Canadian College of Construction Lawyers

LEGAL UPDATE

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A Review of:
A Guide to Canadian Construction Insurance Law

LU #165 [2023]

Primary Topic:
XIII. Insurance
Jurisdiction:
Canada
Author:
Andrea Lee,
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A Review of:
A Guide to Canadian Construction Insurance Law

Construction law is considered by most to be a specialized area of the law. Practitioners of construction law, however, will readily agree that within their field, there are even more specialized areas, key among them being insurance.

In an industry where there may be infinite permutations of risk due to the significant length and complexity of projects and the number of parties required to execute them, insurance is an important risk management tool.

The second edition of *A Guide to Canadian Construction Insurance Law*, released earlier in 2023, provides a helpful roadmap. In this edition, authors Bruce Reynolds and Sharon C. Vogel have updated ten years of developments and legal authorities, adding significant Canadian precedents that impact the landscape of construction and design insurance.

The text is a practical guide, from its opening chapter on the purpose of insurance and the legislative framework in Canada to its chapter on the methodology for advancing an insurance claim. The authors provide insight into a range of insurance products, how to read a policy and how to avoid a loss of coverage through misrepresentation, and the roles of agents and brokers including the applicable standard of care in advising insureds.

As the law in this area continues to evolve, recent Canadian cases highlighted in the text involving builders’ risk, commercial general liability (CGL) and professional liability policies may be of particular interest.

For example, in the chapter on Builder’s Risk Policies, the Supreme Court of Canada’s decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* and the subsequent cases on faulty or improper workmanship exclusion with a resultant damage exception are discussed at length.

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Primary Topic: XIII. Insurance
Jurisdiction: Canada
Author: Andrea Lee, Glaholt Bowles LLP

CANADA

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In *Ledcor,* the builders' risk policy excluded the cost of making good faulty workmanship, but physical damage resulting from the faulty workmanship was insured. The facts involved windows that had been dirtied and damaged during construction. The Court held that where a policy's language is ambiguous, rules of interpretation should be consistent with the reasonable expectations of the parties; the reasonable expectation of the parties was that there was broad coverage available under the policy; and the faulty workmanship exclusion should be interpreted narrowly. The cost of making good faulty workmanship was determined to only exclude the cost of cleaning the windows, while the cost of replacing the windows was within the resulting damage exception. Following *Ledcor,* in *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.,* the British Columbia Court of Appeal interpreted a common defects exclusion in a builder's risk insurance policy, known as LEG 2/96, for the first time in Canada. The Court held that the damage excluded from coverage was the cost to rectify the defect in workmanship immediately before consequential damage occurred, but not the resulting damage caused by the faulty workmanship.

The text also reviews recent Canadian authorities, such as *MDS Inc. v. Factory Mutual Insurance Company,* where the Ontario Court of Appeal decision held that an exception to the exclusion for resulting physical damage includes physical damage, but not damage resulting from loss of use (in other words, economic loss is not covered), and *Pre-Eng Contracting Ltd. v. Intact Insurance Co.,* in which it was found that builder's risk policies do not cover the entire pre-existing property but only the part of the structure on which the builder was working. In the latter case, the CGL policy was found to properly respond to the loss.

Turning to the chapter on CGL policies, the authors examine coverage and exclusions under policies such as the IBC 2100 – 2016 and address the contractual liability exclusion, the coverage grant in respect of "property damage", and liability for defective workmanship, among other issues. The Supreme Court of Canada's decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* highlighted that, where the language of the policy defines an accident as continuous or repeated exposure to conditions which result in unintended property damage, faulty workmanship may be covered by the policy, despite the insurer's argument that this turns a CGL policy into a performance bond. In *G & P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co,* the Ontario Court of Appeal followed *Progressive* to determine that damage to windows caused by the insured's cleaning process was unintended and therefore was an occurrence covered by the policy. However, due to an exclusion for damages arising out of the insured's operations, coverage was nonetheless unavailable.

