Canadian College of Construction Lawyers

LEGAL UPDATE

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Falling in Step: Alberta's Prompt Payment and Construction Lien Act

LU #162 [2022]

Primary Topic:
II. Statutory Regulation
Jurisdiction:
Alberta
Authors:
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Falling in Step: Alberta's *Prompt Payment and Construction Lien Act*

On August 29, 2022, amendments to Alberta's *Builders' Lien Act* (the "BLA") and corresponding regulations came into force, marking the first changes to Alberta's lien legislation in 20 years.

LEGISLATIVE HISTORY

The changes originate from Bill 37, the *Builders' Lien (Prompt Payment) Amendment Act*, 2020, SA 2020, c 30, which received Royal Assent on December 9, 2020. On June 17, 2021, Bill 62, the *Red Tape Reduction Implementation Act*, 2021, SA 2021, c 16, received Royal Assent. This introduced and clarified the applicable scope of projects and services and significantly revised the proposed adjudication model initially set out in Bill 37. The *Prompt Payment and Adjudication Regulation*, Alta Reg 23/2022 (the "PPAR"), and the *Prompt Payment and Construction Lien Forms Regulation*, Alta Reg 22/2022, were issued by Order in Council on February 25, 2022. These provided further clarity to the legislative changes. The new legislation is called the *Prompt Payment and Construction Lien Act* (the "PPCLA").

NOTABLE CHANGES

The PPCLA contains several noteworthy changes, some of which are summarized below.

Lien Periods

Lien periods for the general construction industry have increased from 45 to 60 days, bringing them in line with the lien period in Ontario. Interestingly, the PPCLA introduces a new category and lien period of 90 days for liens relating primarily to the furnishing of concrete. This is a result of certain unique attributes of the concrete industry, such as typical periods for compliance evaluation, which are anywhere from 28 to 56 days. Accordingly, the concrete industry advocated for and was given an extended lien period.

Access to Information

Under the current BLA, only a lienholder is entitled to inspect the contract

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ALBERTA

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and statement of the state of accounts, and there are no requirements for what the statement must contain. The PPCLA significantly broadens who may access this information, giving entitlement to any contractor or subcontractor and a beneficiary of a trust. The PPAR lists specific information that a statement of the state of accounts must contain regarding payments made on the project, allowing for any party on the contractual chain to obtain a clear picture of the status of payments under the prime contract.

Progressive Release of Holdback

Initial amendments to the legislation required progressive release of holdback where certain contractual and other conditions were met. The PPAR clarifies that annual payment of holdback is mandatory for contracts with a schedule longer than one year and where the original contract price exceeds $10 Million. This of course only applies where no liens have been filed or all liens have been satisfied or discharged. The PPCLA says that additional conditions on progressive release of holdback may be made, but none have been added yet.

Certificates of Substantial Performance

The BLA requires only that a certificate of substantial performance ("CSP") be posted in a "conspicuous place on the job site" after issuance. This is of little assistance to lienholders with no presence on a project site, such as material suppliers or equipment rental companies. The PPCLA attempts to modernize the rules for someone issuing a CSP, requiring them to ensure that people "working or furnishing materials have a reasonable opportunity of seeing the certificate" by either posting it in a conspicuous place on site or providing an electronic copy. This change should make it easier for all potential lien claimants to identify the trigger for the clock on release of the major lien fund.

Engineers & Architects

Under the BLA, design professionals such as engineers and architects had limited lien rights. Over the years, a body of case law developed on this topic. The initial amendments suggested the PPCLA might apply to certain professionals acting as consultants but gave no further details. The PPAR clarifies this application, providing that the PPCLA applies to regulated professional engineers and architects when performing consultative work "in respect of an improvement". Legislative debate suggests the intent is for the prompt payment provisions to apply to consultants on a project.

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Prompt Payment Provisions

Following the example of other Canadian jurisdictions, one of the biggest changes to Alberta's lien regime is the addition of prompt payment provisions. The prompt payment obligations hinge on and begin with issuance of a "proper invoice". The PPCLA lists the information a "proper invoice" must contain. The parties may specify additional requirements for proper invoices in the contract. A contractor must give an owner a proper invoice at least every 31 days, except where the contract calls for testing and commissioning requirements and these have not been met.

Unless disputed, an owner must pay a proper invoice within 28 days of receipt. An owner must give a contractor notice of dispute within 14 days of receiving a proper invoice. Notice must be given in the form and manner prescribed (Form 1), including the reason for non-payment. Any portion of a proper invoice that is not disputed must still be paid within 28 days. The prompt payment obligations cascade down the contractual chain with different timelines for issuing a notice of dispute for each rung.

Adjudication

Like other provinces, Alberta's adjudication provisions are meant to be a fast-track interim binding dispute resolution mechanism. Its application is not restricted to the prompt payment regime. Alberta's list of matters that can be adjudicated is like Ontario's list. Matters that may be submitted to adjudication include payment and change order disputes, disputes over a notice of non-payment, holdback disputes and any other matter under the contract that the parties agree to have adjudicated, whether or not it falls under the lien legislation. Court actions and adjudication cannot proceed concurrently. If a court action is concurrently commenced in respect of a dispute, adjudication is discontinued. Adjudication is not available after completion of the contract.

Unlike Ontario and Saskatchewan where there is a single Nominating Authority, Alberta will have multiple Nominating Authorities. The Nominating Authorities will govern the adjudication process. Nominating Authorities will qualify and appoint adjudicators, arrange for adjudicators to hear matters, develop and oversee adjudicator training progress and establish a complaint process. Parties can specify a Nominating Authority in the contract, but not an adjudicator. If none is specified, the claimant unilaterally selects the Nominating Authority when submitting its notice of adjudication.

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TRANSITIONAL PERIOD

Any contract entered into on or after the coming into force of the PPCLA is subject to the new provisions. Contracts that pre-date the PPCLA coming into force are governed by the BLA until they expire, are terminated, or amended to conform to the new provisions. However, any contract that pre-dates the PPCLA but is scheduled to remain in effect for longer than 2 years after the PPCLA coming into force must be amended within 2 years from coming into force of the PPCLA to comply with the new legislation. This means both the BLA and the PPCLA could simultaneously apply to different contracts on lengthy projects. There may also be projects where the prime contract falls under the BLA, while certain subcontracts are subject to the PPCLA.

QUESTIONS AND POTENTIAL CHALLENGES

The new legislation and regulations raise several questions and potential challenges for clients and counsel alike, on the front end, during a project and dealing with disputes that arise during and after completion of the work. Some of these potential issues and questions are discussed below.

What does the new concrete lien period encompass?

The question of what specific types of concrete-related work will be subject to the 90-day lien period will no doubt arise, as will disputes, much like those we have seen over the years as to the type of work that falls under the 90-day lien period for oil and gas wells and well sites under the BLA. So far, the only detail contained in the PPAR for the concrete-related lien period is found in Section 36(2) which says it does not apply to those who install or use ready-mix concrete as per the NAICS (the North American standard used to classify businesses).

Does interim release of holdback result in a corresponding reduction of an owner's lien-related liability?

The answer to this question is unclear. The language used is not as clear as it could be that an owner's lien-related liability is reduced by the amount of any progressive releases of holdback. No reference is made to sections 25 (liability of owner) or 27 (payment from lien fund), and these have not been amended to reference progressive release. That said, this is a foundational element to the proper functioning of lien legislation, so hopefully this issue will be quickly clarified in the case law.

