Canadian College of Construction Lawyers

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II. Statutory Regulation
Jurisdiction:
Ontario
Author:
Sahil Shoor, Gowling WLG

Supreme Court Redefines Health and Safety Responsibilities for Owners of Construction Projects: A Closer Look at R v. Greater Sudbury

After two years of anticipation, the Supreme Court of Canada has issued a split decision in *R v. Greater Sudbury (City)* ("**Sudbury**"). This precedent-setting decision significantly expands the health and safety obligations of an "Owner" under Ontario's Occupational Health and Safety Act ("**OHSA**").

As a result of the Supreme Court's decision, engaging a General Contractor ("**GC**") as a "constructor" at a construction project, and allowing the GC to assume full operational "control" over the project, may no longer insulate an owner from liability under the OHSA. Owners are at greater risk for health and safety on their projects and need to carefully reconsider their contractual arrangements with GCs and construction managers.

Factual background

A very standard contractual arrangement

The contractual arrangement in *Sudbury* will be familiar to most "owners" and "constructors" across the province of Ontario. The Corporation of the City of Greater Sudbury ("**City**") put to tender a construction project for road and water main repairs. The City contracted with the successful GC for the completion of the repairs (the "**Project**"). The GC agreed to serve as the "constructor" for the Project. The GC, as constructor, would assume control over day-to-day management of the Project. The contract also stipulated that the GC would assume full responsibility for ensuring that it – and all sub-trades under its control – was in full compliance with the OHSA for the entire project.

As is very typical in these types of contractual agreements, the contract between the City and the GC called for minimal involvement on the part of the City. The City's involvement was limited to monitoring the project by occasionally sending City-employed quality control inspectors to the job site to check for defects in workmanship. The quality control inspectors had limited authority – they could not direct or control any of the work performed by the GC or its sub-trades. No other City workers were present at the Project.

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A tragic incident

In September 2015, a pedestrian was tragically struck and killed by a road grading machine operated by an employee of the GC. The pedestrian was crossing a street at a traffic light that was adjacent to the Project, while the road grading machine was reversing.

The Ministry of Labour ("**Ministry**") attended at the Project and investigated the accident. The Ministry charged both the City and the GC with numerous violations of the OHSA.

The City was charged for breaching its obligations as a "constructor" under the OHSA.

Notably, the City was also charged with breaching its purported obligations as an "employer" under the OHSA.

Ontario's *Occupational Health and Safety Act*

The *Occupational Health and Safety Act* (the "**OHSA**") governs all workplaces in Ontario, including construction sites. The OHSA imposes health and safety responsibilities and obligations on employers. An "employer" is broadly defined to mean:

> "a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;"

Under the OHSA, on a construction project, an employer is permitted to delegate some of its health and safety responsibilities to a "constructor." There are certain rules governing how this delegation can be permitted, including the conduct of due diligence on the proposed constructor by the owner, and on the requirements of the constructor, including having control of the project site.

The *Sudbury* case examines what residual liability remains with the owner of a construction project site as an employer *after* the owner has properly appointed a constructor.

Lower court decisions

Briefly, the procedural history of this case is as follows:

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- Trial decision - The Trial judge noted that there were numerous, clear violations of the OHSA at the Project, which contributed to the accident in September 2015. However, the Court ruled that it was "crystal clear" that the GC was the "constructor" and had "control" over the Project. Further, the Court ruled that the City was only an "employer" with respect to its own quality control inspectors. The Trial Judge stated:

  "[t]he City did not have control of the conduct of the workplace to bring it within the obligations intended or created by the OHSA for employers."

- Superior Court of Justice - The Crown appealed the Trial Judge's ruling to the Superior Court of Justice. Again, the Crown asserted that the City was liable both as a "constructor" and as an "employer" under the OHSA. The Superior Court endorsed the Trial Judge's ruling and dismissed the appeal. The Court commented on the current state of affairs in the construction sector, stating that accepting the Crown's position would:

  "...change substantially what has been the practice in Ontario on construction projects."

- Ontario Court of Appeal - The Crown's second appeal to the Ontario Court of Appeal was partially successful. While the Court of Appeal refused to hear the Crown's appeal regarding the matter of whether the City was a "constructor," the Crown was allowed to proceed regarding its assertion that the City was an "employer" for the purposes of the OHSA. Because the OHSA imposes a standard of strict liability on an employer, the fact the 2015 accident occurred at the Project meant that the City had breached its duties under the OHSA. The matter was remitted to the Trial level for a determination of the outstanding issues:

  a. Whether the City had exercised due diligence with respect to the Project; and

  b. If the City failed to exercise due diligence, the establishment of an appropriate penalty or sentence.

Supreme Court decision – A divided judiciary

A majority decision of the Supreme Court is required to overturn a lower Court decision. Accordingly, in a 4-4 split decision, the Supreme Court *upheld* the decision of the Court of Appeal.