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The text also delves into various aspects of the exclusion for damage to property, reviewing recent case law pertaining to "that particular part of any property that must be restored, repaired or replaced because 'Your Work' was incorrectly performed on it". In *Royal & Sun Alliance Insurance Company of Canada v. Community Electric Ltd.,* the Saskatchewan Court of Appeal held that the exclusion applied only to the extent of repairing the defective work and not to the resulting loss of use of property. Likewise, in *St Paul Fire and Marine Insurance Company v. AIG Insurance Company of Canada et al,* an Ontario Court found that consequential damage caused by the failure of the mechanical system installed by the insured might be covered by the CGL policy. The authors note that the exclusion has been examined in numerous Candain cases, which are difficult to reconcile because the rulings are fact driven, but conclude that in general, if the property that must be restored, repaired or replaced is divisible, the exclusion will operate to exclude only those damages that relate to the part of the property where work was incorrectly performed. The overlap between builders' risk and CGL policies is also discussed, as *Community Electric* also stands for the proposition that builders' risk is not always primary to any other insurance; the enquiry is dependent on the wording of the policies.

Of course, while the foregoing faulty workmanship discussion is generally unapplicable to design professionals (being a common exclusion given the nature of architectural and engineering services), in the chapter on professional liability policies, the authors review other exclusions that are lesser known, including the performance of services outside of a professional's area of knowledge, failure to provide services promptly, and bankruptcy or insolvency. This is particularly interesting given the tendency of client-drafted services agreements to include strict timelines for the delivery of contract administration services; requirements that the design professional determine, at first instance, disputes between the owner and contractor which may be outside of their expertise; broad indemnities; and clauses that contain no limitations of liability. As noted in recent years by Canadian professional associations and regulators, such clauses could put the design professional at risk of being uninsured.

The authors also review the uncertainty in the law on the applicability of limitation of liability clauses in professional services agreements to third parties such as contractors and subconsultants, examining *PDC 3 Ltd. Partnership v. Bregman + Hamann Architects, Imperial Metals Corporation v. Knight Piesold Ltd.* and *Swift v. Eleven Eleven Architecture Inc.* The text concludes that where design professionals intend to rely on a limitation of liability clause in an agreement to which they are not a party, it is critical that they be aware of the clause's scope as it pertains to their liability.

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The *Guide to Canadian Construction Insurance Law,* 2nd edition, is an instructive summary of the multi-faceted approaches to risk management available in the construction industry. For parties to a project who have questions as to coverage issues or claims, or for lawyers who are interested in delving into a more specialized area of construction law, this text is an essential practical reference book on the subject of construction insurance.

Graham-Lockerbie Stanley JV v Ovivo Inc.
2023 SKKB 63

LU #165 [2023]

Primary Topic:
I. General
Jurisdiction:
Saskatchewan
Authors:
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SASKATCHEWAN

Mikkel Arnston

Jenna Chamberlain

When the Limitation Clock Starts on a Construction Project

In *Graham-Lockerbie Stanley JV v Ovivo Inc.,* 2023 SKKB 63 ("*Ovivo*"), the Saskatchewan Court of King's Bench considered whether to strike claims in contract, negligence, breach of warranty, contribution and indemnity on the basis that all of the claims were time-barred. The application to strike was partially successful. The Court held that the claims in contract, negligence and breach of warranty were time-barred, but the claims in contribution and indemnity were <u>not</u> time-barred, even though all of the claims arose out of the same construction contract and same fact pattern.

The Facts

The underlying project was for upgrades to a water treatment plant ("Plant"). The Owner (who was not a party to the proceedings) retained Graham-Lockerbie Stanley to act as design-builder (the "Design-Builder"). The Design-Builder retained Ovivo to design, manufacture, and install the water clarifiers for the Project (the "Subcontractor").

The key dates are as follows:

October 6, 2016:	30-day performance testing is aborted due to issues with performance of the Plant
December 31, 2016:	Substantial Completion is achieved (however, pending satisfactory completion of the 30-day performance testing, the Owner retained $25,000,000 from the Design-Builder as a deficiency holdback)
January 16, 2017:	Design-Builder sends a notice to the Subcontractor indicating that the water clarifiers do not comply with the subcontract and are inadequate
October 2017:	Owner and Design-Builder enter into a tolling agreement (as of the date of the decision, the Owner had not issued a claim against the Design-Builder)
November 29, 2019:	Design-Builder issued a Statement of Claim against the Subcontractor and 2 engineers employed by the Subcontractor ("Engineers")

Contract, Negligence and Breach of Warranty Claims

The Court confirmed that, while claims in negligence and contract may be discovered on different dates, in this case, the underlying facts were identical and, therefore, the limitation period for each claim started on the same date.

