Canadian College of Construction Lawyers

LEGAL UPDATE

CCCL | CCAC

L.U. #167

June 19, 2024

INSIDE THIS ISSUE:

Brendan D. Bowles

Editor's Note

I am pleased to confirm that this will be my last "solo" editor's note. I am not retiring from Legal Update, but I am taking the pen one last time to welcome Catriona Otto-Johnston as co-chair of this Committee, as announced at the Annual General Meeting at our recent conference in Montreal.

Catriona has already "jumped in" and was instrumental in compiling, editing and writing for this issue. Going forward, I believe Fellows will notice an improvement in terms of the frequency of Legal Updates and in ensuring timely, high-quality updates with a national focus. My sincere thanks to Catriona for stepping up!

We begin Legal Update #167 with Catriona's case comment on a noteworthy decision from Alberta. Catriona and her colleague Luca Zuliani summarize an important case from Alberta dealing with the always "hot" topic of the scope of the duty of good faith in the performance of construction contracts. The case deals specifically with an owner's call upon a letter of credit furnished by a contractor as performance security. The contractor unsuccessfully moved for an injunction to prevent the owner's call upon the letter of credit, alleging a breach of the duty of good faith. Leave to appeal to the Supreme Court was refused, so the Alberta Court of Appeal decision is the final word on this specific case, but as Catriona and Luca note, the Courts have not closed the door entirely on this argument.

Paul Ivanoff and his colleague Bushra Nassab summarize a decision of Mr. Justice Perell of the Ontario Superior Court of Justice which found that a contractual limitation period trumped the basic statutory limitation period to commence an action against a contractor. Counsel need to be aware of this case, particularly in the context of unfolding contractual dispute resolution processes. Here, the contractual limitation period expired notwithstanding the parties' ongoing contractual process of dispute resolution.

Markus Rotterdam, Xenia Charapov and I review a preliminary decision of Associate Justice Robinson challenging the commonly used form of letter of credit as lien security in Ontario. The case has been adjourned to allow the Accountant of the Superior Court of Justice and the affected bank to respond. This case is worth monitoring as it will either affirm or invalidate the commonly used form of letter of credit.

Editors' Note
LU #167 [2024]

Editor's Note

We now have the first reported decision on Alberta's adjudication regime. This is noteworthy, but not without some controversy: an *obiter dicta* comment in the court's reasons could impact future cases. Corbin Devlin and Peter Vetsch bring different perspectives to this precedent setting decision.

I conclude by welcoming some new Committee members and saying goodbye to an invaluable member.

We welcome Conor O'Neil of New Brunswick, Collin Hirschfeld of Saskatchewan and Mike Preston and Dirk Laudan of British Columbia. We are excited to add four new members from across the country and very much look forward to working with them.

Last but certainly not least, I would like to repeat my remarks at the Annual General Meeting thanking John Kulik for his tireless contributions to Legal Update. Since I joined, and I would say even well before then John was a reliable contributor to Legal Update – at least one case comment per issue, and often two. He set a great example for all of us: he regularly shared his knowledge, wrote with a certain flair characteristic of Atlantic Canada, and effectively used this platform to share the work of his colleagues. We will miss him at our meetings. However, if he ever wants to submit a case comment the door remains open!

Brendan

Stretching the Limits: Honest Contractual Performance and Letters of Credit

Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd

2023 ABKB 736

LU #167 [2024]

Primary Topic:
III. Building Contract
Secondary Topic:
VII. Breach of Terms of Contract
Jurisdiction:
Alberta
Authors:
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CanLII References:
2023 ABKB 736
2024 ABCA 74
2024 CANLII 35282

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Catriona Otto-Johnston

Luca Zuliani

Letters of credit are a common form of performance security seen on construction projects, particularly large-scale oil and gas or other industrial projects. Because letters of credit are "on demand" instruments and do not require any investigation into an alleged default, they are a valuable form of contract security for owners. An owner has confidence that so long as the conditions of presentment set out in the letter of credit are met, the issuing bank will pay out.

While this liquidity is valuable for an owner, these instruments present significant risk for a contractor should the owner call on the letter of credit. Typically, to obtain a letter of credit, the contractor will have had to place funds in the amount of the letter of credit in an account with the issuing bank, as security for the issuing bank. The loss of control of these funds could put a contractor offside of its own financial covenants in respect of its banking facilities possibly leading to its insolvency.

This was the position that the contractor, Pacific Atlantic Pipeline Construction Ltd. ("PAPC"), faced when Coastal Gaslink Limited Partnership ("CGL") called on PAPC's $117,162,384 letter of credit (the "LOC"), particularly as CGL had previously advised PAPC that it did not intend to do so. At the time of CGL's call on the LOC, PAPC and CGL were participating in an arbitration with respect to several underlying disputes between them on an LNG pipeline project in British Columbia (the "Project").
To prevent CGL from calling on the LOC, PAPC applied for an injunction, arguing that CGL had agreed not to call on the LOC and otherwise breached its breached its duty of honest contractual performance by calling on the LOC, with this latter argument being the focus of this article. PAPC's application was denied by the Court of King's Bench in *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd*, 2023 ABKB 736, with that decision affirmed by the Court of Appeal in *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd*, 2024 ABCA 74 (leave to appeal to the SCC refused, 2024 CanLII 3 5282 (SCC)).

The Court of Appeal's decision aligns with the expectations of any owner beneficiary who holds a letter of credit and confirms that these instruments are as powerful as historically understood. An owner is entitled to call on a letter of credit even when it is not in a contractor's best interests to do so. However, the Alberta courts have left the door open to the possibility that on right facts, a party may be able to obtain an injunction preventing a beneficiary from calling on a letter of credit for reasons other than fraud.

The Facts

In 2018, CGL and PAPC entered into a contract for the construction of certain portions of the Project (the "Contract"). Pursuant to the Contract, PAPC

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2024 ABCA 74
2024 CANLII 35282

ALBERTA

was required to provide an irrevocable standby letter of credit in the amount of $117,162,384. The LOC, which was issued by HSBC, specified that in order for CGL to draw down on the LOC, CGL had to certify to HSBC that PAPC had: (1) failed to pay CGL; (2) failed to perform its obligations in accordance with the terms and provisions of the Contract; or (3) failed to provide a replacement letter of credit at least 30 days prior to the expiration of the LOC.