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The plurality of the Court's comments is particularly salient for owners:

- Court of Appeal decision upheld – The plurality of the Court agreed that the City was an "employer" for the purposes of the OHSA. The Supreme Court's analysis was as follows:
    - ◊ The City was an employer of the quality control inspectors, whom it employed directly and dispatched to the construction project;
    - ◊ The City was also found to be an "employer" of the GC, with whom it contracted to undertake the Project;
    - ◊ As an employer of its inspectors and the GC, the City was required by the OHSA to ensure that the measures prescribed by the OHSA were carried out at the Project;
    - ◊ In September 2015, measures required by the OHSA were not followed – a fence between the job site and the public roadway was not present; and signalers were not present;
    - ◊ Accordingly, the City, as an "employer," committed an offence under the OHSA.
- Due diligence defence remains available – An employer charged with violating the OHSA can assert the defence of due diligence – essentially, stating that it has taken all reasonable preventative steps to ensure that the workplace is as safe as possible. If charged with a violation of the OHSA, a defendant employer may be found "not guilty" if they can prove that due diligence was exercised. In other words, the employer must prove that all precautions reasonable under the circumstances were taken to protect the health and safety of workers. In *Sudbury,* the Court of Appeal did not consider evidence regarding whether the City exercised any "control" over the GC's staff, or any involvement in the day-to-day management and operations of the Project. The Supreme Court confirmed the Court of Appeal's approach.
- "Control" test as part of the due diligence analysis – The Supreme Court maintained that the defence of due diligence remained available to the City. Further, the plurality of the Court held that the City's control over the Project, and the parties at the workplace, was relevant to its due diligence defence. The plurality of the Court held that assessing "control" at the due diligence phase answers fairness concerns about imposing liability on an employer for a breach caused by another party.

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As a result of the Supreme Court's split decision, the *Sudbury* case will be remitted to Trial for a determination of all outstanding issues, including the City's due diligence defence. It remains to be seen whether the City will be successful in this regard. The plurality of the Supreme Court made suggestions regarding factors that might inform the Trial Court's assessment of whether the City met the standard of due diligence under the OHSA:

- Did the accused exercise a degree of control over the workplace or the workers?
- Did the accused delegate control to the GC / constructor in an effort to overcome its own lack of skill, knowledge, or expertise in accordance with the OHSA?
- Did the accused take steps to evaluate the GC / constructor's ability to ensure compliance with the OHSA before deciding to contract for its services?
- Did the accused effectively monitor and supervise the GC / constructor's work on the project to ensure that the prescribed compliance requirements under the OHSA were carried out at the workplace?

A divided judiciary

We would be remiss if we did not mention the several, well-reasoned, dissenting opinions issued by half of the Supreme Court.

Four Justices of the Supreme Court recognized that the implications of the Ontario Court of Appeal's decision would create far-reaching consequences that would upset business practices and risk management mechanisms that were established for several decades.

At several points in the *Sudbury* decision, they described the interpretation adopted by the Ministry, the Court of Appeal, and the plurality of the Supreme Court, as "absurd":

> "The Ministry argues that as soon as a worker is present in the workplace, their employer is liable for complying with all regulatory measures... What this interpretation effectively means is that everyone who employs *anyone* is responsible for everything that *anyone* does. It would be absurd to interpret [the OHSA] as obligating every employer at a construction project to ensure compliance with all measures contained within the [OHSA]."[1]

They continued:

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> "...It would be absurd for an excavating company which had safely equipped its own workers to be liable if a welding company on the other side of the project is not providing its workers with gloves, or for one employer to bear responsibility for ensuring that every other employer had made their own traffic plans... The legislature clearly did not intend to require an employer to "ensure" compliance with obligations directed only at other workplace parties."[2]

Still further:

> "Put simply, a measure contained in the Regulation applies to an employer where it relates to the work that the employer controlled and performed through their workers. Otherwise, employers would have no ability to ensure compliance with that measure nor would the measure bear any relation to their workers' tasks. The structure of the [OHSA], the division of roles in the construction context, the relationship with other employer duties, the purpose of protecting workers, and the presumption against absurdity call for such an approach."

It is possible that the repercussions of the plurality of the Court's decision will extend beyond the confines of the construction sector. The prevailing approach could support an all-encompassing "everyone is responsible for everything" expansion in the duties of employers across all provincially regulated sectors and industries.

Key takeaways

For the past several decades, owners of projects have successfully managed risks associated with day-to-day violations of the OHSA by ceding control of projects to experienced and reputable GCs / constructors. The Supreme Court's decision in *Sudbury* appears to be an initial push by the Courts to move industry stakeholders away from one of the sector's most established risk management strategies. This appears to be a sign of things to come.

As a result of *Sudbury,* it may no longer be prudent for an owner to send its own employees to conduct quality control, maintenance, etc., at a project, even though those functions may have nothing whatsoever to do with construction work being performed.

Further, even if an owner retains a GC to serve as the constructor for a project and essentially adopts a "hands off" approach to the project, it may be required to meet much more strenuous compliance obligations under the OHSA, including maintaining supervisory responsibility over the day-to-day affairs of the project, and heightened due diligence requirements. Failure to discharge these obligations could result in substantial increased exposure,

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or, alternatively, significantly reduce the likelihood that the owner will be able to meet the standard of due diligence in the event of a charge.