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How best to satisfy the new CSP requirements?

The attempt to modernize the method of posting a CSP makes sense and may benefit those without a presence on the job site. However, it will require the person posting the CSP to consider what electronic platform will satisfy the obligation to ensure that people working or supplying materials have a "reasonable opportunity" to see the CSP. One option might be a publicly accessible, project-specific website. Parties should consider incorporating language into their contracts to address this issue.

Does application of the PPCLA to engineers and architects change the common law?

For the PPCLA to apply to engineers and architects acting as consultants, their work must still relate to an "improvement", but this could give rise to creative arguments that the amendments change what is and is not lienable in terms of a consultant's work.

How do you draft a contract with milestone payments?

The prompt payment regime appears to affect the ability of parties to agree on certain types of payment structures in a contract that would see time periods between invoices of longer than every 31 days, as required by the PPCLA. As with the BLA, parties cannot contract out of the PPCLA. However, on larger-scale projects, we often see parties structuring invoices and payment to coincide with performance milestones. How do parties arrange a contract on milestone payments where proper invoices are required every 31 days? Will this even be an option anymore where milestones are more than a month apart?

Will contractual set-off arguments be affected by the prompt payment obligations?

A question that may arise is whether the 28-day payment requirement under the PPCLA prevents a party from arguing entitlement to contractual set-off and withholding rights. The payment obligation under the PPCLA is triggered where an owner "owes money under a proper invoice" in respect of an "amount payable". If an owner has the right to set-off under the contract, it could argue the amount is not owing or payable. A further question will be whether the owner must provide a notice of dispute within 14 days in order to avail itself of its contractual set-off or withholding rights. To err on the side of caution, owners may want to issue a notice of dispute in such circumstances, regardless of whether this coincides with what the contract requires for notice of such a claim.

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Will there be a race to the courthouse to avoid adjudication?

Presumably, a party who wants to avoid adjudication need only commence an action before the counterparty starts the adjudication process. The legislation does not contain the same limitation for arbitration. It remains to be seen whether mandatory arbitration under a contract can run concurrently with the adjudication process.

How do you best deal with issues arising from the transition period?

Questions will almost certainly arise from application of the transition period between the BLA and the PPCLA. Where contracts pre-date the PPCLA and fall under the BLA, the parties will need to consider whether to amend the contract to bring it within the new regime. Is there a benefit (or a draw back) to keeping a prime contract under the BLA where the subcontracts are subject to the PPCLA?

CLOSING COMMENT

Section 70(d) of the legislation allows the Lieutenant Governor in Council to "prescribe rules for the purpose of remedying any confusion, difficulty or inconsistency in applying any provision, including transitional issues, of this Act and any regulation prescribed under this Act". This is wording not commonly seen in legislation, and the intention is unclear.

Saskatchewan Prompt Payment and Adjudication

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II. Statutory Regulation
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SASKATCHEWAN

Murray Sawatzky

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Recent changes to Saskatchewan's *The Builders' Lien Act* (the "BLA") brought into force prompt payment and mandatory adjudication to enable and encourage prompt payment in the construction pyramid scheme. *The Builders' Lien (Prompt Payment) Amendment Act, 2019* (the "Amendment Act") was proclaimed on March 1, 2022 and incorporated into the BLA.

The two main purposes of the amendments are to:

a) ensure the prompt payment of contractors and subcontractors; and

b) to establish an efficient adjudicative process to resolve disputes between owners, contractors and subcontractors.

The key features of prompt payment in the Amendment Act include:

a) owners are to pay contractors within 28 days of receiving a "proper invoice";

b) contractors are then to pay their subcontractors who supplied services or materials that were included in the "proper invoice" within 7 days of receiving payment from the owner; and

c) subcontractors must also pay their subcontractors within 7 days of receiving payment from contractors.

A "proper invoice" is an invoice that satisfies certain conditions as outlined in section 5.1 of the BLA:

Definition

5.1 In this Part, **"proper invoice"** means a written bill or other request for payment for services or materials with respect to an improvement under a contract, if it contains the following information and, subject to subsection 5.3(2), meets any other requirements that the contract specifies:

a. The contractor's name and address;

b. The date of the invoice and the period during which the services or materials were supplied;

c. Information identifying the contract or other authority under which the services or materials were supplied;

d. A description, including quantity if appropriate, of the services or materials that were supplied;

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e. The amount payable for the services or materials that were supplied, and the payment terms;

f. The name, title, telephone number and mailing address of the person to whom payment is to be sent;

g. Any other prescribed information.

Disputes

Unless the contract states otherwise, the contractor must render a "proper invoice" to the owner on a monthly basis. If an owner disputes an invoice, it may refuse to pay all or a portion of the amount payable under the "proper invoice", however, the owner must pay any undisputed amount within the required 28-day period. The owner must give written "notice of non-payment" to the contractor no later than 14 days after receiving the "proper invoice" and must specify the amount of the "proper invoice" that is not being paid and detail the reasons for non-payment.

If a contractor or subcontractor does not receive payment from the level above, it must still pay its subcontractor(s) within the defined deadlines, unless they undertake to refer the matter to adjudication within 21 days, after giving the notice of non-payment to the subcontractor(s).

After service of the notice of non-payment, the dispute may then be resolved through the "adjudication process" specified in the legislation.

Adjudication

Any party to a dispute can refer to adjudication by giving another party a "written notice of adjudication" which is in a specified form.

Adjudication is available for disputes for invoices for which a Notice of Non-Payment has been issued, other payment related disputes, disputes about the failure or refusal to issue a Certificate of Substantial Performance or any other issue the parties agree to address.

The parties to the dispute are to use the adjudication process before the contract or subcontract in question is completed. However, the parties can agree to adjudicate after completion. Each adjudication is to address only one issue unless the parties agree otherwise.

The parties may agree on an adjudicator, or the Adjudication Authority can appoint an adjudicator, designated by the Ministry of Justice. The "Adjudication Authority" is the Saskatchewan Construction Dispute Resolution Office ("SCDRO"). In order to be an adjudicator, the Regulations require that an individual must have 10 years of relevant experience in the con-

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struction industry and must have completed a training program specified in the Regulations in addition to other conditions.

There are 5 steps in the adjudication process:

1. The Notice of Adjudication is served;
2. An Adjudicator is appointed, either by consent of the parties or by the SCDRO;
3. Within 5 days after the appointment of the Adjudicator, the disputing party must provide to the Adjudicator and any other party a copy of the notice, contract or subcontract and any other documents they wish to rely on during the adjudication;
4. Within the following 5 days, the responding party may serve the adjudicator and the disputing party with a written response and any documents they wish to rely on;
5. The deadline for the adjudicator's determination is 30 days after receiving the disputing parties' documents, although this deadline may be extended with the consent of the parties.

In making the decision, the Adjudicator can review the documents provided by the parties, visit the construction site, and receive assistance from an expert such as an accountant or engineer.

The adjudication decision must be delivered in writing, and if filed in Court, is enforced like a Court Order. Each party to an adjudication is to bear its own costs unless the adjudicator orders otherwise.

An application to the Court of Queen's Bench to set aside the adjudicator's determination may be made within 30 days of the determination.