The Project suffered various issues due to COVID-19 and protests leading to issues between PAPC and CGL, culminating in CGL's phased termination of the Contract. As a result, PAPC commenced arbitration proceedings, seeking damages for wrongful termination. CGL counterclaimed for damages relating to PAPC's failure to perform.

During a preliminary meeting between PAPC and CGL, officials from CGL expressed their reluctance to call on the LOC at that time, noting that they did not want to put their contractor out of business. PAPC took the position that these representations by CGL constituted a verbal commitment that CGL would refrain from calling on the LOC until after the conclusion of the arbitration.

However, in preparation for the arbitration, CGL retained a third-party expert to assess its damages, and upon receiving a draft report, CGL determined that its damages exceeded the amount of the LOC. Given this new information, CGL decided to call on the LOC in the full amount, delivering the required notice to HSBC. Shortly thereafter, CGL advised PAPC of the steps it took to call on the LOC, offering to pause its call to facilitate a short period of negotiation to attempt to resolve the overall dispute.

In response to CGL giving notice to HSBC, PAPC first approached HSBC to try to stop it from paying out under the LOC. When that was unsuccessful, PAPC applied to the Alberta Court of King's Bench for an interim injunction seeking to delay CGL from drawing down on the LOC until the arbitration was concluded. PAPC sought the injunction based on two grounds: (1) CGL orally agreed to forbear on its ability to call on the LOC until the conclusion of the arbitration; and (2) CGL breached its duty of honest contractual performance by misleading PAPC of its intention to defer calling on the LOC and for calling on the LOC for improper and abusive reasons.

With respect to PAPC's first argument, upon considering the evidence proffered by witnesses for both parties, the Alberta Court of King's Bench disagreed there was any agreement to forbear.

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2024 ABCA 74
2024 CANLII 35282

ALBERTA

Canadian courts have traditionally granted injunctions preventing a party from calling on a letter of credit only where the beneficiary has committed fraud. However, recent Canadian decisions have opened the door to the potential that injunctions of this type might be issued in circumstances where drawing on the letter of credit would violate a contractual obligation, including a party's obligation to act honestly and in good faith.

The Court of King's Bench Decision

Before the Chambers Justice, relying on the Supreme Court of Canada's decisions in *Bhasin v Hrynew, 2014 SCC 71* [*Bhasin*], *CM Callow Inv. v Zollinger, 2020 SCC 45* [*Zollinger*] and *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7* [*Wastech*], PAPC argued that CGL was limited to drawing upon the LOC for purposes identified in the Contract, meaning that CGL could only call on LOC if it needed the funds to complete the work. PAPC argued that at the time CGL called on the LOC, the Project was substantially complete, and thus this requirement was not met. Additionally, PAPC argued that CGL was exercising its discretion to call upon the LOC in bad faith, including to frustrate the arbitration process.

After determining that PAPC needed to show a strong *prima facie* case to obtain an injunction, the Court went on to consider whether PAPC had proven CGL breached the duty of honest contractual performance such that an injunction should be granted. In considering PAPC's argument, the Chambers Justice cited *Bhasin* and the definition of the "general duty of honesty in contractual performance."[1]

The Chambers Justice also referred to *Zollinger* and *Wastech*, confirming that a breach of the duty of honest performance is found where a party lies or intentionally deceives another in order to achieve a benefit to which it was not entitled.[2] In considering these authorities, the Chambers Justice concluded that on the evidence before it, PAPC had "not raised a strong *prima facie* case that CGL's attempt to draw on the [LOC] constituted a breach of the duty of honest performance…", instead finding:[3]

1. The evidence did not support the assertion that CGL lied or intentionally deceived PAPC but rather supported, at most, the existence of a misunderstanding between the parties;

[1] *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd*, 2023 ABKB 736 at para 51 [PAPC v CGL – KB].
[2] PAPC v CGL – KB at paras 52 to 53.
[3] PAPC v CGL – KB at para 65 to 69 .

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2024 ABCA 74
2024 CANLII 35282

ALBERTA

2. PAPC's belief that CGL would not call on the LOC, or its supposed reliance on that belief, did not raise any barrier to CGL's ability to call on the LOC, as PAPC had not shown that CGL induced PAPC's reliance or belief through lies or dishonest means;

3. Rather than showing CGL acted in an abusive manner, the evidence supported that the third-party report gave CGL important information needed to decide whether to draw on the LOC;

4. CGL's attempts to leverage its rights under the LOC into a negotiated settlement of the arbitration was not a breach of the duty of honest contractual performance because parties are not prohibited from acting in their own self-interest, even if doing so may cause loss to another party;

5. There was no language in the Contract or the LOC which limited CGL's ability to call on the LOC; and

6. There were no limitations imposed by the duty of honest contractual performance, as CGL was attempting to recover the additional costs it honestly believed it had incurred as a result of PAPC's default.

PAPC's application for an interim injunction was therefore denied.[4]

The Court of Appeal Decision

PAPC appealed, arguing that the Chambers Justice had erred in applying the test for a breach of the duty of honest performance. PAPC argued that a breach can arise where one party leads another into misapprehension, is aware of the misapprehension, and does not correct it. PAPC also argued that CGL had failed to exercise its discretion to call upon the LOC in good faith.

The Court of Appeal dismissed PAPC's appeal on all grounds. Specifically, they held that the Chambers Justice did not err in finding that CGL did not lie or intentionally deceive PAPC, noting that the Chambers Justice applied the test as it was set out by the Supreme Court of Canada in *Bhasin* and *Zollinger*.[5] The Court of Appeal found no reviewable error in the Chambers Justice's finding that "there was no strong *prima facie* case CGL "ever promised, stated, or otherwise represented that CGL's intention not to draw

[4] PAPC was given a brief interim injunction pending appeal as a result of the impending closure of the Alberta courts over the holiday season.