On December 8, 2023, Sudbury filed a Notice of Motion for a rehearing of the appeal on the basis that the appeal was heard by a full panel of the Court, but Justice Brown did not participate in the Decision of the Court. On February 15, 2024, the motion for a rehearing was denied. Accordingly, the Court's decision stands, meaning that an owner's failure to account for these exposure points in the short term may trigger substantially more liability under the OHSA than the owner initially anticipated, or contracted for.

Book Review – Christopher Seppala's The FIDIC Red Book Contract: An International Clause-by-Clause Commentary

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III. Building Contract
Jurisdiction:
International
Author:
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INTERNATIONAL

Bruce Reynolds

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Given its international stature, it perhaps comes as somewhat of a surprise that the FIDIC suite of contracts has – historically speaking – not been the subject of regular use in the Canadian construction industry; while not unheard of, they are still the exception rather than the norm. However, as the industry and its participants continue to become more global in nature, we have begun to see an increase in the use of the FIDIC contracts in Canada, and Canadian contractors venturing into the global market regularly encounter the FIDIC forms. As well, understanding the risk allocation assumptions of foreign contractors negotiating Canadian domestic contracts benefits from an appreciation of the FIDIC approach to key issues.

Generally, though, Canadian practitioners have less familiarity with these contracts and find themselves at a somewhat of a disadvantage in the international context, where the FIDIC suite is arguably the most used standard across the world. Of course, this is particularly true of FIDIC's Red Book contract, which applies to design-bid-build projects, and is the most frequently used of the FIDIC suite.

Canadian lawyers will therefore be gratified to learn that there now exists a comprehensive treatment of the Red Book, delivered through Christopher Seppala's treatise, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary*. True to its name, the text provides an extensive, 1,300-page analysis of not only each individual clause and sub-clause of the Red Book (of which there are 168 in total), but also a detailed review of FIDIC as an organization and its entire suite contracts, and an analysis of the laws applicable to the treatment and interpretation of FIDIC contracts in both common law and civil law jurisdictions – all extremely valuable contextual information.

The text is split into five chapters, along with a brief set of appendices.

In his first (introductory) chapter, Seppala discusses the purpose of the book, the role and function of FIDIC, and FIDIC's suite of construction contracts (including, but not limited to, the Red Book). As it relates to the Red Book, this chapter provides an insightful commentary as to how the Red Book is properly construed in both the common law and civil law contexts, the latter of which is particularly important given the extent of the Red Book's usage in civil law jurisdictions. In particular, the chapter considers the Red Book's use of an independent engineer – which Canadian readers will think of as the Consultant under a CCDC contract, for example – as well as its use of contingencies and its allocation of risk (which topics have both been the subject of sustained interest to the Canadian construction bar over many years.

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The second chapter covers the subject of applicable law, reviewing the treatment by common law and civil law jurisdictions of several key construction issues including duties of good faith, contract defaults, terminations, liquidated damages, limitations on liability, *force majeure*, bankruptcy, and limitations periods, among many other topics. This comparative analysis will be of particular interest to any lawyer engaged in international projects, as well as anyone seeking different perspectives on how such critical (and topical) issues have been treated in other jurisdictions and therefore inform the thinking of foreign contractors working in Canada. From a policy perspective, including within the context of appellate advocacy regarding the interpretation of the key provisions of construction contracts, the analysis of these issues is also very valuable.

Next, the third chapter discusses the issue of contractual interpretation as it applies to the Red Book. For Canadian users who lack familiarity the Red Book, this is literally an invaluable resource into how the Red Book has historically been treated, and, more pertinently, how the Red Book itself *instructs* how it should be interpreted, as well as how it can be interpreted by reference to other FIDIC publications. Of note, this chapter deals in part with the issue of how the Red Book's dispute adjudication board provisions have been considered elsewhere, which will be particularly relevant to Canadian readers given the growing use of dispute adjudication boards in Canada.

The fourth chapter contains Seppala's commentary on each of the Red Book's 168 sub-clauses, and spans over 1,000 pages. Seppala's treatment of the Red Book is truly encyclopaedic, and (unsurprisingly) goes far beyond the basic task of paraphrasing those clauses. The text offers insightful analysis and commentary on each sub-clause, making it the most comprehensive resource imaginable for users of the Red Book. Of particular interest will be the commentary relating to the SCL's Delay and the Disruption Protocol, the procedure for claims under the Red Book (including the issue of notice provisions and time bars), and the Red Book's treatment of arbitration, including the applicable ICC rules. Again, this chapter's discussion of the Red Book's dispute avoidance/adjudication board is especially important reading for Canadian construction lawyers, as is its treatment of the ICC rules.

The fifth chapter addresses several documents related to the Red Book, including the documents used to constitute the dispute avoidance/ adjudication board, FIDIC's advisory note regarding the use of BIM, project security documents (e.g. parental guarantees), and others. Although it is relatively succinct in its treatment of these other documents, Seppala's text nevertheless again provides helpful commentary that situates these documents in the context of the Red Book and provides guidance as to how they are implemented.