The grounds for appeal include a reasonable apprehension of bias on the part of the Adjudicator, the contract or subcontract is invalid and that the procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject pursuant to the legislation.

Exemptions

Importantly, the Regulations exempt the following professions from the prompt payment and adjudication regime:

1. Persons supplying services or materials in relation to a mine or mineral resource (other than oil and gas);

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2. Architects, engineers, and land surveyors; and

3. Persons supplying services or materials in respect to an improvement related to infrastructure for the generation and distribution of electrical energy by SaskPower.

Transitional Provisions

Depending on when parties entered into a "contract" for an "improvement", the amendments to the BLA may not be applicable. Essentially, if a "contract" for an "improvement" was entered into before March 1, 2022 (regardless of the date of the subcontract) or if the premises with respect to which an improvement is being made are the subject of a lease entered into before March 1, 2022, the BLA and associated regulations as of February 28, 2022 will continue to apply. The prompt payment and adjudication provisions in part 1.1 and 2.1 of the Amendment Act apply to contracts entered to on or after March 1, 2022 and with respect to subcontracts made under those contracts.

If an arbitration had been commenced under section 85 of the BLA before March 1, 2022, that arbitration may be continued as if that section had not been repealed by the Amendment Act.

Progress towards Prompt Payment Legislation in B.C.

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Progress towards Prompt Payment Legislation in B.C.

On 28 October 2021 and 1 November 2021, several British Columbia's construction associations hosted a series of town halls focused on prompt payment legislation in B.C. Among other topics, the success of Ontario's prompt payment regime and amendments to the *Construction Act*, R.S.O. 1990, c. C. 30 were discussed with counsel for the B.C. Ministry of the Attorney General.[1]

On 24 January 2022, the Electrical Contractors Association of British Columbia ("**ECABC**"), the Mechanical Contractors Association of British Columbia ("**MCABC**") and the British Columbia Construction Association ("**BCCA**") confirmed that the B.C. Ministry of the Attorney General is creating a working group to accelerate progress on prompt payment legislation. The working group will be managed by the B.C. Ministry of the Attorney General and will be comprised of industry organizations as well as the ECABC, MCABC, and BCCA.[2] BCCA hopes that with "hard work and collaboration between industry and government we can expect BC's Prompt Payment Legislation to be tabled Fall 2022."[3]

At the same time, the BC Government has a report from the British Columbia Law Institute on reform of the *Builders Lien Act*.[4] No timeline for any actual amendment to the legislation (except in so far as prompt payment provisions may be appended to it, as in other provinces) has been confirmed.

[1] *Prompt Payment Townhall* (28 October and 1 November 2021), online: ECABC <https://eca.bc.ca/wp-content/uploads/2021/11/Prompt-Payment-Town-Hall-Presentation-Oct-28-2021.pdf>. See also *BCCA Briefing - Prompt Payment Special Edition* (November 2021), online: BCCA <https://mailchi.mp/bccassn.com/bcca-briefing-prompt-payment-special-edition-webversion> ("Special Edition").

[2] ECABC, MCABC and BCCA, *Media Release* (24 January 2022), online: BCCA <https://bccassn.com/wp-content/uploads/2022/01/Press_Release_Prompt_Payment_Update_Jan24.pdf>.

[3] Special Edition

[4] *Report on the Builders Lien Act*, British Columbia Law Institute (July 2020), online: BCLI Report-Builders-Lien-Act-final.pdf (bcli.org)

In With the New: A Summary of New Brunswick's Construction Remedies Act

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NEW BRUNSWICK

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Melanie Gillis

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In With the New: A Summary of New Brunswick's Construction Remedies Act

In the construction world, it would be hard to find more steadfast statutes than Atlantic Canada's lien legislation. Nova Scotia's Builders' Lien Act still speaks of liens against "trestleworks", "fish ponds" and "fruit or ornamental trees". There are no trust provisions in the lien statutes for Prince Edward Island or Newfoundland and Labrador.

New Brunswick's 70+ year-old *Mechanics' Lien Act*, RSNB 1973, c M-6 ("Old Act") was perhaps the most *progressive* of the lot. Nevertheless, the Old Act still referenced the ability to bind a married woman's dower.

However, New Brunswick's new *Construction Remedies Act*, SNB 2020, c 29 (the "New Act") ushers in a host of sweeping changes. It came into force on November 1, 2021, and has been sending shockwaves through the construction industry in New Brunswick over the past year.

This update will summarize five key changes under the New Act, and what implications they have for key players in the construction arena.

1. Owner's Trust

There is nothing revolutionary about imposing trust obligations in lien legislation. Indeed, the Old Act imposed trust obligations on contractors and sub-contractors all the way down the construction pyramid, and that tradition has been carried forward in the New Act as well.

What has changed, however, is the New Act imposes trust obligations on the owner (except the Crown or local government owners) for the benefit of all contractors, sub-contractors, suppliers, and anyone else that has supplied services or materials for an improvement.

Specifically, section 11(2) of the New Act imbues the following sweeping list of funds with trust obligations owed by the owner:

a) Funds advanced to the owner to finance the improvement;
b) Any amount that becomes due to a contractor pursuant to a contract for the improvement;
c) The amount of the unpaid contract price that is in the owner's control when substantial performance of a contract has been certified;
d) Proceeds from the sale of the land; and
e) Amounts received from an insurance policy covering the improvement.

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This is a significant development, as it creates **early**, **enduring**, and **expansive** trust obligations on the part of owners.

Right off the bat, all construction financing received by the owner forms part of the trust. This means that on construction projects where owners receive early advances, they may have trust obligations before breaking ground.

Second, amounts due to any contractor at any time during the course of the project are also not spared. This means that all approved accounts payable form part of the trust, which creates an enduring and rolling contribution to the trust fund throughout the course of construction.

Finally, the trust obligations introduced by the New Act are expansive in scope. Namely, owners cannot convert, misappropriate, or use the trust funds for a purpose inconsistent with the trust provisions under the New Act, and if they do, they are liable for breach of trust and may be forced to pay a **fine** of (up to) $10,000. Furthermore, Employees, directors and officers of owners who acquiesce to the breach may also be held personally liable.

2. Lien Registration Deadline

Of course, not all the changes under the New Act are additive. Under the Old Act, there were several different registration deadlines depending on the nature of work performed (materials, services, wages, etc.) This (understandably) led to some confusion among trades, owners, and courts alike around whether liens were properly registered.

That confusion is now gone: or at least that is the hope. The New Act does away with differing deadlines depending on service type, and ushers in the singular deadline of 60 days from the earlier of: the date of contract completion, the last day of work, or the date of issuance of a certificate of substantial performance.

This reduces uncertainty on all sides when it comes to registration. It also leaves contractors with less places to hide if they are non-compliant: as we all know, courts across the land are unyielding at best when it comes to lien deadlines.

We note the time for perfecting a lien is still 90 days from the lien registration date.

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3. Definition of Substantial Performance

As we know from the CCDC forms and legislation alike, the definition of substantial performance of work is the star in the lien solar system: all other rights and obligations orbit around it.