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SASKATCHEWAN

When the Limitation Clock Starts on a Construction Project

The applicable statutory framework set out the following test:

1. When did the Design-Builder have actual or constructive knowledge that a loss had occurred?
2. When did the Design-Builder have actual or constructive knowledge that the loss was caused or contributed to by the act or omission of the Subcontractor?

When did the Design-Builder have actual or constructive knowledge that, having regard to the nature of the loss, a proceeding would be an appropriate means to seek to remedy it?
The Design-Builder conceded that, for the purpose of the first stage of the test, it had actual knowledge of a loss being suffered when issues with the Plant began, in **October of 2016**.

When assessing the second stage of the test, the Court focused on correspondence between the parties from January 4-16, 2017. The Subcontractor sent a notice to the Design-Builder on January 4, 2017 which included the statement "Just to be clear on this, we consider this to be a vendor design deficiency and they need to sort it out". In response, the Design-Builder sent the Subcontractor a notice, on January 16, 2017, which included the statements: "[the water clarifiers] have not been furnished in strict accordance with the Purchase Contract [… and …] have not been adequately designed".

The Court found that, by **January 16, 2017**, the Design-Builder had actual knowledge that it had suffered a loss which was caused or contributed to by the Subcontractor and Engineers.

To assess the third branch of the test, the Court looked at the efforts the parties made throughout 2017 to resolve the performance issues at the Plant. The Design-Builder argued they could not have known litigation was appropriate until after these efforts failed to resolve the problem (towards the end of 2017). However, in this case, the remedial action taken by the Subcontractor could not eliminate the losses already incurred.

The Court found that, by **January 16, 2017**, the Design-Builder knew that legal proceedings would be the appropriate means to recover the losses suffered, which were caused or contributed to by the Subcontractor and Engineers.

The limitation period for the Design-Builder's claims in negligence, breach of contract, and breach of warranty commenced on **January 16, 2017** and were all time-barred.

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When the Limitation Clock Starts on a Construction Project

Contribution and Indemnity Claims

The Design-Builder entered into a tolling agreement with the Owner and the Owner has never commenced an action against the Design-Builder. Therefore, the Design-Builder argued that its limitation period to seek contribution and indemnity against the Subcontractor has not commenced because the Owner has not initiated an action against the Design-Builder.

In response, the Subcontractor argued that the potential for a claim by the Owner against the Design-Builder has long been known by the Design-Builder and that the limitation period for its claims in contribution and indemnity should be deemed to have commenced at an earlier time.

In interpreting the Saskatchewan legislation, the Court held that, unless the contrary is proven, a claimant seeking contribution and indemnity from another wrongdoer is presumed to be discovered on the date the claimant is "served with the claim with respect to which contribution and indemnity is sought". As a result of this finding, the Court held that the limitation period for the Design-Builder's claims in contribution and indemnity have not yet commenced and, consequently, these claims are not time-barred. The Subcontractor argued that this decision created an absurdity, to which the Court held:

> "the absurdity does not arise from the proper application of the Act but from [the Design-Builder] advancing a claim for contribution and indemnity from [the Subcontractor] even though [the Design-Builder] itself is not in jeopardy of a judgment in favour of [the Owner]. Whether such an action is legally maintainable is a matter for another time."

Setting-Off When Setting the Lien Fund: Helpful Reminders from the Court
2023 ABKB 484

LU #165 [2023]

Primary Topic:
IX. Construction and Builders Liens
Jurisdiction:
Alberta
Author:
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ALBERTA

Catriona Otto-Johnston

Setting-Off When Setting the Lien Fund: Helpful Reminders from the Court

The lien fund is made up of two parts, commonly referred to as "Part A" and "Part B". Part A of the lien fund is relatively straightforward – 10% of the value of the work actually done or materials actually furnished[1] – so long as the value of the work can be ascertained. It is trite law that there are no rights of set-off as against Part A. The same is not true for Part B, which is comprised of any additional amounts due and owing but not yet paid for work done or materials furnished.[2] The owner can set-off against Part B, thereby reducing the amount of the lien fund and the amount payable by the owner, as well as the amount available to claimants to the lien fund. When disputes arise amongst the various participants on a construction project, setting the lien fund can be difficult.