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On balance, it seems safe to say that *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* is *the* definitive resource for users of the Red Book. It is exhaustive in its treatment of not only the Red Book itself, but also the surrounding context necessary to fully appreciate the Red Book. However, readers should not expect a text that is summary or high-level in nature; as a reference, it is intended serve as an encyclopaedia rather than a guide. Ultimately, for those lawyers engaged on projects using the Red Book, or for those who wish to deepen their understanding, or develop an internationally informed understanding of the policy and negotiating considerations in regard to key issues in respect of construction contracts, this text is therefore essential reading.

It is not an exaggeration to say that, among international construction lawyers, Seppala's expertise in regards to the FIDIC forms is veritably legendary: nor would it be an exaggeration to say that, even for Seppala, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* represents a capstone achievement, the value of which will be realized by the global construction bar for many years to come.

Prompt payment gaps in the Construction Act

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John Margie

Jay Narthwani

Ontario's prompt payment system under the *Construction Act* (the "*Act*") has changed the way that parties to construction projects understand their payment obligations. But there are several significant gaps in the prompt payment scheme that produce significant uncertainty and risk for contractors. In this article, we discuss three such gaps.

First, when it comes to public-private partnership ("P3") projects (also known as alternative financing and procurement or AFP projects), the language of the *Act* produces significant legal uncertainty that many parties involved in P3 projects are likely not even aware of – and that urgently demands a change to the *Act*'s regulations. Absent such a change, prompt payment will not apply, or will apply unevenly, to the construction phase of P3 projects.

Second, contractors may be stranded with liability to pay subcontractors following certification of completion of a subcontract, without the ability to recover from the owner. The problem is that the Act's scheme for payment of holdback requires payment of holdback by a party who is directly liable for payment on a subcontract any time all liens under *any subcontract* expire; but it requires holdback release from the owner *only* when all liens *under the contract* have expired. This means that a contractor can be liable for mandatory payment of holdback to a subcontractor following certification of completion of a subcontract, without the ability under the *Act* to require or obtain release of holdback from the owner.

Third, holdback release from an owner to a contractor is mandatory following the expiry of a contractor's lien rights. But the Act creates a potential issue if a contractor wants to enforce that mandatory release through adjudication, because the Act's language means that, by default, adjudication will not be available if holdback payment is refused following completion of a contract or subcontract.

1. Prompt payment on P3 projects

Trigger for prompt payment obligations

The triggering event for prompt payment obligations is the giving of a "proper invoice." It is only once a proper invoice is given that the payment deadlines in sections 6.4 to 6.6 are triggered.

Section 6.1 of the *Act* defines a proper invoice as "a written bill or other request for payment…under a contract", and section 6.3 provides that proper

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invoices are "given to an owner." As proper invoices are given by a contractor to an owner, the identity of the contractor and the owner matters – as does the way that funds flow on a P3 project.

Structure of a P3

On a P3 project, the provincial Crown (or a municipality) (often known as the "Contracting Authority") will enter into a "Project Agreement" with a "Project Co", which is typically a special-purpose entity formed for the project by the operating companies which will carry out the construction.

For a P3 in which Project Co is required to design, build, finance and maintain a project, Project Co will then typically enter into a series of contracts: a lending agreement to secure financing; a design-build "Construction Contract" with the "Construction Contractor" for the design and construction, and a maintenance contract with "Maintenance Co" for the long-term maintenance of the project. These contractual arrangements will vary depending on the precise scope of the P3; for instance, Project Co may also be required to operate the project over the long term, or there may be no maintenance component at all.

The key feature of P3 is that the private sector is responsible for financing a significant part of the cost of construction, and it recovers that cost (and can repay its lenders) only upon contractual "Substantial Completion" of the project (which is not the same as substantial performance under the *Act*). At the outset of a P3 project, Project Co, through its lenders, is typically financing all of the cost of construction. As Project Co hits certain milestones, the Contracting Authority will make milestone payments, and in the later stages of the project the Contracting Authority will start to contribute more of the cost of construction. The proportion will vary from one monthly draw to the next and will depend on the progress achieved.

This variability has significant consequences for the prompt payment system.

Owner and contractor on a P3

The *Act* specifies the identity of the owner and contractor on P3 projects. Section 1.1(2) of the *Act* provides that, except as provided in section 1.1, the Project Agreement between the provincial Crown (or a municipality) and Project Co is a contract, and the Construction Contract between Project Co

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and the Construction Contractor is a subcontract.

Section 1.1(5) creates an exception to the rule set out in section 1.1(2). It deems Project Co to be the owner, and the Construction Contractor to be the contractor, for the purpose of a number of specified sections (none of them having to do with prompt payment).

Importantly, section 1.1(5)(6) also provides that this exception applies to "Any other portion or provision that may be prescribed" by regulation. Section 88(1)(c) explicitly provides that Lieutenant Governor in Council may make regulations respecting section 1.1(5), but no such regulations have yet been made.

Invoicing and prompt payment on a P3 project

As a result of the unique financing arrangements on the P3 project, in many months there will be no invoices given by Project Co to the Contracting Authority – rather, Project Co will submit draws to its lenders.