Section 7(1) of the New Act offers a new definition of substantial performance that borrows from Ontario legislation. Specifically, it deems a contract is substantially performed:

a) when the improvement under the contract is ready for use or is being used for the purposes intended, and

b) when the improvement is capable of completion or, if there is a known defect, of correction, at a cost of not more than

    i) 3% of the first $250,000 of the contract price,
    ii) 2% of the next $250,000 of the contract price, and
    iii) 1% of the balance of the contract price.

Helpfully, the New Act also deems a contract complete when the cost of completion does not exceed 1 percent of the contract price.

4. Definition of 'Improvement'

While some may consider what is a lienable interest to be difficult to define, New Brunswick legislators have made a concerted effort nonetheless. The New Act creates a lienable interest for any person who supplies services or materials for an improvement, and defines improvement with the following sweeping language:

a) any alteration, addition or capital repair to the land,

b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

c) the complete or partial demolition or removal of any building, structure or works on the land.

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The real kicker here is 'capital repair', which is defined (paraphrased) to include repairs intended to extend the normal economic life of the land, highway or building, or to improve its/their value or productivity. This type of work was previously considered to be "maintenance" and was not lienable.

This broad new definition creates more lien risk for owners. While crystal-balling is always a risky endeavour when it comes to new legislation, we do think it is safe to predict that this new definition will be the subject of some litigation in the early days to test where its outer edges lie.

5. Holdback Obligations

The government is holding fire on one of the more major changes under the New Act: the introduction of more stringent holdback requirements.

While the New Act has brought the holdback down to 10 percent (from the former 15), the changes dealing with holdback trust accounts are not expected to come into force until at least April 2022.

It is probably a good thing that owners have more time to consider these new holdback measures, because they are burdensome. The New Act provisions on holdback trust accounts are similar to the Saskatchewan Builder Lien Act.

First, the New Act will require the owner to open a holdback trust account with a financial institution.

Second, owners must open separate holdback trust accounts for each improvement to the land where the value of the contract exceeds $100,000.

Third, the owner has to administer the account (if there is just one) jointly with the contractor as a trustee, and any payment from any account requires the signatures of both joint account holders (unless otherwise ordered by the court).

Where there is more than one contract for the given improvement, the owner must jointly administer a single account with one of either the contractor, a lawyer, an architect/engineer, a chartered professional accountant, or a trust company.

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What is clear from this change is that it will have significant implications for owners and financial institutions alike. This will introduce a heavy administrative burden on owners - specifically, owners will have to open copious numbers of holdback trust accounts, each of which will have another signatory, who will have to be at the ready for signature when it becomes necessary to issue payments from the funds. Financial institutions will equally have to be on guard for being lumped into litigation around improper management of trust funds.

Failure of Applicant to Comply with Adjudicator's Decision Results in Divisional Court Dismissing Application for Judicial Review

LU #162 [2022]

Primary Topic:
V. Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Joshua Strub,
Jaspal Sangha,
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CanLII Reference:
2022onsc2254

ONTARIO

Joshua Strub

Jaspal Sangha

Failure of Applicant to Comply with Adjudicator's Decision Results in Divisional Court Dismissing Application for Judicial Review

The Ontario Divisional Court has recently demonstrated that an adjudicator's decision must be complied with. An application for judicial review was dismissed by the Divisional Court as a result of the applicant's failure to comply with the underlying adjudicator's determination.

The applicant had failed to make payment to a contractor on two proper invoices despite providing no notice of non-payment. As a result, the contractor commenced an adjudication to enforce the strict prompt payment provisions of the *Construction Act.* At adjudication, the contractor succeeded in persuading the adjudicator to enforce section 6.4(1) of the *Construction Act* and require the owner to pay the proper invoices without regard to the owner's alleged reasons for non-payment.

The applicant sought and was granted leave to bring an application for judicial review of that determination. Pursuant to section 13.18(7) of the *Construction Act*, the granting of leave did not have the effect of staying the adjudicator's determination, despite the applicant seeking such stay in its motion materials. After leave was granted, the application did not bring any further stay motion.

Despite numerous requests, the applicant failed to pay amounts required by the adjudicator's determination. The contractor argued that the applicant should not be afforded the right to set aside the determination while violating the underlying determination and the *Construction* Act itself. The Divisional Court required parties to make submissions regarding this issue at the outset of the hearing of the application, following which the application was summarily dismissed.

In its brief decision, the Divisional Court makes the following principles clear:

- Prompt payment is an integral to the scheme of the *Construction Act* and failure to pay a proper invoice in accordance with the prompt payment requirements of the *Construction Act* may result in the Divisional Court refusing leave.
- If leave is granted, an applicant must obtain a stay of the adjudicator's determination or must make payment, failing which the Divisional Court may dismiss the application for judicial review.

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Finally, during its argument, the applicant advised, for the first time, that "there was no money" to pay the adjudicator's determination. The applicant filed no evidence to establish this point. For the purposes of its decision the Divisional Court accepted this argument to reinforce the Divisional Court's view that if an owner is insolvent, it should not be permitted to run up costs and delays through litigation while failing to comply with an adjudicator's determination and the prompt payment provisions of the *Construction Act*.

Joining Ontario Breach of Trust and Lien Claims in the Same Action – An Evolving Landscape

LU #162 [2022]

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Joining Ontario Breach of Trust and Lien Claims in the Same Action – An Evolving Landscape

Introduction

It was undisputed law under the *Construction Lien Act* (the "**Old Lien Act**") that a trust claim could not be joined with a lien claim. After all, there was an explicit prohibition in section 50(2) of the Old Lien Act.[1]

However, when the Ontario Legislature updated the Old Lien Act to the *Construction Act* (the "**New Act**") in 2017, section 50(2) was removed. Therefore, the question that was bound to arise before the courts in Ontario was whether, under the New Act, trust claims and lien claims can be brought together in the same action.

That question first came before the courts in the case of *Damasio Drywall Inc. v. 2444825 Ontario Limited* ("***Damasio Drywall***")[2] in December 2021 when Associate Justice Wiebe released his decision and made statements in *obiter dicta* that the prohibition still applied.

The question came before Associate Justice Wiebe again in January 2022, in the case of *6628842 Canada Inc. v. Topyurek* ("***Topyurek***"),[3] where he adopted his *obiter dicta* statements from *Domasio Drywall*.

But this was not the end. In February 2022, Justice Harper rendered a decision in *SRK Woodworking Inc. v. Devlan Construction Ltd.* et al. ("***SRK Woodworking***")[4] which disagreed with Associate Justice Wiebe.

Therefore, the question is, what is the current state of the law on this issue and might it evolve further as more cases on this issue are decided by the courts.

What is a Breach of Trust Action

Both the Old Lien Act and the New Act create a powerful statutory trust which provides that all funds received by an owner (other than the Crown or a municipality) for use in financing an improvement, or any amounts received by a contractor or subcontractor on account of the contract or subcontract price in respect of an improvement, constitute trust funds for the benefit of those persons who are supplying services or materials to the improvement.[5]

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[1] Section 50(2) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "**Construction Lien Act**").
[2] 2021 ONSC 8398.
[3] 2022 ONSC 253.
[4] 2022 ONSC 1038.
[5] Sections 7(1) and 8(1) of the *Construction Lien Act* and of the *Construction Act*, R.S.O. 1990, c. C.30 (the "**Construction Act**").