When the value of the lien fund is in dispute, an owner (or its agent) can apply to the Court for a determination, as was done in *Bonnyville (Municipal District No 87) v RPC Group Inc*, 2023 ABKB 484 ("*RPC Group*"). In *RPC Group*, the owner argued that a payment made after lien registration should be deducted from the lien fund. It further claimed set-off for the cost of fixing the contractor's deficient work, but failed to adduce sufficient evidence to prove the "deficiency repairs". The owner also failed to prove on the evidence that certain "extra work" it performed was actually part of the contractor's scope of work. Finally, the owner claimed set-off for legal fees. The Court dismissed this claim on the basis that the contract did not permit setting-off of legal fees. As a result, the lien fund was set without reduction of the owner's set-off claims.

The decision in *RPC Group* contains three helpful reminders when applying to set the lien fund. First, the PPCLA (and the *Builders' Lien Act* before it) is clear that once a lien is registered, an owner cannot make further payments.[3] If an owner pays a contractor after a lien is registered, the lien fund is not reduced by a corresponding amount.[4] In that case, the owner will effectively pay twice. Second, if an owner wants to set-off against Part B of the lien fund, it must prove it has the right under the contract to set off the amounts being claimed.[5] Third, an owner seeking set-off must put sufficient particulars into evidence to allow the Court to assess the claim.[6] Failing to do so may lead to dismissal of the set-off claim and setting of the lien fund without accounting for what otherwise may be valid backcharges.

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[1] Section 18(3)(a) of the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 (the "*PPCLA*").
[2] Section 18(3)(b) of the PPCLA.
[3] Section 18(2) of the *PPCLA*.
[4] *RPC Group* at paras 5-6.
[5] *RPC Group* at paras 9, 11.
[6] *RPC Group* at paras 9-10.

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LU #165 [2023]

Primary Topic:
IX. Construction and Builders Liens
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Setting-Off When Setting the Lien Fund: Helpful Reminders from the Court

Although brief, this decision serves as a good reminder to those applying to set the lien fund that while it is not a summary judgment application, applicants would be wise to "put their best foot forward" in adducing evidence of entitlement to and quantification of any backcharges sought to be set-off against Part B of the lien fund.

Seagate v.
Halifax Regional Municipality
2023 NSSC 176

LU #165 [2023]

Primary Topic:
III. Building
Secondary Topics:
X. Architects and XI. Engineers
Jurisdiction:
Nova Scotia
Authors:
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Michael Richards,
McInnes Cooper

NOVA SCOTIA

John Kulik, Q.C.

Michael Richards

Design and Build are Not the Same - Seagate v. Halifax Regional Municipality

The recent decision of **Seagate v. Halifax Regional Municipality, 2023 NSSC 176** upholds the separation between a contractor and designer's responsibilities on a construction project. Absent clear contractual language to the contrary, a contractor is not responsible for verifying an engineer or architect's design.

Background Facts

In February 2015, the Halifax Regional Municipality ("**HRM**") issued a tender for the construction of the pavilion at the Emera Oval skating rink (the "**Project**"). The pavilion was intended to house public washrooms and other facilities.

The tender was ultimately awarded to Seagate Construction ("**Seagate**") in April 2015.

Prior to Seagate's involvement tin the Project, HRM had retained DSRA Architecture Incorporated ("**DSRA**"), to act as the Project consultant. DSRA designed the boiler room for the Project and, in turn, hired M. Lawrence Engineering Ltd. ("**Lawrence Engineering**") as the mechanical engineer to provide design input for the boilers.

During construction, Seagate became concerned about the size of the boiler room and submitted alternative approaches, including using different boiler types, or reconfiguring the layout of the room. Both options were rejected by DSRA and Lawrence Engineering.

Seagate continued to raise concerns regarding the size of the boiler room during construction.

A Certificate of Substantial Performance was issued in December 2015 and the pavilion was opened for use.