Project Co's lenders are not "owners" as defined by the *Act*: under section 1 (1) of the *Act*, an owner is a person "having an interest in a premises at whose request…an improvement is made to the premises". Project Co's lenders will secure their loans with the assets of the operating/parent companies involved in the project, but the lenders will not take a security interest in the project lands; and it is the Contracting Authority, not the lenders, which makes the request for the improvement.

Recall that, under section 6.3, proper invoices are requests for payment which are "given to an owner." As the draws between Project Co and the lenders are not given to an owner, they are not "proper invoices" within the meaning of the *Act*.

Under section 6.4, prompt payment obligations start to flow when an *owner* receives a proper invoice: the *Act* then requires that, subject to a notice of non-payment, "an *owner* shall pay the amount payable *under a proper invoice* no later than 28 days after receiving *the proper invoice* from the contractor." (Emphasis added.) Sections 6.5 and 6.6 flow these prompt payment obligations down the construction pyramid.

As Project Co's draws to the lenders are not proper invoices, the monthly invoicing by Project Co in the first phases of a P3 project will not trigger the prompt payment system. This will likely come as a surprise to the many sub-

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contractors expecting prompt payment throughout the construction of P3 projects in accordance with the *Act*'s timelines.

Just as problematic is the mixture of payment streams which occurs later in a P3 project. There will be months when some funds received by Project Co come from the owner (the Contracting Authority), and others from the lenders. Under section 6.5(1), the contractor (Project Co) must, after receiving payment from the owner, "*pay each subcontractor who supplied services or materials* under a subcontract with the contractor *that were included in the proper invoice* the amount payable to the subcontractor." (Emphasis added.) How is Project Co to determine which services or materials were "included in the proper invoice", and which were included in a draw to the lenders?

Even more vexingly, how are the Construction Contractor and its subcontractors to make this determination in respect of their prompt payment obligations? The Construction Contractor's subcontractors will have no visibility into the invoicing and financing arrangements at the Project Co level.

This produces enormous uncertainty and uneven outcomes in prompt payment on a P3 project, including a lack of certainty about when notices of non-payment must be given, or what claims for payment they must be given in respect of.

It cannot have been the intention of the Legislature in enacting a prompt payment scheme that it would apply to some but not all of the construction phase of a P3 project, or that it would apply in respect of some but not all of the payments made in a given month.

Fixing prompt payment on P3s

It seems clear that this is an unintentional gap in the *Act*. Fortunately, the solution is simple and requires only a change to the regulations, not to the *Act*.

Recall that section 1.1(5)(6) of the *Act* provides that Project Co is deemed to be the owner for the purpose of "Any other portion or provision that may be prescribed."

The provincial cabinet need only pass a regulation prescribing that Project Co is deemed to be the owner for the purpose of Part I.1 of the *Act* (the prompt payment provisions).

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Then, the monthly invoice from the Construction Contractor to Project Co would be a "proper invoice." It would not matter how Project Co funded the payment of the Construction Contractor's proper invoices – whether from its lenders or from the Contracting Authority. Payment of the Construction Contractor's proper invoices would then trigger the prompt payment provisions down the construction pyramid, in respect of the full amount invoiced by the Construction Contractor each month.

Many of the major P3 projects currently ongoing – such as the Eglinton Crosstown, Finch West and Hazel McCallion LRT lines – are governed by the *Construction Lien Act* and not subject to prompt payment. But as major new P3s are now underway or in procurement, it is essential for the industry that the regulations be amended, sooner rather than later.

2. Holdback release for subcontracts

The prompt payment system aims to ensure smooth back-to-back payment from the owner through the contractor and down the chain to subcontractors. But a gap in prompt payment system under the Construction Act (the "Act") means that contractors may be stranded with liability to pay subcontractors following certification of completion of a subcontract, without the ability to recover from the owner.

Background to the current mandatory holdback release provisions

Under the former *Construction Lien Act* ("*CLA*"), payment of holdback after the expiry of liens was permissive, not mandatory. Section 26 of the *CLA* provided:

> 26 Each payer upon the contract or a subcontract ***may***, without jeopardy, make payment of the holdback the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired or been satisfied, discharged or otherwise provided for under this Act. [Emphasis added.]

Prior to lien expiry, a subcontractor was protected against an owner deducting amounts from the holdback, because section 21 provided that a lien was a charge on the holdback, and section 30 prohibited applying holdback funds to correct a contractor's default.

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LU #166 [2024]

Primary Topic:
II. Statutory Regulation
Jurisdiction:
Ontario
Authors:
John Margie and
Jay Nathwani,
Margie Strub
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However, once liens had expired, holdback funds became trust funds, and section 12 of the CLA permitted a trustee to exercise set-off rights against trust funds.

Collectively, these provisions led to the development of an unfortunate practice by some owners who would wait for the lien period to expire after certification of substantial performance before advising the contractor that they intended to exercise set off right against the holdback. It was then too late for subcontractors to secure their right to payment by registering a lien. So subcontractors were put in the position of either needing to lien preemptively (which is not a great way to get repeat business), or to hold their breath and hope that the holdback would be paid – neither being particularly attractive options.