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The Old Lien Act and the New Act then impose obligations on trustees with respect to those funds and the failure to comply with those obligations will result in a breach of trust for which the trustee is liable.[6]

Not only might the trustee be liable for a breach of trust, but section 13 creates a powerful right to pierce the corporate veil and sue individuals for breach of trust.[7]

Joinder Under the Old Lien Act

Section 50(2) of the Old Lien Act, prohibited the joinder of breach of trust claims with lien claims, as follows:[8]

> (2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

Additionally, section 55(1) of the Old Lien Act contained a permissive joinder provision, allowing for a claim for breach of contract to be joined with a lien claim as follows:[9]

> (1) A plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract.

Cases decided under the Old Lien Act interpreted the permissive nature of section 55(1) as being restrictive. That is, the language explicitly allowing for breach of contract claims to be joined with lien claims was interpreted as excluding the joinder of other causes of action.[10]

While the Old Lien Act did not allow for the joinder of lien and trust claims, there was no explicit prohibition against hearing trust claims and lien claims at the same time, or one after the other. As section 67(3) of the Old Lien Act provided that, except where inconsistent with the Old Lien Act, the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under the Old Lien Act. It therefore became commonplace for counsel to rely upon Rules 6.01 and 54 of the *Rules of Civil Procedure*, to seek and obtain a connecting order that allowed the breach of trust action to be tried with the lien action.[11]

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[6] Sections 7(4) and 8(2) of the *Construction Lien Act* and of the *Construction Act*.
[7] Sections 13(1) and 13(1) of the *Construction Lien Act* and of the *Construction Act*.
[8] Section 50(2) of the *Construction Lien Act*.
[9] Section 55(1) of the *Construction Lien Act*.
[10] *Juddav Designs Inc. v. Cosgriffe*, 2010 ONSC 6597.
[11] Section 67(3) of the *Construction Lien Act* and Rules 6.01 and 54 of the R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*.

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The Removal of the Prohibition Section in the Construction Act

Prior to the New Act, in 2016, the Ministry of the Attorney General commissioned a report titled *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. In the report, numerous recommendations were made to modernize and update the Old Lien Act.[12]

The report noted that the prohibition of joining breach of trust claims with lien claims stems from the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act in 1982* and that "[a]*t that time, it was decided that the issues in relation to lien claims and trust claims may be very different, and the resolution of lien claims should be the primary concern under the Act*."

The report also noted that Ontario is the only common law province that prohibits the joinder of lien and trust claims. Ultimately, the report included recommendation number 39 which stated:

> *The prohibition on joinder of lien claims and trust claims under section 50(2) should be removed from the Act, subject to a motion by any party that opposes joinder on the grounds of undue prejudice to other parties.*

The analysis leading to the recommendation in the report explains that "[t]*he 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 New Act

In the New Act, section 50(2) as it read in the Old Lien Act was removed. Section 50(2) of the New Act now contains a provision similar to the old section 67(3), as follows:[13]

> (2) Except to the extent that they are inconsistent with this Act and the procedures prescribed for the purposes of this Part, the *Courts of Justice Act* and the rules of court apply to actions under this Part.

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[11] Section 67(3) of the *Construction Lien Act* and Rules 6.01 and 54 of the R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*.
[12] Bruce Reynolds and Sharon Vogel's 2016 Report, Striking the Balance: Expert Review of Ontario's Construction Lien Act.
[13] Section 50(2) of the *Construction Act*.

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Further, in the New Act, section 55(1) was also removed.[14]

However, section 88(1) of the New Act set out a long list of matters which the New Act permitted to be addressed by regulations. Two of those matters are set out below, one of which specifically related to the procedures that apply to actions, as follows:[15]

> respecting anything that, under this Act, may or must be prescribed or done by regulation;
>
> ...
>
> (l) for the purposes of Part VIII, governing procedures that apply to actions;

Importantly, in addition to substantially increasing and modifying the list of matters for which the Lieutenant Governor in Council may make regulations, the New Act also included additional wording in the introductory sentence of section 88(1). In the Old Lien Act, the provision read "*The Lieutenant Governor in Council may make regulations".* In the New Act, section 88(1) reads: "*The Lieutenant Governor in Council may make regulations respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, including regulations".*

In 2009, the government passed four regulations under the New Act. The regulations not only addressed general matters, adjudications and forms, but O. Reg. 302/18 – Procedures for Actions Under Part VIII of the Act addressed procedures with respect to actions under the New Act. Section 3(2) contains the same language that was previously in section 55(1) of the Old Lien Act, as follows:[16]

> (2) A plaintiff may, in an action, join a lien claim and a claim for breach of a contract or subcontract.

The Evolving Case Law

The question of the effect of these legislative and regulatory changes were eventually bound to find their way to the courts and in late 2021 and early 2022, we received guidance for the first time.

[14] Section 55 of the *Construction Act*.
[15] Section 88(1) of the *Construction Act*.
[16] Section 3(2) of O. Reg. 302/18: Procedures For Actions Under Part VIII under the *Construction Act*.

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The Damasio Drywall Decision

In *Damasio Drywall*, the plaintiff brought a motion for an order granting leave to amend their statement of claim in a lien action to add additional parties and allege a trust claim against those parties.

As stated by Associate Justice Wiebe, his comments are *obiter dicta* for the benefit of the public, as the plaintiff chose to withdraw its motion.

The plaintiff argued that section 50(2) of the Old Lien Act contained an explicit prohibition against joining a trust claim with a lien claim, which was repealed and not carried forward into the New Act. Further, while the language of section 55(1) of the Old Lien Act was carried into O. Reg 302/18, the section 50(2) language was not carried into O. Reg 302/18. As a result, the plaintiff argued that there was no longer any prohibition and the New Act ought to be interpreted as allowing for the joinder of trust claims with lien claims.

Associate Justice Wiebe was not persuaded. Instead, he opined that while neither the section 50(2) prohibition nor the section 55(1) joinder provision were in the New Act, the "*the Legislation appears to have had a change of mind and decided to resurrect the joinder limitation of the old section 55(1).*"

Associate Justice Wiebe found that the language of section 55(1), as resurrected in section 3(2) of O. Reg. 302/18, acts as a complete limitation prohibiting the joinder of trust claims with lien claims, other than breach of contract claims. Associate Justice Wiebe found that "[a] *trust claim cannot pass the test of O. Reg 302/18 section 3(2) as that section has been historically interpreted*."

Effectively, Associate Justice Wiebe's view was that the decision not to carry section 50(2) of the Old Lien Act into the New Act or the regulation was not sufficient to establish legislative intent that trust claims can be joined with lien actions. Rather, Associate Justice Wiebe effectively considered that the inclusion of the language from section 55(1) of the Old Lien Act into the New Act, was indicative of the legislature's intent to prohibit the joinder of trust claims with lien claims, stating "[i]*f the Legislature intended to allow trust claims to be joined with lien claims, it should have stated so explicitly, given this mandate and the nature and complexity of a trust claim. It did not.*"

It is worth noting that when the initial version of O. Reg 302/18 was passed, the language that was in section 50(2) that prohibited a trust claim

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from being joined with a lien claim and the language that was in section 55(1) that permitted a breach of contract claim to be joined with a lien claim were missing from the regulation. Repealing these provisions and excluding them from the initial version of the regulation was consistent with the intent of *Striking the Balance* that recommended that trust claims be joined with lien claims. However, as Associate Justice Wiebe noted:

… that in the spring of 2019 the Legislature reintroduced the joinder limitation of old section 55(1) by adding section 3(2) to O. Reg. 302/18. The wording was the same. That means, in my view, that the Legislation [sic] appears to have had a change of mind and decided to resurrect the joinder limitation of the old section 55(1). Therefore, trust claims may again be prohibited from being joined with lien claims.