However, in February 2016, the commissioning consultant on the Project determined that the boiler room was too small. The Nova Scotia Department of Labour ("**DOL**") also determined that the boiler room did not comply with the *Technical Safety Act* (the *"Act"*)*,* and the Boiler and Pressure Equipment Regulations enacted thereunder. In addition, the operations staff at the Project felt they would be unable to service the boilers due to the space restrictions.

Seagate v.
Halifax Regional Municipality
2023 NSSC 176

LU #165 [2023]

Primary Topic:
III. Building
Secondary Topics:
X. Architects and XI. Engineers
Jurisdiction:
Nova Scotia
Authors:
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Design and Build are Not the Same - Seagate v. Halifax Regional Municipality

As a result, HRM directed Seagate to perform additional work to make the boiler room compliant with the Compliance Orders issued by the DOL (the "**Additional Work**").

HRM took the position that Seagate was in breach of its obligations for constructing the boiler room in a manner that was in contravention of the *Act*. As a result, when Seagate submitted its application for payment of the outstanding contract amounts, HRM refused to pay these amounts until Seagate completed the Additional Work. HRM then refused to pay Seagate for the Additional Work.

While HRM eventually paid Seagate for the outstanding contact amounts, HRM maintained its position that Seagate was not entitled to compensation for the Additional Work. Seagate commenced litigation seeking payment for the Additional Work and interest on the contract amounts that were paid over three years after Seagate had submitted its application for payment.

The principal issue in this case was whether Seagate was in breach of contract for failing to construct the boiler room in compliance with the applicable legislation and regulations. More fundamentally, this case considered the separation of responsibilities between a contractor and designer, and whether a contractor is required to verify a design prepared by an engineer or architect.

In reviewing prior case law, Justice Bodurtha held that, absent clear and strong language, a contractor is not an obligated to verify the design work prepared by an engineer or architect. Beyond reviewing past case law, Justice Bodurtha considered the practical realities of ignoring the distinction between contractors and engineers and noted that such an "obligation on the contractor without clear and strong language in the contract to verify the engineer's work would turn the industry on its head".

Justice Bodurtha also noted that if contractors were responsible for verifying an architect or engineer's work, then there would be no reason to hire an architect or engineer in the first place.

> For HRM to suggest Seagate has a greater responsibility based on their interpretation of the contract provisions is flawed. It would not make sense for there to be a design prepared and vetted by engineers and architects hired by the owner (HRM) to then have the contractor

Seagate v.
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Design and Build are Not the Same - Seagate v. Halifax Regional Municipality

> either verify all of the designer's work or ignore the design and build something different on their own initiative. If the contractor has the liberty and ability to ignore the design, it begs the question as to why a designer was hired to develop a design in the process. There is a distinction between the responsibilities of the designer for the design versus the contractor for construction. This was not a design-build contract where Seagate was responsible for both.

Importantly, Justice Bodurtha distinguished the present situation from those instances where there is no engineer or architect involved in the work. In those situations, courts are more likely to find that the owner was relying on the skill and expertise of the contractor to ensure the work met the necessary codes and regulations. As those types of projects more often involve residential construction, where a homeowner hires a contractor, it is reasonable in those circumstances to require the contractor to ensure that their work meets the relevant building codes.

Here, the contract between Seagate and HRM was the CCDC 2 (2008) stipulated price contract. In reviewing the terms of this contract, and in particular GC 3.1 - Control of the Work, Justice Bodurtha held that this clause reflected the typical separate between design and construction and specified that the contractor is responsible for executing the design and the method of construction but is not responsible for the design itself.

Justice Bodurtha held that Seagate was not in breach of its contractual obligations and Ordered that HRM pay Seagate for the Additional Work and interest for its delay in paying the outstanding contractual amounts.

Significance

This decision upholds the separation of responsibilities between the contractor and the designer, with contractors only being responsible for properly carrying out the work in accordance with the design. However, as noted by Justice Bodurtha, this typical separation can be overridden by express contractual language to the contrary. Therefore, contractors and owners must carefully consider the terms of their contract to ensure that all parties have a clear understanding of their responsibilities.

Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc
2023 ABKB 545

LU #165 [2023]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Alberta
Author:
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ALBERTA

Corbin Devlin

Case Comment: Owner Bound by Subcontract Arbitration Clause

Can a third-party beneficiary of a contract litigate contractual warranties in its favour when the contract requires "all disputes" under the contract to be arbitrated?

In Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2023 ABKB 545, Husky (the project owner) sued Technip (a subcontractor) to enforce warranties contained in the subcontract between the general contractor and subcontractor. The warranties were for the benefit of Husky as the owner of the property. Husky was not a party to the subcontract and so considered itself not bound by the arbitration clause in the subcontract. It sued as a third party beneficiary of the subcontract.

The defendant subcontractor applied to strike Husky's claim based on a mandatory arbitration clause in the subcontract. In the first instance, the applications judge agreed with Husky, concluding the subcontract could not impose an arbitration burden on a non-signatory. On appeal to the Court of King's Bench (a hearing *de novo*), Justice Lema allowed the appeal and ordered that Husky's contractual claims be struck.

Interpreting the terms of the subcontract, the judge found that Husky was bound to follow the contractual dispute resolution provisions (i.e. to arbitrate). In particular, the judge referenced the express subcontract provision that all warranties are for the benefit of both the general contractor and Husky, as well as a broad subcontract provision requiring "all disputes" to be resolved by arbitration (although this dispute resolution provision made no express reference to Husky). The judge rejected an argument that the arbitration requirement was foisted on Husky. The benefit of the warranty provisions came with the limitation that any related dispute must be resolved by arbitration ("…by seeking to enforce its warranty right, Husky effectively signed on to the accompanying arbitration mechanism and, by extension, became a party to it.")

The court ordered Husky's contractual claims to be struck from its Statement of Claim (i.e. the claims to enforce Husky's warranty rights under the subcontract). Notably, the limitation period to arbitrate had passed, so the decision leaves Husky with no contractual remedy.

Husky also claimed against the subcontractor in tort (negligence), and the judge found that Husky's tort claim survives. Of course, Husky's rights in tort might not be co-extensive with its rights under the contractual warranty (e.g. having regard to potential limits on the recovery of pure economic loss in tort).

Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc
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Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Alberta
Author:
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ALBERTA

Case Comment:
Owner Bound by Subcontract Arbitration Clause

This case is the latest in a string of cases illustrating the risks associated with the intersection of arbitration agreements and limitations statutes. More significantly, it illustrates a complication associated with the enforceability of subcontractor warranties. This author would not have anticipated the court's finding that the owner is bound by an arbitration clause in the agreement between contractor and subcontractor.

Husky and Technip have both appealed Justice Lema's decision to the Court of Appeal.

Adjudication: Ontario Decision a Reminder that "Rough Justice" is Not Real Justice

Arad Incorporated v. Rejali et al
2023 ONSC 3949

LU #165 [2023]

Primary Topic:
XV. Adjudication
Jurisdiction:
Ontario
Author:
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ONTARIO

Paul Ivanoff

With the introduction of prompt payment and adjudication into Ontario's *Construction Act*, the pursuit of "rough justice" became a new tool in the tool-kit of project participants. In spite of its procedural and other frailties, adjudication arrived along with a legislated provision that "the determination and reasons of an adjudicator are admissible as evidence in a court."[1] The addition of this "admissibility" provision raises interesting questions. For example, once the adjudicator's determination is in the hands of a judge, will courts concede that the adjudicator's determination should be given deference? Or, will courts recognize adjudication for what it is: a process that lacks the rigor, depth, and scrutiny to determine legal rights of project participants.

In the case of Arad Incorporated v. Rejali et al, 2023 ONSC 3949 (CanLII), the reliance on the findings of an adjudicator was in issue. In Arad, a dispute arose in connection with the supply of services and materials by the plaintiff (the "Contractor") to the defendant (the "Owner"). The Contractor registered a claim for lien against the property, which lien was subsequently vacated. Two adjudications were then commenced: one by the Contractor and one by the Owner. The adjudicator dismissed the claim of the Contractor and dismissed the claim of the Owner as well. Leave to judicially review or stay the adjudicator's determinations was not sought by any of the parties - but that was not the end of the story.