The new prompt payment scheme for holdback release

One of the important changes to the *Act* under prompt payment was to make payment of holdback mandatory following the expiry of lien rights. Section 26 now provides:

> 26 Subject to section 27.1, ***each payer*** upon the contract or a subcontract ***shall make payment of the holdback*** the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

There are two key points to note here:

- First, this obligation applies to any "payer" on a contract ***or*** a subcontract. A payer is a person who is ***directly*** liable for payment on a contract or subcontract.
- Second, the payment is mandatory "where all liens that may be claimed against that holdback have expired."

This means that the expiry of liens in respect of holdback on a given contractor ***or*** subcontract trigger a mandatory obligation to pay holdback by the party which makes payment on that contract or subcontract.

And what if there is a reason not to pay holdback?

For payment of holdback to a contractor by an owner, the way for an owner to avoid mandatory payment is for the owner to publish a notice of non-

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payment ahead of lien expiry, and for the owner to notify the contractor of publication. The Act now provides:

> 27.1(1) An owner ***may refuse to pay*** some or all of the amount the owner is required to pay to a contractor under section 26 or 27, as the case may be, ***if***,
>
> (a) ***the owner publishes a notice in the prescribed form*** specifying the amount of the holdback that the owner refuses to pay, and the notice is published in the manner set out in the regulations ***no later than 40 days after*** the date on which,
>
> (i) the applicable ***certification or declaration of substantial performance*** is published under section 32, or
>
> (ii) if no certification or declaration of substantial performance is published, the date on which the ***contract is completed, abandoned or terminated***; and
>
> (b) the owner notifies, in accordance with the regulations, if any, the contractor of the publication of the notice.
>
> [Emphasis added.]

The balance of section 27.1 flows down the mandatory obligation to pay holdback from the contractor through to subcontractors. Note that a contractor may refuse to pay holdback to a subcontractor only where the owner has refused to pay:

> 27.1(2) A ***contractor may refuse to pay*** some or all of the amount the contractor is required to pay to a subcontractor under section 26 or 27, as the case may be, ***if***,
>
> (a) ***the owner refuses to pay some or all of the amount the owner is required to pay*** to the contractor under that section;
>
> (b) the contractor refers the matter to adjudication under Part II.1; and
>
> (c) the contractor notifies, in accordance with the regulations, if any, every subcontractor to whom the contractor is required to pay the amount that the amount is not being paid and that the matter is being referred to adjudication.
>
> [Emphasis added.]

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The problem

The problem is that, taken together, these provisions require holdback release from a payer on a subcontract when all liens on the subcontract have expired; but they do not require holdback release on account of that subcontract by the owner, because the owner is not a "payer" on the subcontract. The owner is only required to release holdback after all liens under the main contract have expired.

What's more, a contractor can *only* refuse to pay holdback if the owner refuses to pay "some or all of the amount the owner is required to pay to the contractor under" section 26. But section 26 does not require the owner to pay anything when only a subcontractor's lien rights have expired, because, as noted above, the owner is not a "payer" on the subcontract.

This creates a potentially serious cash-flow problem. Anytime a subcontractor can demonstrate that all liens on the subcontract have expired (by obtaining certification of completion of subcontract from a payment certifier, for instance), the payer (which could be a contractor or another subcontractor, depending on the level of the subcontract) becomes liable for payment under section 26, but has no ability to refuse to pay under section 27.1.

Mitigation strategy

A contractor could mitigate the effects of this gap in the prompt payment regime by requiring in the contract that the owner will release holdback on account of a subcontract when that subcontractor's lien rights expire. The contractor could then deliver a proper invoice for the holdback amount, and if the owner refused to pay, it could take the owner to an adjudication.

If a subcontractor were also pursuing an adjudication for the payment of holdback, the contractor would be well-advised to require a consolidated adjudication under section 13.8(2) to avoid any inconsistency in the result.

On that point, however, there is another gap in the Act related to using adjudication to enforce holdback payment obligations after subcontract (or contract) completion.

3. Adjudication for holdback release following contract or subcontract completion

As noted above, holdback release from an owner to a contractor is mandatory following the expiry of a contractor's lien rights. But the Act creates a potential issue if a contractor wants to enforce that mandatory release through adjudication.

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Section 13.5(1)(6) makes adjudication available in the case of non-payment of holdback. However, section 13.15(3) of the Act provides, "An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise."

As we've seen above, holdback is released only when liens rights have expired. One of the ways that lien rights can expire is through the completion of a contract (section 31(2)(b)(i)) or the certification of completion of a subcontract (sections 31(3)(a)(iii) and 31(3)(b)(ii)).

The Act's language means that, by default, adjudication will not be available if holdback payment is refused following completion of a contract or subcontract.

The point of adjudication is to arrive at a swift and efficient interim result which will allow funds to flow. There is no good reason that this process should be available if holdback release is being triggered by the publication of a certificate of substantial performance or a subcontractor's last supply, but unavailable if a subcontract is certified complete or the contract is completed.

The Act should be amended to provide for an exception for adjudication of holdback release following completion.

Until that happens, contractors and subcontractors should include in their contracts and subcontracts and agreement that adjudication is available if the payer refuses holdback release.