[5] *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd,* 2024 ABCA 74 at para 19 [*PAPC v CGL – CA*].

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2024 CANLII 35282

ALBERTA

on the [LOC] would remain in place until after the arbitration, or until any other point in time", or in the finding that "…at the highest, 'the evidence supports the occurrence of a misunderstanding induced by wishful thinking on the part of [PAPC]'".[6] The Court of Appeal also noted that because PAPC's "misunderstanding was not due to any misleading statement or conduct on the part of CGL", there was no reviewable error in the conclusion reached by the Chambers Justice that CGL was not required to correct PAPC's misapprehension.[7]

Finally, the Court of Appeal stated that "assuming (without deciding) that the decision to draw on the irrevocable standby letter of credit could constitute a discretionary action" as described in *Wastech*, calling on the LOC to recover costs resulting from PAPC's default was connected to the "purpose for which the discretion was granted" and was not "arbitrary or capricious, or outside the range of behaviour contemplated by the parties."[8]

Conclusion

While the decisions of the Alberta courts confirm the traditional reluctance of Canadian courts to interfere with a beneficiary's ability to call on a letter of credit, the possibility remains that a beneficiary's comments, actions or underlying intentions leading up to calling on a letter of credit could potentially raise barriers to receiving payment, despite the autonomy of a letter of credit from the underlying contract.

[6] *PAPC v CGL – CA* at para 22.
[7] *PAPC v CGL – CA* at para 23.
[8] *PAPC v CGL – CA* at para 16.

Beware the Contractual Limitation Period

MTO v
J&P Leveque Bros.
Haulage Ltd.

LU #167 [2024]

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CanLii Reference:
2024 onsc 2285

ONTARIO

Paul Ivanoff

Bushra Nassab

It is common for construction contracts to contain provisions respecting the resolution of disputes. Industry participants employ a wide array of mechanisms to address and resolve claims. These may include straight-forward provisions such as those contained in the CCDC-2 form of contract, to more elaborate resolution systems requiring many levels of review, mapped over various prescribed timelines. In navigating through a claims resolution process, parties must be mindful of their contractual rights and obligations in connection with dispute resolution, including those pertaining to limitation periods.

Under Ontario's *Limitations Act, 2002*, there is a two-year basic limitation period founded on the concept of discoverability (the "**Act**").[1] The Act also provides that parties to a "business agreement" may vary limitation periods in certain circumstances and in the manner set forth in the Act.[2] Contractual dispute resolution systems, including elaborate ones with multiple levels of review and stringent timelines, may include prescribed time limitations restricting a party's ability to resort to litigation. This was the case in the recent decision of Mr. Justice Perell of the Ontario Superior Court of Justice in *MTO v. J&P Leveque Bros. Haulage Ltd.* ("***Leveque***") where the issue of the application of a contractual limitation period was front and centre.[3]

In *Leveque*, the Court analyzed a claim by MTO that proceeded through an elaborate multi-level contractual dispute resolution system. The Court held that although the claim of MTO was timely under sections 4 and 5 of the *Limitations Act, 2002*, the Construction Contract was a "business agreement" within the meaning of section 22 of the Act in which the parties had varied the statutory basic limitation period. In considering the facts, the Court concluded that MTO's claim was barred by the terms of the Construction Contract, which provided that if either party wished to resort to litigation, then: (a) the dispute resolution system would have to be completed; and (b) the litigation had to be commenced no later than two years after the date of Contract Completion. In the end, MTO failed to commence litigation within two years after the date of Contract Completion and as a result, its action was dismissed.

Introduction

In November of 2022, the Ontario Government (His Majesty the King in Right of Ontario, as represented by the Minister of Transportation) ("**MTO**") sued J & P Leveque Bros. Haulage Ltd. ("**Leveque**"), a highway construction contractor for $1,769,023,40. The approximately $1.8 mil-

[1] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, section 4 ["***Limitations Act***"].
[2] *Limitations Act*, subsection 22(5).
[3] *Ontario (Transportation) v. J & P Leveque Bros. Haulage Ltd.*, 2024 ONSC 2285 ["***Leveque***"]

Beware the Contractual Limitation Period

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Osler, Hoskin
and Harcourt LLP

CanLii Reference:
2024 onsc 2285

ONTARIO

lion claimed by the MTO was part of an award made by a Referee Panel of the Alternative Dispute Resolution Institute of Ontario.[4]

In the court action, MTO submitted that pursuant to the Construction Contract between it and Leveque, the Referee's award was only provisional and that MTO was entitled to sue for a refund of the approximately $1.8 million it had paid Leveque.[5]

Leveque moved for summary judgment to dismiss MTO's action arguing that MTO's resort to litigation was out of time pursuant to the dispute resolution provisions of the Construction Contract. Leveque argued that: (a) the Construction Contract was a "business agreement" within the meaning of s. 22 of the *Limitations Act, 2002*, and (b) MTO's claim was barred by the terms of that Construction Contract. Leveque contended that, although MTO's claim would be timely under sections 4 and 5 of the *Limitations Act, 2002*, those time periods were replaced by the time limits prescribed by the parties in their business agreement and thus MTO's resort to litigation was untimely. MTO accepted that the Construction Contract was a "business agreement"; however, it submitted that properly interpreted, the language of the Construction Contract had not supplanted the limitation period under the *Limitations Act, 2002*.[6]

The Construction Contract

The Construction Contract between Leveque and MTO was for the removal and replacement of asphalt, grading, and drainage improvement. The Construction Contract included: (a) the Tender; (b) Drawings and Standard Drawings; and (c) the MTO General Conditions of Contract applicable to Ontario Provincial Standard Special Provisions (the "**General Conditions**").[7]

Pursuant to the Definitions of "Construction Contract" and "Notice of Protest" and clauses GC 3.14.13.07.03 and GC 3.14.14.02 of the Construction Contract, neither MTO nor Leveque could resort to litigation unless (a) the Contract Review process and/or the Review Process had run their course, and (b) the litigation was commenced no later than two years after the date of Contract Completion.[8] The Construction Contract provided an "elaborate dispute resolution system" involving a three-level Claims Review Process, a Referee Process, a Referee's Decision, a Notice of Protest, and a sixty-day period to explore alternative dispute resolution processes, after

[4] *Leveque*, para. 1.
[5] *Leveque*, para. 2.
[6] *Leveque*, paras. 3-5.
[7] *Leveque*, para. 17.
[8] *Leveque*, para. 19.