Importantly, and as will be clear from the discussion below, it was not the "Legislature" that added language to O. Reg. 302/18 but rather the Lieutenant Governor in Council.

The Topyurek Decision

Less than one month after the *Domasio Drywalls* decision, Associate Justice Wiebe was given the opportunity to address the issue again in *Topyruek*.

In *Topyurek*, the plaintiff commenced a lien action which included a claim for breach of contract and breach of trust. The motion before Associate Justice Wiebe was brought by the plaintiff for default judgement against the defendants.

In a short decision, Associate Justice Wiebe dismissed the motion for three reasons, one of which was that the plaintiff had improperly joined a trust claim with its lien claim. Associate Justice Wiebe adopted his comments made in *obiter dicta* in the *Domasio Drywalls* decision and found that the joinder was improper.

Therefore, the comments made in *obiter dicta* in *Domasio Drywalls* became *ratio* in *Topyurek*.

But the saga of this procedural issue does not end there.

The SRK Woodworking Decision

Just two weeks after the *Topyurek* decision, Justice Harper released his decision in *SRK Woodworking* which addressed the very same legal issue, that is whether the moving party could amend its pleading to add a breach of trust claim with its lien action.

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In *SRK Woodworking*, Justice Harper provided a detailed analysis of the issue, focusing on principles of statutory interpretation. A few key principles of statutory interpretation that Justice Harper followed include:

1. Repeal, revocation or amendment of an act or regulation does not imply anything about the previous state of the law or that the act or regulation was previously in force.[17]

2. An act and its regulations, which are consistent with that act, shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.[18]

3. The mere fact of an amendment is not necessarily significant.[19]

4. That the modern principle of statutory interpretation permits a court to look beyond the plain meaning of the text of a statute in order to discern its true meaning.[20]

5. The challenge for courts when interpreting statutes is determining the scheme, objective, or intention of the legislature.

6. The principle of statutory interpretation referred to as *expression unius est exlclusio alterius* (to express one is to exclude others) must be used with care.

In his analysis to determine legislative intent, Justice Harper relied on a summary prepared by the Ministry of the Attorney General that explained key changes that came into force on July 1, 2018. With respect to the joinder of trust and lien claims, the summary stated that "[t]*he prohibition on joinder of lien claims and trust claims has been removed.*"[21]

Justice Harper also relied upon the analysis and recommendations made in the report *Striking the Balance*, although he did note that the entire recommendation was not adopted because the joinder was to be "*subject to anyone opposing bringing a motion*" was not carried forward into the New Act.

Justice Harper went on to address trust claims and prompt payment and adjudication. He concluded that the since the prompt payment and adjudications schemes did not apply to the matter before him, there was no reason why trust and lien claims could not be part of the same action. Justice

[17] Section 56 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sched. F.
[18] Section 64 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sched. F.
[19] *Sullivan on the Construction of Statutes* (5th ed.) at p. 592 to 593.
[20] R. v. Tenny, 2015 ONSC 1471.
[21] Amendments to the construction lien and holdback provisions.

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Harper pointed out that the adjudication provisions do not apply to claims for breach of trust, nor may a lien action be referred to adjudication.

However, while not stated by Justice Harper, certainly the inclusion of prompt payment and adjudication to provide a swift and summary mechanism to resolve payment issues on construction projects emphasizes the reasonableness of allowing joinder of trust and lien claims. After all, there is less of a need for summary lien proceedings by the existence of adjudication, notwithstanding the fact that section 50(3) of the New Act remains clear that procedures in an action shall be as far as possible of a summary character.[22]

Of particular interest is Justice Harper's analysis in *obiter dicta*, that O. Reg. 302/18, section 3(2) was unlawfully passed.

Justice Harper refers to the language in section 88 of the New Act and asks where section 3(2) of O. Reg 302/18 is a "*matter necessary or advisable to carry out effectively the intent and purpose of the Act*".

Justice Harper found that matters of fundamental importance should be dealt with in legislation so that parliamentarians have a chance to consider and debate the matter and goes on to find that there is nothing in section 88 of the New Act that gives authority to pass a regulation that dictates what actions may be brought. In Justice Harper's view, this is a matter of fundamental importance and should be dealt with in the statute.

Justice Harper's reasoning and conclusion in this regard is interesting.

First, nothing in section 3(2) of O. Reg 302/18 addresses what actions may be brought. Instead, section 3(2) deals with the procedure for joining a breach of contract claim with a lien claim, permitting (but not requiring) that they be brought together.

Second, Justice Harper relies on section 88(1)(a) as the appropriate enabling provision, questioning whether the joinder of a breach of contract and lien claim fall within a matter that "*may or must be prescribed by regulation*." In doing so, Justice Harper ignores section 88(1)(l) which provides for making regulations "*for the purposes of Part VIII, governing procedures that apply to actions*". Surely the allowance or restriction on the joinder of causes of action is a procedural matter.

Third, Justice Harper conducts no analysis of the fact that the introductory sentence to section 88(1) provides that "[t]*he Lieutenant Governor in Coun-*

[22] Section 50(3) of the *Construction Act*.

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*cil may make regulations respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, **including regulations**,"* [emphasis added]. This implies that the list that follows, while not exhaustive, has been determined by the legislature to be matters necessary or advisable to carry out effectively the intent and purpose of the New Act.

Conclusion

There is a clear divide between Associate Justice Wiebe and Justice Harper on the joinder issue. Perhaps more importantly is the question of whether section 3(2) of O. Reg 302/18 is unlawful.

Before this issue reaches an appellate court, the Legislature should step in and fix section 3(2) of the regulation so that it permits a breach of trust claim to be joined with a lien claim, consistent with the recommendation in the report *Striking the Balance*. In the interim, Justice Harper's decision in *SRK Woodworking* is likely binding law that can be relied upon. But plaintiffs must be cautioned by the state of flux and consider whether, while more costly, it makes sense to continue following the old approach of commencing separate lien and trust actions.

C.M. Callow and its Uptake in Construction Law

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LU #162 [2022]

Primary Topic:
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In three seminal decisions, *Bhasin v. Hrynew*,[1] *C.M. Callow Inc. v. Zollinger*,[2] and *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*,[3] the Supreme Court of Canada has described two existing doctrines as manifestations of the principle of good faith: the duty to exercise a *contractual* discretion in good faith and the duty of honest performance of a contract.

This paper will focus on *Callow* and the reported cases that have considered this decision. *Callow* is fundamentally a case about termination of contracts, and the duty to do so in good faith. It is noteworthy, therefore, that a closer examination of caselaw that pre-dated even the seminal *Bhasin* decision reveals a trend toward requiring party terminating a construction contracts to conduct themselves in good faith.

1.0 C.M. Callow

Callow has been commented on extensively, so a summary will suffice as a reminder.