Revisiting Fairness: Adjudicator's Determination Set Aside due to Breach of Procedural Fairness

LU #166 [2024]

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XV. Adjudication
Jurisdiction:
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Authors:
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Revisiting Fairness: Adjudicator's Determination Set Aside due to Breach of Procedural Fairness

To date, Ontario's Divisional Court has generally shown deference to adjudicator's determinations made pursuant to Part II.1 of the *Construction Act*. This makes sense; if adjudication is to function to ensure prompt payment as intended by the legislature, it should be difficult to have these decisions overturned in court. Simply put, the system will not work as intended if adjudications are routinely litigated.

However, it was only a matter of time before the Divisional Court intervened in a process where, even in the context of the "rough justice" nature of adjudication, a party was denied fundamental procedural fairness rights.

This has now happened. In a historic decision released on January 29, 2024, the Divisional Court set aside an adjudicator's determination for the first time. At least, *Ledore Investments v Dixin Construction*, 2024 ONSC 598, is the first *reported* decision where an Ontario adjudicator's determination has been set aside.

The case arose in the context of a relatively straightforward and typical payment dispute between subcontractor and contractor. Ledore, operating under the business name "Ross Steel" and serving as a subcontractor to Dixin, forwarded three invoices to Dixin, the general contractor. Despite Dixin having received payment from the project owner, it failed to remit payment to Ledore on account of its claimed three invoices. Notably, Dixin did not provide Ledore with a *Construction Act* notice of non-payment in relation to any of the three invoices submitted, as required by section 6.5 of the *Construction Act*.

Following Dixin's failure to provide the requisite notice of non-payment, Ross Steel initiated an adjudication process seeking payment for the three outstanding invoices. However, the determination rendered by the adjudicator proved contentious as it ventured beyond the issues initially presented by the involved parties in their notices of adjudication, and the adjudicator's decision hinged on a matter unrelated to the submissions made by the parties. The adjudicator concluded that Dixin's failure to furnish a "proper invoice"[1] to the project owner rendered the prompt payment provisions delineated in Part I.1 of the *Construction Act*, including the requirement to send a notice of non-payment, inapplicable. Consequently, Ross Steel's claim was denied based on this unforeseen interpretation of the statutory prompt payment provisions in Part I.1 of the *Construction Act*.

Subsequently, Ross Steel pursued a judicial review of the adjudicator's determination, citing the procedural unfairness inherent in this adjudication process. Specifically, Ross Steel contended that it was deprived of the op-

[1] As defined in s. 6.1 of the *Construction Act*.

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portunity to present arguments or evidence regarding the pivotal issue that ultimately dictated the outcome of the adjudication.

There are limited circumstances under which an adjudicator's determination may be set aside on judicial review, and then only with leave on the grounds outlined in section 13.18(5) of the *Construction Act*. Leave for judicial review was granted on the basis that the determination was of a matter entirely unrelated to the subject of the adjudication, the procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under the *Construction Act*, and the applicant's right to a fair adjudication was thereby prejudiced, pursuant to subsections 13.8(5).3 and 13.8(5).5.

On judicial review, the Divisional Court agreed with Ross Steel's position, affirming that it constitutes a fundamental miscarriage of justice for an adjudicator to base their decision on an issue not raised or contested by any of the involved parties during the proceedings, and the Divisional Court opted to remand the case back to the adjudicator for further consideration. The court directed the adjudicator to afford both parties an opportunity to present submissions specifically addressing the issue concerning the purported deficiency in the invoicing process, commonly referred to as the "proper invoice" matter.

In its ruling, the Divisional Court unequivocally asserted that procedural fairness demands that adjudicators adhere strictly to the issues pleaded by the parties involved in the adjudication process. The court emphasized the principle that each party must be afforded a fair opportunity to address and argue against any issues raised during the proceedings. By deviating from this fundamental tenet, the adjudicator risks prejudicing one party unfairly and undermining the integrity of the adjudicative process.

This decision affirms the paramountcy of procedural fairness within adjudicative processes governed by the *Construction Act*. Notably, the Divisional Court's ruling in this case emphasizes the foundational principle that adjudicators must adhere to standards of procedural fairness, ensuring that determinations are rendered based on issues duly raised and argued by the parties involved. This principle safeguards the integrity of dispute resolution mechanisms by affording each party a reasonable opportunity to present their arguments and evidence on all pertinent matters influencing the outcome.

In delineating the adjudicator's role, the Divisional Court highlighted the discretionary authority granted to adjudicators to shape the proceedings as they see fit, including the prerogative to solicit additional submissions from the parties regarding pivotal issues arising during the adjudicative process.

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This recognition highlights the adjudicator's duty to foster an environment conducive to comprehensive deliberation and fair adjudication.

Moreover, the court's decision emphasizes the remedial approach to instances of procedural unfairness, wherein matters may be remitted to the adjudicator for reconsideration. This judicial action seeks to rectify any procedural deficiencies identified during the initial adjudication, thereby affording the parties an opportunity to present their arguments anew, considering the court's directives.