MTO v J&P Leveque Bros. Haulage Ltd.

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and Bushra Nassab
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and Harcourt LLP

CanLii Reference:
2024 onsc 2285

ONTARIO

Beware the Contractual Limitation Period

which either MTO or Leveque could resort to litigation.[9] The Court described the steps of the dispute resolution system as follows:

> a. The first step of the Claims Review Process is the delivery of an RFC (Request for Clarification) to the Contract Administrator. WSP Canada was the Contractor Administrator retained by the MTO.
>
> b. The next step of the Claims Review Process is a Field Level Review. The timeline for the Field Level Review is 30 Business Days. After the Field Level Decision, which is made by the Contract Administrator, the contractor then has 15 Business Days to accept or reject the Field Level Decision and if rejected, 15 Business Days to submit a Notice of Claim for a Regional Level Review or to activate the Referee Process. (The Referee Process can be initiated by the Contractor after the conclusion of any level of the Claims Review Process and by MTO after a Regional Level Decision or a Provincial Level Decision.)
>
> c. The timeline for the Regional Level Decision is 60 Business Days from the delivery of the Notice of Claim. After the Regional Level Decision, which is made by the MTO Regional Manager, Operations Office, the contractor then has 15 Business Days to accept or reject the Regional Level Decision and if rejected, 15 Business Days to elevate the claim for a Provincial Level Review or to activate the Referee Process. After a Regional Level Decision, the MTO may also elect to activate the Referee Process.
>
> d. The timeline for the Provincial Level Decision is 60 Business Days. After the Provincial Level Decision, which is made by MTO's Manager, Claims Office, the contractor has 15 Business Days to request the Referee Process. After a Provincial Level Decision, the MTO may also elect to submit the claim to the Referee Process.
>
> e. A Referee or Referee Panel is selected based on the amount at issue and in accordance with GC 3.14.13.03 – "Referee Selection." Typically, it takes approximately two months to select a Referee/Referee Panel and execute the standard form Referee Services Agreement ("RSA") or Referee Services Panel Agreement ("RSPA"), pursuant to GC 3.14.13.04 of the construction contract.
>
> f. The prescribed Referee Services Panel Agreement (2017-5126-REF-012) specifies that the entire

[9] *Leveque*, para. 20.

Beware the Contractual Limitation Period

MTO v
J&P Leveque Bros.
Haulage Ltd.

LU #167 [2024]

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and Bushra Nassab
Osler, Hoskin
and Harcourt LLP

CanLii Reference:
2024 onsc 2285

ONTARIO

Referee Process must be completed within 90 Business Days from referral of the Claim to the Referee Panel. More particularly, ss. 9.08 - of the Referee Services Panel Agreement states:

> RS 9.08 The Referee Panel's written provisionally binding decision, with reasons, shall be delivered to the Ministry and the Contractor:
>
> (a) within 15 business days after the Referee Panel has:
>
> (i) received the submissions pursuant to RS 9.02 to RS 9.03 inclusive;
>
> (ii) held meeting pursuant to RS 9.04; and
>
> (iii) completed RS 9.05 if required by the Referee Panel; and
>
> (b) in no event later than 90 business days after the Claim was referred to the Referee Panel in accordance with RS 1.01.
>
> RS 9.09 The Referee Panel's written decision shall be provisionally binding on the Ministry and the Contractor and both parties shall abide by the decision(s) of the Referee Panel ruling and carry out the award without delay. The Referee panel decision shall continue to be provisionally binding on the Ministry and the Contractor unless and until otherwise resolved in accordance with GC 3.14.14.02.
>
> RS 9.10 If a party disputes the Referee Panel's decision, that party shall deliver a Notice of Protest to the other party within 30 business days of receipt of the Referee Panel's written decision.

g. The Referee's decision is provisionally binding on both parties subject to the right of either party to protest the decision. The Referee's decision is final and binding unless either party delivers a Notice of Protest within 30 Business Days of the release of the decision.

h. To deny the provisional decision and to commence litigation, a party must deliver a "Notice of Protest," then explore alternative dispute resolution for 60 Business Days all to be completed no later than two years after the date of Contract Completion.

i. The contractor may not resort to litigation without having completed the Claims Review Process, the

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and Harcourt LLP

CanLii Reference:
2024 onsc 2285

ONTARIO

> Referee Review Process and having issued a Notice of Protest and having explored alternative means of dispute, all to be completed no later than two years after the date of Contract Completion.[10]

Dispute Resolution Chronology

The Court found that since the Construction Contract was completed on July 9, 2019, in accordance with its terms, if either party wished to resort to litigation, then: (a) the dispute resolution system would have to be completed, and (b) the litigation had to be commenced by no later than July 9, 2021.[11]

The Court went on to set out a chronology of steps that the parties had taken in connection with the dispute resolution. Some of the key steps are described below:

- On September 23, 2019, Leveque submitted Request for Clarification RFC #65;
- On April 21, 2020, 12 days overdue, MTO's Regional Office issued its Regional Level Decision;
- On May 12, 2020, Leveque elevated the claim to the Provincial Level and MTO issued its overdue Provincial Level Decision on March 15, 2021;
- On April 1, 2021, Leveque rejected the Provincial Level Decision and referred its claim to a three-member Referee panel in accordance with the Contract;
- On October 19, 2021, the Referee Panel issued its decision and awarded Leveque approximately $1.8 million in respect of its claim;
- On October 21, 2021, MTO served a Notice of Protest and two weeks later requested Leveque's agreement to set aside the referee decision and explore alternative dispute resolution methods according to General Conditions of the contract GC 3.14;
- On December 1, 2021, Leveque advised MTO that it was outside of the contractual two-year limitation; and
- About one year later, on November 14, 2022, MTO commenced its court action against Leveque seeking a refund of the approximately $1.8 million it had paid Leveque.[12]

[10] *Leveque*, paras. 20.
[11] *Leveque*, para. 25.
[12] *Leveque*, para. 24-51.

