge of the claims advanced by the contractor, such knowledge may be found to satisfy the contractual claim notice provisions in a constructive manner.[26] Of course, such a position would be assessed by the Court in the light of the factual circumstances and context of the case, especially the language of the contract at issue. The contractor must lead affidavit evidence in support of its position.[27]

Second, where an owner, through its conduct, varied the terms of the notice provisions of the contract, the owner may no longer be able to strictly rely on the express language of such provisions.[28] Generally, to benefit from this second exception, the contractor must lead evidence "of a pattern of conduct by which the parties had varied the terms of the contract"[29] such that the owner "communicated an "unequivocal and conscious intention to abandon" its right to rely on the Notice Provision or to otherwise waive strict compliance with its terms."[30]

Third, where an owner is unable to discharge the evidentiary burden of establishing that the contractor did not comply with the notice provisions of the contract, summary judgment is not appropriate. This is because a material fact would remain in dispute and, accordingly, there would be at least one genuine issue requiring a trial.[31]

Finally, and in addition or in alternative to the foregoing, a contractor might also advance arguments that a claim notice provision is not effective under general principles of contract law due to unconscionability, illegality, or some other established ground.

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[26] *Clearway*, *supra* note 1 at para 36; *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Limited*, 2017 ONSC 5071 at paras 38–39, 64–67 [hereinafter *Limen*].
[27] *Clearway*, *supra* note 1 at para 36.
[28] *Ibid* at paras 38–39. See *Colautti Construction Ltd. v. Ottawa (City)*, 1984 CarswellOnt 731 (CA) at paras 28–30 (WL Can).
[29] *Clearway*, *supra* note 1 at para 39.
[30] *Technicore*, *supra* note 4 at para 64.
[31] *Hryniak*, *supra* note 6 at para 49; *Limen*, *supra* note 26 at paras 38–39, 67, 82–83; *Elite Construction (Motion)*, *supra* note 5 ("there are no material facts in dispute [...] and there are no issues requiring a trial" at para 57).

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Conclusion

The decisions in *Elite Construction*, *Urban Mechanical* and *Tower Restoration* may support an emerging trend towards strict compliance with notice provisions in Ontario. A contractor's failure to comply with a notice of claim provision under a construction contract raises a significant risk that the owner will be entitled to summary judgment in its favour should the contractor decide to proceed with the claim despite its failure to give timely notice. However, in our view even the most recent case law from the Ontario Court of Appeal does not completely "close the door" where the contractor can show, through evidence, that it constructively complied with the claim notice provision or that the owner waived strict compliance with such provision through conduct. Additionally, summary judgment will not be available where the Court determines that there is a genuine issue requiring trial or that that the provision itself is unenforceable.

Cases relied on by contractors for applying a standard lower than strict compliance are often from other provinces, particularly British Columbia. It remains to be seen if a notice case will progress beyond a provincial Court of Appeal so that our Supreme Court can weigh in on whether strict compliance with contractual notice provisions in construction contracts should be a national standard. For now, in Ontario, the safest course is to assume that strict compliance will be required, absent narrow exceptions that must be firmly established in the evidence, or, at a minimum, raise issues which require a trial.

Joining Lien and Trust Claims – Impossible Again?

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LU #161 [2022]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan D. Bowles (Partner)
& Markus Rotterdam (Director of Research), Glaholt Bowles LLP

Canlii Reference:
2022 onsc 253

ONTARIO

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The former *Construction Lien Act* contained a provision prohibiting the joinder of trust claims with lien claims. Section 50(2) provided that "a trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction".

However, nothing in the Act stated that a lien action and trust action could not be heard at the same time or one immediately after the other. As a result, parties often requested and obtained a "connecting order" from a master or judge to procedurally connect lien and trust actions, with common discoveries, pre-trial conferences, and settlement meetings.

As pointed out in *Conduct of a Lien, Trust and Adjudication Proceedings*, the trust action could be referred to a master under Rule 54 and heard by the same master as on-going referred lien actions; or the lien actions could be "un-referred", by order of a judge, and the two actions heard at the same time, or one after the other, by the same judge. In Toronto, masters used the jurisdiction granted by s. 67(3) of the former *Construction Lien Act* and Rule 6.01 of the *Rules of Civil Procedure* to fashion connecting orders.