Practically, this ruling emphasizes the need for adjudicators to adhere to procedural frameworks prioritizing fairness and equity. While adjudicative proceedings are designed to be expeditious and informal, the imperative of procedural fairness remains paramount. Upholding principles of equity and procedural justice within adjudicative frameworks is essential to preserving the integrity and efficacy of construction dispute resolution mechanisms.

Counsel should still expect the judiciary to be reluctant to intervene in adjudications. Absence of procedural fairness will be one of the limited circumstances where intervention will be warranted. Even then, however, we expect the *process* of adjudication itself will still be upheld, as it was here. Namely, the remedy was to send the matter back to the adjudicator for a fresh determination, with the benefit of the Court's directions on procedural fairness.

Construction Delays and Liquidated Damages: Navigating the Legal Landscape

Construction Delays and Liquidated Damages: Navigating the Legal Landscape

LU #166 [2024]

Primary Topic:
I. General
Jurisdiction:
Canada
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Construction projects can be complex endeavors that involve multiple parties, extensive planning, and substantial financial investments. Delays are a common challenge in the construction industry, leading to increased costs and disruptions. To manage these delays, construction contracts may include provisions for liquidated damages, which can have significant legal implications.

This article provides an overview of liquidated damages clauses in the context of construction delays. Successfully navigating the legal landscape in this context requires a thorough understanding of the contractual agreements in question and relevant laws based on your jurisdiction. It is important to *consult a lawyer* for advice regarding your individual situation.

Understanding Construction Delays

Construction delays can occur for numerous reasons, including, among other things, adverse weather conditions, unforeseen site conditions, labor shortages, design changes, or deficiencies in design and construction. These types of complications may impact the critical path of the construction schedule, increase costs, and cause disputes among project stakeholders.

Liquidated Damages for Construction Delays: What Are They?

To mitigate the financial consequences of delays, construction contracts may include liquidated damages clauses. Liquidated damages are predetermined sums of money that a party agrees to pay in advance in the event of a breach of contract. For example, a construction contract may include a liquidated damages clause contemplating a scenario where the contractor fails to complete its work on time (often, by the "substantial completion" date).

The amount payable under a liquidated damages clause is specified in the contract and is intended to serve as a genuine pre-estimate of anticipated damages and liabilities,[1] so both parties "know what they are facing, even if actual damages turn out to be more or less".[2]

[1] *Canadian General Electric Co. v. Canadian Rubber Co.*, 52 SCR 349 (S.C.C.), at para. 3.
[2] *PS Asia Group PTE Ltd. v. Belair Fabrication Ltd., 2015 CF 1141, at para. 64. See also: Mitchell v. Paddington Homes Ltd., 3 B.C.L.R. 330 (BCSC).*

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Merely including a liquidated damages clause is not necessarily a guarantee for the recovery of damages. The party seeking to enforce the clause must establish that the delays were the fault of the other party to recover damages. Depending on the terms of the contract, the other party may seek to enforce rights of set-off from the contract price or seek recourse by starting a court action.

Other considerations that may impact the ability of a party to recover damages under a liquidated damages clause include the following:

- **Scope**: liquidated damages clauses may be drafted broadly to permit a party to recover damages for *any* delay to a construction project or recovery may be triggered by a particular event. Parties should ensure their contracts are clear about the event(s) that will trigger a liquidated damages clause.

- **Conditions Precedent:** construction contracts may require a party to comply with certain conditions precedent, such as notice obligations, prior to seeking recovery under a liquidated damages clause. Parties should ensure they have an understanding of how liquidated damages clauses interact with their rights and obligations under the contract as a whole.

- **Enforceability:** the sum stipulated to be paid on breach must be reasonable.[3] If the agreed-upon damages are excessive or appear punitive, a liquidated damages clause may be deemed unenforceable by the courts.[4]

Additional Considerations for Navigating Construction Delays

Where construction delays occur, the following additional considerations may assist with preventing costly disputes:

1. ***Clear Contractual Agreements****: it helps to have a clear and comprehensive contract that outlines the parties' respective responsibilities relating to the scope of work, timelines and consequences of any delays, such as liquidated damages. Clear contracts can help avoid ambiguity and prevent potential disputes.*

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[3] Badesha v. Snowland Sporting Goods Ltd., 2015 BCSC 1229; reversed on other grounds 2016 BCCA 294.

[4] H.F. Clarke Ltd. v. Thermidaire Corp., [1976] 1 S.C.R. 319 (SCC); G Collins Insurance Agencies Ltd v. Elsley Estate, [1978] 2 SCR 916 (SCC).

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2. ***Proactive Project Management****: project management, which includes planning, organizing and managing activities relating to the project, can help prevent or mitigate any delays that arise in construction projects. Parties should have contingency plans in place prior to commencing construction to address issues that often impact scheduling, such as weather, labour disputes, shipping delays, supply backlogs and accidents. When delays occur, effective communication between project stakeholders can help mitigate the impact.*

3. ***Dispute Resolution****: to mitigate the impact of disputes, parties should establish clear dispute resolution mechanisms in their contracts. In doing so, parties should consider whether alternative dispute resolution mechanisms such as negotiation, mediation or arbitration would be desirable to avoid engaging in litigation, which can be more costly and time-consuming.*

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