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CanLii Reference:
2024 onsc 2285

ONTARIO

Beware the Contractual Limitation Period

Did the Limitation Period in the Construction Contract Apply to Bar MTO's Claim as Untimely?

The Court considered the issue of whether the limitation period in the Construction Contract applied to bar MTO's claim as untimely. In particular, the Court considered whether pursuant to s. 22(5) para. 1 of the *Limitations Act*, *2002* the two-year limitation period under the Act was varied by the Construction Contract.[13] Section 22 of the *Limitations Act, 2002* states as follows:

> Limitation periods apply despite agreements
>
> 22 (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6)
>
> Exception
>
> (2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004.
>
> Same
>
> (3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006.
>
> Same
>
> (4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered.
>
> Same
>
> (5) The following exceptions apply only in respect of business agreements:
>
> 1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.
>
> 2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be sus-

[13] *Leveque*, paras. 60-61.

Beware the Contractual Limitation Period

MTO v
J&P Leveque Bros.
Haulage Ltd.

LU #167 [2024]

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Ontario
Authors:
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Osler, Hoskin
and Harcourt LLP

CanLii Reference:
2024 onsc 2285

ONTARIO

> pended or extended only in accordance with subsection (4).
>
> Definitions
>
> (6) In this section,
>
> "business agreement" means an agreement made by parties none of whom is a consumer as defined in the Consumer Protection Act, 2002;
>
> "vary" includes extend, shorten and suspend.[14]

After considering Leveque's argument, the Court agreed with Leveque and found that the action of MTO was untimely and barred by the contractual terms.[15] In considering the contractual terms that purported to vary the statutory limitation period, the Court referred to the Ontario Court of Appeal's decision in *Boyce v. Co-Operators General Insurance Co*, stating that:

> In *Boyce v. Co-operators General Insurance Co.*, the Court of Appeal stated that where a court is faced with a contractual term that purports to shorten a statutory limitation period, the court must consider whether the provision: (a) in clear language describes a limitation period; (b) identifies the scope of the application of that limitation period; and (c) excludes the operation of other limitation periods. In my opinion, that is what the language of the Construction Contract does in the immediate case.[16]

In the end, the Court held that the parties had entered into a business agreement (as defined under the *Limitations Act, 2002)*, which agreement "plainly and clearly excludes and substitutes a limitation period for the limitation period prescribed by the *Limitations Act, 2002*."[17] With that being so, the action of MTO was dismissed.

Takeaways

Limitations clauses can be a critical aspect of a contract's dispute resolution regime. Contractual limitation clauses may be found to govern the period of time during which legal claims must be validly brought against a counterparty. *Leveque* represents a cautionary tale for project participants and highlights several important considerations. First, at the outset of a construction project, it is prudent to carefully review any contractual limitation periods to consider how they may impact a party's rights. Second, *Leveque* is a reminder that courts may enforce contractual limitation clauses if they are unambiguous, clear in language and scope, and exclude the operation of other limitation periods. Third, to the extent that a contractual limitation period is shorter than the basic two-year limitation period set out in the *Limitations Act, 2002*, *Leveque* is a stern reminder that parties should be especially diligent in monitoring applicable timelines while proceeding with claims through dispute resolution.

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[14] *Limitations Act*, section 22.

[15] *Leveque*, para. 65.

[16] *Leveque*, para. 66, citing *Boyce v. The Co-Operators General Insurance Company*, 2013 ONCA 298, para 20.

[17] *Leveque*, para. 73.

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

***TruGrp Inc. v. Karmina Holdings* Inc.**

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Markus Rotterdam and Xenia Charapov, Glaholt Bowles LLP

CanLii Reference:
2024 ONSC 2165

ONTARIO

Brendan D. Bowles

Markus Rotterdam

Letters of credit have been acknowledged as viable forms of lien security by courts for many years, but there is very little case law on this practice and none on the sufficiency of the commonly used standard form that is found, for example as an appendix in the precedents section of *Conduct of Lien, Trust and Adjudication Proceedings*. That is about to change, since this was precisely the matter under consideration in *TruGrp Inc. v. Karmina Holdings* Inc. 2024 ONSC 2165.

Associate Justice Robinson heard a motion to set aside an order vacating a lien upon posting of security in the form of a letter of credit. His Honour's reasons for decision released on April 15, 2024, put a spotlight on the current commonly used form of letter of credit and whether it is sufficient security for a lien.

Associate Justice Robinson outlined but did not finally resolve the issue of the sufficiency of the letter of credit. The Court will only issue its final decision upon notice and an opportunity for the Accountant of the Superior Court of Justice and the bank who provided the letter of credit to be heard.

It is worth keeping an eye on this matter. The final decision could potentially influence future legal interpretations and practices regarding the use of letters of credit in securing liens.

Vacating a lien

Section 44 of the *Construction Act* contemplates an *ex parte* motion to vacate the registration of a claim for lien and certificate of action upon posting "security" in the required amount.

"Security" is not defined in the *Construction Act*. However, for decades both lien bonds and letters of credit have been accepted as security by the court.

The form of lien bonds is prescribed by s. 2(20) of O Reg 303/18 under the *Construction Act,* i.e., Form 21. The actual form for letters of credit is not prescribed in the *Act* however, s. 44(5.1) was added in 2018 to clarify that letters of credit that contain references to an international commercial convention are acceptable for the purposes of s. 44.

As noted, the form of letter of credit at issue is not a mandated form under the *Construction Act*. It never has been.

[1] See for example decision by Master Polika in *Naylor Group Incorporated v Enfinity Canada EPC Inc.*, 2012 ONSC 4365.

TruGrp Inc. v. Karmina Holdings Inc.