Since all of that seemed somewhat contrived and counterproductive, Bruce Reynolds and Sharon Vogel, in their *Expert Review of Ontario's Construction Lien Act* (the "Report"), recommended the repeal of section 50(2):

> The removal of the prohibition against joinder of lien and trust claims would make the *Act* consistent with legislation from the other provinces, where such a prohibition does not exist. It is particularly concerning because the prohibition of joinder can be circumvented by a court order for a trial together or one after another, resulting in unnecessary costs and delays. The very problem this provision seeks to address is exacerbated by the duplication of proceedings it can cause, contributing to the courts' backlog and costs to the parties. The provision has been heavily criticized by stakeholders, most of whom have suggested its removal, and none of whom proposed its retention. In keeping with the summary procedure provisions of the *Act*, parties should be able to join lien and trust claims without leave of the court, subject to a motion by any party that opposes the joinder on grounds that the joinder would cause undue prejudice to other lien claimants or parties.

That recommendation was followed by the legislature and section 50(2) was not carried forward into the *Construction Act*, so that many commenters, including the author of *Conduct of Lien, Trust and Adjudication Proceedings* were of the view that there was nothing preventing parties from bringing forward claims under Part II of the Act in a lien action under the new Act.

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However, it has now been held that subsequent legislative developments effectively reinstated the prohibition.

Associate Justice Wiebe, in *6628842 Canada Inc. v. Topyurek*, 2022 ONSC 253, pointed out that the old Act also provided in s. 55(1) that "a plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract." That provision was originally also omitted from the new Act, but was added again *verbatim* later, in 2019, to O. Reg. 302/18 as s. 3(2). That, according to the Associate Justice, indicated that the Legislature appeared to have had a change of mind and decided to resurrect the joinder limitation on trust claims by reintroducing old section 55(1). The decision not to carry forward the old s. 50(2) did not change that result in His Honour's analysis.

The intention of former section 55(1) was generally held to be precluding a personal injury or unrelated tort claim from being advanced in a lien claim, since lien proceedings were intended to be summary in nature: see, for example, Master Albert's decision in *Juddav Designs Inc. v. Cosgriffe*, 2010 ONSC 6597. There seems to be no case in which section 55(1) was held to have precluded a joinder of a trust claim, which, considering the express prohibition in s. 50(2), is not surprising.

More importantly, it is respectfully submitted that if the effect of s. 3(2) of O. Reg. 302/18 on its own were to prohibit the joinder of trust claims, then the former s. 50(2) would have been superfluous, and a legislative interpretation which renders any provision of an Act meaningless or superfluous is to be avoided: see *Wormell v. Insurance Corp. of British Columbia*, 2011 BCCA 166; R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 159 and 162.

It is not entirely clear whether notwithstanding the recommendations in the Report, the legislature indeed intended to reinstate the restriction on trust claims by reintroducing section 55(1) into the regulations, or whether the reintroduction of former s. 55(1) without addressing former s. 50(2) was on oversight on the part of the legislature.

For the time being, however, joining a trust claim with a lien claim will be subject to challenge based on this decision.

Addressing this issue and carrying out the intention of the Report, if this was indeed the intention of the legislature, will require either analysis of this issue by a higher court or further act of the legislature.

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LegalUpdate119	2014	119	Full text of newsletter	I. General
LegalUpdate118	2013	118	Full text of newsletter	I. General
LegalUpdate117	2013	117	Full text of newsletter	I. General
LegalUpdate116	2013	116	Full text of newsletter	I. General
LegalUpdate115	2013	115	Full text of newsletter	I. General
LegalUpdate114	2013	114	Full text of newsletter	I. General
LegalUpdate113	2013	113	Full text of newsletter	I. General
LegalUpdate112	2013	112	Full text of newsletter	I. General
LegalUpdate111	2012	111	Full text of newsletter	I. General
LegalUpdate110	2012	110	Full text of newsletter	I. General
LegalUpdate109	2012	109	Full text of newsletter	I. General
LegalUpdate108	2012	108	Full text of newsletter	I. General
LegalUpdate107	2012	107	Full text of newsletter	I. General
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