With the adjudicator's determination in hand, the Owner then brought a motion for an order that the monies paid into court to vacate the lien be returned to the Owner. The motion came on before Justice Sutherland. In a nutshell, the issue before the court was whether the determination of the adjudicator (that no monies were owed to the Contractor) meant that the money paid into court to vacate the lien should be returned.

Justice Sutherland framed the questions before him as follows: (i) what is the nature of the adjudicator's determination? and (ii) should the security be reduced or returned?

As for the first question, Justice Sutherland noted in his reasons that it was not contested that the determinations of the adjudicator were interim decisions, and as interim decisions, they do not put an end to the proceeding. He went on to state that:

> *"The determinations of the adjudicator are not binding upon this court. The findings and con-*

[1] Construction Act, s. 13.13(7)

Arad Incorporated v. Rejali et al
2023 ONSC 3949

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Primary Topic:
XV. Adjudication
Jurisdiction:
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ONTARIO

Adjudication: Ontario Decision a Reminder that "Rough Justice" is Not Real Justice

> *clusions of an adjudicator set out in the determination is evidence, like any other evidence, this court may take into consideration in determining whether to exercise its discretion to reduce security "where it is appropriate to do so." But an adjudicator's conclusions are not determinative on the decision to reduce security."*[2]

As for the second question - whether the security should be reduced or returned - Justice Sutherland noted that for the court to determine if the security should be reduced or returned to the party that paid it into court, the requirements of section 44(5) of the *Construction Act* must be satisfied. Section 44(5) provides as follows:

> ***Reduction of amount paid into court***
> *44(5) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order* ***where it is appropriate to do so,***
> *(a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or*
> *(b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be.*

In assessing the question of whether the security should be returned or reduced, Justice Sutherland noted that, except for the determinations of the adjudicator, there was no other evidentiary basis in the affidavits before the court to determine that the monies paid into court should be returned to the Owner. The sole evidentiary basis for the relief sought on the motion was the determinations of the adjudicator.

Justice Sutherland found that the determinations of the adjudicator alone did not meet the evidentiary threshold required for the court to conclude that the lien claim did not attract the need for security. His conclusion was made for several reasons, including the following: the adjudicator made findings based on his opinion as an engineer and not based on expert opinion or reports; the adjudicator's opinion was not subject to contestation by any of the parties; the adjudicator made findings based on a site visit and

[2] *Arad Incorporated v. Rejali et al*, 2023 ONSC 3949 (CanLII), para.17

Arad Incorporated v. Rejali et al
2023 ONSC 3949

LU #165 [2023]

Primary Topic:
XV. Adjudication
Jurisdiction:
Ontario
Author:
Paul Ivanoff,
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Adjudication: Ontario Decision a Reminder that "Rough Justice" is Not Real Justice

verbal statements during the oral hearing; and, the adjudicator's findings were not all based on admissible evidence. With respect to the adjudicative process itself, Justice Sutherland stated that: "The adjudicative process is an interim measure to keep money flowing down the construction pyramid to the persons that provided labour and materials for the improvement to property so that such persons can be paid on a timely basis. It is not to determine the legal rights of the parties on a final basis."[3]

In recognizing rough justice for what it is, Justice Sutherland stated the following as to why courts should be wary of solely relying on the findings of an adjudicator:

> *I appreciate that the process is an interim one to provide a quick and efficient determination to get the money flowing down the construction pyramid. Not all evidentiary rules may be adhered to. Not all evidence provided may be subject to scrutiny through the discovery process or subject to cross examination. As such, the court should be weary solely relying on the findings of an adjudicator in this process to conclude that security paid per s.44 of the Act should be reduced or returned.*[4]

As a take-away, Project participants should recognize adjudication for what it is - a quick process lacking rigor in which, among other things, not all evidence is subject to scrutiny through the discovery process or cross-examination. Those dissatisfied with determinations of adjudicators should be buoyed by this Ontario Superior Court of Justice decision where the court held that the adjudicator's determination on its own was not sufficient for the court to grant the relief requested. Although project participants now have adjudication as a tool in their dispute resolution tool-kit, the *Arad* decision is a stern reminder that where the adjudication path is chosen, rough justice is not real justice, and the court will not simply yield to a determination of an adjudicator.

[3] *Arad*, para.26
[4] *Arad*, para.28

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