LU #167 [2024]

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Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

A precedent form of letter of credit appears in the appendices to the current edition of *Conduct of Lien, Trust and Adjudication* proceedings.[2] The form is substantially unaltered from the precedent that appeared in the first edition of *Conduct of a Lien Action* in 2004, then authored by Duncan Glaholt. As Mr. Glaholt noted in the preface to the first edition, the Toronto masters presiding over construction lien court at the time provided invaluable assistance and input to that first edition, including in respect of this precedent form of letter of credit.

Associate Justice Robinson correctly notes that there is no case law addressing the sufficiency of the expiry and renewal provisions in the current standard letter of credit; in fact, courts have not addressed why they have accepted the commonly used form of letter of credit as sufficient security.

Background

Karmina Holdings Inc. ("**Karmina**") moved *ex parte* for an order vacating TruGrp Inc.'s ("**TruGrp**") two claims for lien and certificate of action supported by security in the form of a letter of credit issued by the Bank of Montreal ("**BMO**"). The court reviewed and rejected the initial wording of the letter of credit, for reasons which are immaterial to the issue still to be resolved. Karmina amended and resubmitted the letter of credit. The court approved the amended letter of credit and granted the Order.

Associate Justice Robinson correctly noted that the form of letter of credit at issue had been specifically reviewed, revised, and re-submitted before it was approved by the Court. This was more than just a "pro forma" approval. However, as is permitted by the *Construction Act*, the order vacating the lien was obtained *ex parte* and without notice to the lien claimant, TruGrp.

Subsequently, Karmina posted the letter of credit with the office of the Accountant of the Superior Court of Justice (the "**Accountant**") and registered an application to delete construction lien to vacate TruGrp's registrations from title to the premises.

After its claims for lien and certificate of action were already vacated from title, TruGrp moved to set aside A.J. Robinson's order vacating TruGrp's two claims for lien and certificate of action. Alternatively, TruGrp sought directions from the court to address its concerns.

TruGrp's letter of credit contains the same language found in the typical form of letter of credit. The current common form letter of credit provides

[2] See *Sundance Development Corporation v. Islington Chauncey Residence Corp.*, 2021 ONSC 241.

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

TruGrp Inc. v. Karmina Holdings Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Markus Rotterdam and Xenia Charapov, Glaholt Bowles LLP

CanLii Reference:
2024 ONSC 2165

ONTARIO

for the automatic renewal of the letter of credit for successive one-year periods unless the issuing bank elects not to extend the letter of credit. The bank may only exercise its option not to extend the letter of credit by providing at least thirty days' written notice to the Accountant and providing the Accountant with a bank draft for the balance of the security.

TruGrp initially brought the motion in Hamilton, where the lien actions were brought, however Justice Nightingale directed the motions to proceed before Associate Justice Robinson since the vacating order had been issued by the Associate Justice on an *ex parte* motion in Toronto. It is relatively commonplace for the Associate Justices in Toronto to hear vacating motions for liens outside of Toronto because they specialize in such motions and have *ex parte* court time set aside that may not be available outside of Toronto. It is therefore not unusual to seek to bring an *ex parte* motion in Toronto for a non-Toronto lien, particularly where there is some urgency to obtaining the order vacating the lien. The circumstances here were not unusual and the letter of credit was in standard form.

However, sometime after receiving the Order of Associate Justice Robinson made on an *ex parte* basis, TruGrp became concerned with the expiry and renewal language in the letter of credit issued by BMO. TruGrp submitted that the language was such that it could result in there being no security for its lien. As proof of this, TruGrp stated that it had received communications from the Accountant which confirmed that the Accountant would not accept a replacement bank draft sent by BMO without both a court order and compliance with subrule 72.03(2) of the *Rules of Civil Procedure*.[3] *Rule* 72.03 (2) essentially states that in order to receive payment out of court in accordance with a court order, a person must file with the Accountant a written request for payment, as well as the court order or report ordering the payment, and an affidavit saying that, in the case of a report, the report has been confirmed and the manner of confirmation, or in the case of an order, the time prescribed for an appeal has expired and no appeal is pending or that the appeal period for the order has expired with no pending appeal.

The Legal Arguments

TruGrp argued that the terms of the letter of credit providing for potential replacement with a bank draft at the bank's option gives rise to a contingency in the security that is at odds with the *Construction Act*. TruGrp further argued that it placed duties and obligations on the Accountant that are at odds with the *Public Guardian and Trustee Act*.

[3] *Rules of Civil Procedure*, RRO 1990, Reg 194.

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

TruGrp Inc. v. Karmina Holdings Inc.

LU #167 [2024]

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CanLii Reference:
2024 ONSC 2165

ONTARIO

TruGrp argued that there was a potential gap whereby the letter of credit is not renewed by BMO, but the Accountant will not accept the bank draft as contemplated by the letter of credit without a court order, resulting in there being no enforceable security held in court for TruGrp's lien between that time. Since Karmina is allegedly seeking to sell the liened premises, TruGrp is concerned that it could be left without any security for its lien, contrary to the intent of the *Construction Act.* Further, TruGrp argued that since nothing in the letter of credit requires notice to any party other than the Accountant, a lien claimant could also be entirely unaware of a potential deficiency with the security for its lien.

Additionally, TruGrp submitted that the requirement in the letter of credit for the Accountant to accept a bank draft creates positive duties and obligations on the Accountant that are contrary to the scope of the Accountant's statutory role, which is limited to being a "custodian" of lien security. The role and duties of the Accountant are now governed by the *Public Guardian and Trustee Act.* TruGrp relied on the stated role of the Accountant as a "custodian", in s. 3(7) of the Regulation under that Act, which states that "[t]he Accountant is the custodian of mortgages, securities, other instruments and other personal property deposited with him or her, **but has no other duties or obligations with respect to them."**[4]

TruGrp argued that if the letter of credit is not renewed and the bank provides a bank draft instead, it would require the Accountant to interpret the letter of credit to determine if BMO's notice was compliant, then review the bank draft to confirm that it is also compliant, and then decide whether to accept or reject the bank draft, which may require the Accountant to actually investigate the matter. TruGrp argued that these duties are not properly part of the Accountant's role.