In 2010, a few condominium corporations (collectively "Baycrest") entered into a two-year winter maintenance agreement with C.M. Callow Inc. ("Callow"). In 2012, Baycrest entered into two new two-year agreements with Callow, a renewal of the winter maintenance contract and a separate summer maintenance contract. The winter maintenance agreement allowed Baycrest to terminate Callow without cause on just 10 days' notice in writing.

Baycrest was generally satisfied with Callow's performance. However, in Spring 2013, it appointed a new property manager, Tammy Zollinger, who immediately recommended terminating the winter maintenance agreement. Baycrest decided to follow that advice but did not disclose its decision to terminate to Callow at the time.

As Callow performed the summer maintenance agreement in 2013, it also pursued a further renewal of the winter maintenance agreement and discussed potential renewal with Baycrest's board members. Based on those talks, Callow believed that a further renewal of the winter agreement was likely and did work "above and beyond" what was required under the summer maintenance agreement, described as "freebie" work, including the improvement of two condo gardens.

In July 2013, board members discussed this extra work by Callow and acknowledged that it was being performed based on Callow's expectation

[1] 2014 SCC 71.
[2] 2020 SCC 45.
[3] 2021 SCC 7.

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that he would be continuing the winter work. Only in September 2013, did Baycrest finally give Callow 10 days' notice of termination. Callow commenced an action against the Baycrest and Zollinger, claiming $81,383.68 for breach of contract, intentional interference with contractual relations, and negligent misrepresentation.

The majority of the Supreme Court found in favour of Callow, finding that in determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly.

The majority found that Baycrest's conduct amounted to a breach of the duty of honest performance – Baycrest had an obligation to refrain from misleading Callow in exercise of the termination clause and had "an obligation to correct the false impression created through its own actions". It did not, and this amounted to "active deception" in that Baycrest had "knowingly misled" Callow in the way it exercised its termination rights. Considering Baycrest's conduct as a whole, the majority found that Baycrest was aware of Callow's misapprehension and should have corrected it.

2.0 Subsequent Construction Cases

2.1 Stericycle ULC v. HealthPRO Procurement

Both doctrines identified by the Supreme Court, the duty to exercise a contractual discretion in good faith and the duty of honest performance of a contract, were at the heart of an appeal recently heard by the Ontario Court of Appeal in *Stericycle ULC v. HealthPRO Procurement*[4] in a public tendering context.

In 2019, HealthPRO, a group contracting organization that manages procurement and contracts on behalf of its member hospitals and health authorities across Canada, issued a request for qualification (an "RFQ") for a new national contract for biological waste management services. The purpose of the RFQ was to qualify potential suppliers for the forthcoming public tendering process (the "RFP").

One of HealthPro's members on whose behalf the procurement process was conducted was British Columbia's Provincial Health Services Authority ("PHSA").

The plaintiff Stericycle responded to the RFQ and qualified to bid. So did Daniels, a competitor. Both Stericycle and Daniels also responded to the RFP.

[4] 2021 ONCA 878.

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Six years earlier, in 2013, HealthPRO had awarded Stericycle a contract for those services. As extended, the 2013 Contract had an expiry date of May 31, 2020, and contained the following provision referred to as the "Six Month Provision":

> AWARDED SUPPLIER: Agrees to hold the then current contract pricing firm for committed members up to a period of six (6) months beyond the expiry date (or any option years exercised) to allow, if required, for the implementation of a new contract to a different supplier.

Unlike the 2013 Contract, which contemplated a single supplier, the RFP contemplated the award of 2020 Contracts to multiple eligible suppliers from which a HealthPRO member would select a "primary supplier" and could also designate a "secondary supplier" if more than one 2020 Contract was awarded by HealthPRO. A primary supplier would receive a committed volume of at least 80% of the business of the selecting HealthPRO member; a secondary supplier would be obligated to provide up to 20% of the business but had no guarantee of any volume of business.

At the time of tender, Daniels did not have established waste management facilities in British Columbia, but its RFQ included a statement to the effect that it would be fully committed and able to meet and exceed the service capabilities required for the HealthPRO membership by the 2020 start date of this contract.

HealthPro ended up awarding a 2020 Contract to both Stericycle and Daniels. Both contracts had a start date of June 1, 2020. On June 2, 2020, HealthPRO advised Daniels that it had been selected as the primary supplier. Given that Daniels was not operational in British Columbia on June 1, 2020, PHSA insisted that Stericycle continue to provide all services under the 2013 “Six Month Provision”. Upon the expiration of the six months, Daniels commenced its work.

Before the application judge, Stericycle submitted that HealthPRO and PHSA had acted in bad faith and in breach of contract in awarding the primary supplier designation to Daniels. The application was dismissed.

The application judge held that the 2013 Contract was not spent on the award of the 2020 Contract, or on the start date of the 2020 Contracts, and that PHSA was entitled to insist that Stericycle continue to provide services for six months after June 1, 2020, under the 2013 Contract without such conduct amounting to selection of Stericycle as its primary supplier.

Second, the application judge held that the Daniels 2020 Contract did not require Daniels to commence the provision of services as of June 1, 2020.

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The application judge then concluded that neither PHSA nor HealthPRO owed any duty of good faith to Stericycle in conducting the selection process or otherwise. She held that, in accordance with the analysis of contracts arising in respect of public tendering bids articulated in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, any duty owed by HealthPRO to Stericycle during the tendering process was extinguished on the award of the 2020 Contracts.

Stericycle appealed. In a unanimous decision, the Court of Appeal (Strathy C.J.O.; Zarnett J.A. and Wilton-Siegel J. (*ad hoc*)) dismissed the appeal. At the outset, the court dismissed Stericycle's argument that it was not obligated to maintain 2013 pricing in the present circumstances on the plain language of the Six-Month Provision. The court held that while the provision was indeed plain in its language, it was plain that it applied in the case of "implementation of a new contract to a different supplier". In this case, PHSA implemented a new contract, the Daniels 2020 Contract, and selected a new supplier, i.e. Daniels. In so finding, the Court also rejected Stericycle's argument that the standard of review was one of correctness based on the SCC decision in *Ledcor Construction Ltd. v. Northridge Indemnity Insurance Co.*, 2016 SCC 37, rather than the palpable and overriding error standard of *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.

With respect to good faith, the Court of Appeal addressed both the duty to exercise a contractual discretion in good faith and the duty of honest performance of a contract.

2.1.1 The duty to exercise a contractual discretion in good faith

With respect to Daniels' inability to commence work in June 2020, Stericycle identified several alleged breaches of the obligation to exercise the contractual discretion to select a primary supplier reasonably:

1. a duty to hold suppliers to the commitments made in their RFQ and RFP responses, the breach of which Stericycle describes as allowing Daniels to "re-write" the start date and as permitting impermissible bid repair by Daniels;

2. a duty not to select a supplier known to be unable to commence the provision of services on the start date of the 2020 Contracts; and

3. a duty not to conscript Stericycle into helping Daniels buy time to allow Daniels to cure fundamental misrepresentations in the RFQ and RFP responses by which it won the Daniels 2020 Contract.

In essence, as summarized by the Court of Appeal, Stericycle's argument was that the application judge erred in failing to find that, in excusing Daniels from its obligation to commence providing services under the Daniels

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2020 Contract on June 1, 2020, HealthPRO and PHSA breached a duty of good faith owed to Stericycle.