Karmina attempted to have the motion dismissed on procedural grounds, relying on five separate arguments for why the court should not entertain the motion. Ultimately, each of these arguments were rejected; Associate Justice Robinson held that now that the sufficiency of the letter of credit had been challenged, the challenge should be resolved on the merits.

With respect to the merits, Karmina maintained that the court's approval of BMO's letter of credit was not contrary to either the *Construction Act* or the *Public Guardian and Trustee Act*. It argued that courts have accepted this form of letter of credit for decades without any issues like the one advanced by TruGrp arising. Further, it argued that the approved letter of credit included a specific direction that BMO may provide replacement security to the Accountant by way of bank draft. That being the case, the Accountant, as

[4] O Reg 191/95, s. 3(7).

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

***TruGrp Inc. v. Karmina Holdings* Inc.**

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Markus Rotterdam and Xenia Charapov, Glaholt Bowles LLP

CanLii Reference:
2024 ONSC 2165

ONTARIO

the custodian of the letter of credit on the terms that have been approved by the court, has no basis for refusing to accept a bank draft from BMO, provided that the required notice of at least thirty days has been given.

The court reviewed but did not resolve the controversy on the merits without first affording the Accountant and BMO an opportunity to make submissions. The matter has been adjourned to allow those parties to be put on notice and to potentially respond.

Commentary

As one if its five procedural challenges, Karmina contended that the issue was moot because there was no evidence suggesting that BMO might not renew the letter of credit or opt for a bank draft instead. There is apparent merit in Karmina's argument regarding the mootness of the issue presented before the court. It is indeed notable that there was no evidence indicating BMO's intention to not renew the letter of credit or the likelihood of it opting for a bank draft instead. It is interesting that the court chose not to wait for a live controversy to address this matter.

In any event, the core matter for Associate Justice Robinson's consideration is whether the initial court order suffices in its entirety, or if a subsequent court order is necessary.

Should the court decide two orders are necessary under the current standard letter of credit form, it could pose complications for lien claimants whose liens are presently secured with the existing form for letters of credit. However, such an outcome appears unnecessary. The court's original Order sanctioned the letter of credit in its presented form, thereby endorsing the possibility of the Bank substituting the letter of credit with a bank draft. This approval encompassed an express provision regarding the replacement condition in question. Thus, the court effectively sanctioned BMO's potential substitution of the letter of credit with a bank draft.

In other words, the original order inherently permits the substitution of the letter of credit with a bank draft, even if not explicitly stated. The Court Order provides that the letter of credit is only cancelled if the bank actually provides a replacement bank draft for the Accountant to accept. The Court Order, by its terms, at least implicitly requires the Accountant to not only accept the letter of credit but accept it subject to its terms, including tendering of the replacement draft.

TruGrp Inc. v. Karmina Holdings Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Markus Rotterdam and Xenia Charapov, Glaholt Bowles LLP

CanLii Reference:
2024 ONSC 2165

ONTARIO

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

Further, a bank draft, a familiar instrument to both banks and accountants, is essentially equivalent to cash. Unlike a normal "cheque" which merely directs one's banker to remit the face value of the instrument, provided that there is adequate credit held to the customer's account with the financial institution, a bank draft asserts to the holder that the issuing or certifying institution financially backs the instrument.[5]

Therefore, in the authors' view the Accountant should not require further explicit court authorization to accept the bank draft as replacement security for the court-approved letter of credit.

The *Act* specifies the required forms or contents for letters of credit and bonds but is silent on the language for a bank draft. We believe this omission was intentional by the legislature, recognizing that while letters of credit and bonds may require legislative guidance, no such issues exist for bank drafts.

The historical context of the 1932 *Mechanics Lien Act* also supports this view. The *Act* allowed for the vacating of a lien using a bond or "other security" satisfactory to a judge or officer, without defining "other security." This flexibility has permitted the use of various forms of security, including bank drafts and letters of credit, for over 90 years without significant issues. This long-standing acceptance demonstrates that bank drafts are an effective and appropriate form of security.

Given their equivalence to cash and their established use in legal and financial contexts, bank drafts should be accepted without requiring additional court authorization. This interpretation aligns with legislative intent and practical considerations of efficiency and reliability in financial transactions. If the Accountant maintains that acceptance of the bank draft is contingent upon obtaining a further court order, then it seems logical that the letter of credit persists until such authorization is acquired. The bank cannot unilaterally revoke the letter of credit; it remains valid until all terms are met. This scenario does not appear to endanger or prejudice the lien claimant. Hence, the crux of Associate Justice Robinson's decision lies in determining the sufficiency of the original court order, rather than mandating a second one. Insisting on two orders might introduce uncertainty.

It will be interesting to see if and how the Accountant and/or BMO participate in the relevant motion, as well as the court's ruling on the suitable language for letters of credit utilized in lien security.

[5] Lazar Sarna, "The Law of Cheques and Promissory Notes", 4:3, Release No. 2, September 2023.

TruGrp Inc. v. Karmina Holdings Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Markus Rotterdam and Xenia Charapov, Glaholt Bowles LLP

CanLii Reference:
2024 ONSC 2165

ONTARIO

Caution: Letters of Credit Challenged as Lien Security in Ontario - Stay Tuned

It is also worth keeping an eye on this from the perspective of the review of the *Construction Act* which the Ontario government has appointed Duncan Glaholt to conduct. The form of lien bond, for example, has been mandated by the Regulations to the *Construction Act* for many years. The form of Letter of Credit has not. It may be time to resolve any controversy and affirm this longstanding practice by stipulating the acceptable form of Letter of Credit to post as security through regulation.

SPECIAL SECTION – Viewpoint #1

Alberta's First Adjudication Decision: Two Viewpoints on a Polarizing Decision

Final and Binding Adjudication in Alberta

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Corbin Devlin, McLennan Ross LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

Corbin Devlin

In one of the few reported court decisions on the Prompt Payment and Construction Lien Act (PPCLA), the Court states that adjudication in Alberta is final and binding on the parties - except where the Court makes an order, or an application for judicial review provides a different result.