That argument was rejected for two reasons. First, since Stericycle was not a party to the Daniels 2020 Contract, it could not assert a breach of a duty of good faith in the performance of that contract. If HealthPRO and PHSA had waived any breach of Daniels' obligations in the Daniels 2020 Contract regarding the date of commencement of operations, that was a matter between them and Daniels. That decision was squarely in line with the Supreme Court decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3.

Alternatively, even if Stericycle had standing to raise the good faith issue, there was nothing wrong with the lower court's finding that there was no provision in either the RFQ or the RFP that imposed a mandatory date for the implementation of services, which precluded a finding of bad faith.

In summary, PHSA did not breach any obligation to Stericycle in refraining from requiring Daniels to begin providing service on June 1, 2020. Put positively, PHSA was entitled to select December 1, 2020, as the date of commencement of such services. PHSA did not breach any obligation to Stericycle in requiring it to continue to supply under the Six-Month Provision until December 1, 2020.

2.1.2 The duty of honest performance of a contract

Stericycle's final ground of appeal was that the application judge erred in failing to find that HealthPRO and PHSA breached the duty of honest performance of its 2020 Contract.

Stericycle argued that HealthPRO acted dishonestly in providing information regarding the Six-Month Provision to Daniels and in relying on the Six-Month Provision to allow Daniels to delay its start date. Stericycle also alleged that PHSA acted dishonestly in not informing Stericycle much earlier than June 2, 2020, of its intended reliance on the Six-Month Provision in its selection of Daniels as the primary supplier.

This final argument was also dismissed. The Court of Appeal held that none of those allegations involved lying or actively misleading Stericycle about a matter directly linked to performance of the Stericycle 2020 Contract or to the exercise of rights set forth therein.

The RFP did not prevent PHSA from obtaining the information that it required regarding proposed implementation of the 2020 Contracts by Daniels and Stericycle to make an informed selection of its primary supplier. HealthPRO was entitled to advise PHSA, as its member, of its rights under the 2013 Contract and, as discussed, PHSA was entitled to rely upon such

rights. Nothing done here satisfied the test set out in *C.M. Callow* for demonstration of dishonest performance of the Stericycle 2020 Contract.

2.2 PME Inc v. Enerkem Alberta Biofuels LP (Enerkem Alberta Biofuels GP Inc)

The issue in this case was the extent to which an Alberta lienholder could increase the lien fund by applying equitable principles and recent developments in the law of contract, including *Callow*.[5] Stating that "the law has not been kind to lien claimants who wish to increase the lien fund with novel arguments", Master Schlosser found that they could not. The weight of authority was against inflating the fund by using equitable principles, implied terms, or novation that conflicted with written terms of construction contract.

3.0 Callow is not new law

In an excellent paper by Paul Ivanoff and Ethan McCarthy in the 2021 journal of the CCCL,[6] the authors discuss *Callow* in the context of termination of contracts, be it for default or for convenience, concluding that no contractual right, including a termination right, can be exercised dishonestly and contrary to the requirements of good faith.

In their discussion, Ivanoff and McCarthy point to a 2014 Ontario Superior Court of Justice decision, *Urbacon Building Groups Corp. v. Guelph (City)*,[7] released in June 2014, i.e. five months before the Supreme Court released its decision in *Bhasin* and a full six years before *Callow*. In *Urbacon*, the City of Guelph had retained a consultant to oversee its project for which Urbacon acted as contractor. When the project was about 95% performed, the City asked its consultant for a statement that Urbacon had failed to comply with the Contract to a substantial degree, a prerequisite for issuing a notice of default and eventual termination. When the consultant recommended that the contract not be terminated at that time, the City ghost-wrote the letter for the consultant, who simply adopted the language suggested by the City and issued the letter as requested. That, according to Justice MacKenzie, constituted bad faith and therefore a breach of the City's obligation to discharge its contractual duties in good faith:

> 159 There can be no serious argument that the parties to this contract did not have an obligation to perform or discharge their duties and obligations under the contract in good faith: that is, to do no act

[5] *PME Inc v. Enerkem Alberta Biofuels LP (Enerkem Alberta Biofuels GP Inc)*, 2021 ABQB 889 (Master).
[6] P. Ivanoff, E. McCarthy, "Contract Termination: Considerations in Terminating for Default or for Convenience", 2021 J. Can. C. Construction Law. 61.
[7] 2014 ONSC 3641 (S.C.J.).

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or omission that would detract from the discharge of those duties and obligations under the contract. The Contract here sets out a detailed mechanism for dispute resolution in G.C. 8 which provides for negotiation, mediation and arbitration of disputes, in particular, G.C. 8.2 referred to above. In this regard, the provisions of G.C. 8.2.3, previously mentioned, bear repetition:

> 8.2.3 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank candid and timely disclosure or relevant facts, information and documents to facilitate these negotiations.

160 In my view, the evidence establishes that the spirit, let alone the letter, of the concept in G.C. 8.2.3, particularly after the Extension Agreement in December of 2007, was honoured in the breach rather than the observance. However, the most flagrant example of the failure of Guelph to act under the contract in good faith was the contrivance by Mr. McCrae on behalf of Guelph in orchestrating MTA in the preparation and issuance of the notice of events of default being the precursor or foundational act for Guelph's termination of Urbacon. The details of such orchestration have been described above and do not require repetition here.

161 In the result, the notice of events of default issued by MTA under the direction or orchestration by Guelph is invalid and thereby negates any justification by Guelph of its termination of Urbacon. The failure by Guelph to perform its obligations in good faith under the Contract invalidates any justification for Guelph's termination of Urbacon on the Contract.

Just like six years later in *Callow*, therefore, the court found that a termination in bad faith constituted a breach of contract. It is noteworthy that *Urbacon* held an owner to a good faith standard in termination of construction contracts even before the Supreme Court's *Bhasin* decision was released. In that sense, the cautionary tale of *Callow* is arguably nothing new for a party considering terminating a construction contract. The terminating party will be held to a standard of good faith and honest performance, as will the party who is being terminated, for that matter.

Conclusion

It is arguable that *Callow* will not change much in construction litigation. A brief look at construction cases pre-*Bhasin* and pre-*Callow* indicates that while in general litigation, courts were fairly evenly split in accepting or re-

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jecting a general common law duty to perform a contract in good faith,[8] the majority of construction cases that predate the Supreme Court's pronouncements on good faith seem to already have favoured such a duty.[9] The reason may be that it has long been recognized that owners have an obligation to treat contractors responding to tenders in good faith and, as pointed out elsewhere, "if bidders must be dealt with in good faith before their actual construction contract is awarded, it seems strange that the obligation to act in good faith would be cancelled by the granting of the contract to the compliant bidder".[10]

[8] See the discussion in Bhasin at paras. 37-39.

[9] See A. Simard, "Argumentation Plan" (2004), 34 C.L.R. (3d) 173; A. Heal & K. Robinson, "The Impact of the Emerging Legal Doctrine of Good Faith on The Interpretation and Enforcement of Changed Soils Conditions Clauses" (1998), 38 C.L.R. (2d) 105; D.A. Brindle, "Owners' Claims Against Contractors — A Primer" (2008), 70 C.L.R. (3d) 7; cf. J. Richler, "Good Faith & Construction Contracts" (2004), 34 C.L.R. (3d) 163.

[10] A. Simard, "Argumentation Plan" (2004), 34 C.L.R. (3d) 173.

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