Unlike the Ontario *Construction Act*, which expressly states that an adjudicator's decision is interim binding (i.e. binding and enforceable until a court or arbitrator finally decides the matter), the Alberta legislation does not state whether an adjudication is a final decision or an interim decision. So, it is no surprise that this dispute over the proper interpretation of the PPCLA went to court.

In *Welcome Homes Construction Inc v Atlas Granite Inc., 2024 ABKB 301*, a residential builder and a trade contractor agreed to resolve a payment dispute by adjudication. The adjudicator issued a written decision awarding the trade contactor part of the amount claimed. The builder delivered a Notice to Prove Lien to the trade contractor. The parties disagreed as to the effect of delivering a Notice to Prove Lien following the completion of an adjudication. The trade contractor applied to the court for advice and directions on how to proceed – i.e. via Notice to Prove Lien or judicial review.

The builder argued that the adjudicator's decision was only interim binding, and so they should still be entitled to challenge the validity of the lien. The trade contractor argued that the adjudicator's decision was final, and it would circumvent the PPCLA to require them to prove the validity of their lien after the adjudication. The Applications Judge concludes that adjudications in Alberta are final and binding, subject to the listed exceptions, based on two important distinctions between the PPCLA and the Ontario prompt payment legislation:

1. The Ontario *Construction Act* provides that an adjudication is binding on the parties until a determination of the matter by a court or arbitrator, whereas the Alberta PPCLA says that an adjudication is binding on the parties except where a court order is made in respect of the matter; "except" does not mean the same thing as "until." (Other exceptions include where the parties agree in writing to appoint an arbitrator or agree to a settlement in writing – see excerpts from the legislation below.)

2. The Alberta PPCLA provides a mechanism for "judicial review" of an adjudication decision.

Final and Binding Adjudication in Alberta

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Corbin Devlin, McLennan Ross LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

The Applications Judge bases his decision on a plain language interpretation of the PPCLA and concludes that lien rights are irrelevant to an adjudication. The adjudication process exists to determine contractual rights, not lien rights. An adjudication does not depend on the existence of a valid lien.

Unfortunately, this decision leaves us with as many questions as answers.

- If an adjudication is final and binding, what is the meaning of the phrase "except where a court order is made in respect of the matter" in the PPCLA? It has to mean something other than judicial review, since it is listed separately from the statutory exception for judicial review. Does it mean, as the trade contractor argued, only that a party may apply to court prior to an adjudication decision for a court order that the adjudication will be non-binding? If so, what adjudications would be appropriate for such an application?

- Is the Notice to Prove Lien mechanism available after an adjudication? Although this was really the procedural point of contention between the parties, the Court did not directly address this point. A lien claimant may need to enforce its lien to get paid, even after "winning" an adjudication. The owner or builder may take issue with the validity of a lien for a variety of reasons (e.g. timing of lien registration), whether or not money is owing to the lien claimant as determined by an adjudication, etc. So, surely the Notice to Prove Lien mechanism must remain available after an adjudication. The Court decision pronounces that "an adjudicator's decision cannot be overridden by a Notice to Prove Lien by the opposing party." The practical effect of that pronouncement is not clear, but it should not be taken to mean that the Notice to Prove Lien mechanism is unavailable following an adjudicator's decision.

- If judicial review is the only mechanism available to challenge an adjudicator's decision, what is the standard of review? The Applications Judge mentions the impressive list of qualifications that adjudicators have to meet, which might suggest that the Court will show deference an adjudicator's decision. If so, this would place a surprising amount of power with adjudicators considering the expedited nature of adjudications under the PPCLA.

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Corbin Devlin, McLennan Ross LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

Final and Binding Adjudication in Alberta

Relevant excerpts from the PPCLA:

Section 33.6

...

(5) The determination of a matter by the adjudicator is binding on the parties to the adjudication, except where

(a) a court order is made in respect of the matter,

(b) a party applies for a judicial review of the decision under section 33.7,

(c) the parties have entered into a written agreement to appoint an arbitrator under the Arbitration Act, or

(d) the parties have entered into a written agreement that resolves the matter.

(6) Except in the case of an application for judicial review under section 33.7, nothing in this Part restricts the authority of the court or an arbitrator to consider the merits of a matter determined by an adjudicator.

SPECIAL SECTION – Viewpoint #2

Alberta's First Adjudication Decision: Two Viewpoints on a Polarizing Decision

Distinction Without a Difference? The First Judicial Ruling on Alberta Adjudication and the Law of Unintended Consequences

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
XV. Adjudication
Jurisdiction:
Alberta
Author:
Peter A.K. Vetsch, Rose LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

Peter Vetsch

Alberta now has its first court decision on the prompt payment and adjudication regime that was introduced as part of the province's August 2022 reforms to its builders' lien legislation. In *Welcome Homes Construction Inc v. Atlas Granite Inc*[1], Applications Judge Schlosser of the Alberta Court of King's Bench clarified that an adjudication determination was independent from and unaffected by the potential invalidity of the claimant's underlying lien. However, he also made some surprising comments in *obiter* regarding a purported distinction between the Alberta and Ontario adjudication regimes, one that may not be fully borne out by the language and history of each province's legislation and that may lead to further unexpected interpretations in future cases.

Welcome Homes involved a relatively straightforward residential construction dispute. A homebuilder, Welcome Homes, retained a granite supplier, Atlas Granite, to provide a series of marble countertops for a new home under construction. After a dispute arose regarding the proper length of one of the countertops, the builder refused to take delivery of the disputed countertop and refused to pay the supplier for any of the other work and materials it had previously provided. Welcome Homes ultimately terminated its contract with Atlas Granite, and the supplier registered a builders' lien, which appeared on its face to be out of time.

After the lien was registered, the parties agreed to make use of the new adjudication process set out in Part 5 of the updated Alberta *Prompt Payment and Construction Lien Act*[2] (the "PPCLA"), and their selected adjudicator awarded Atlas Granite a substantial portion of its claim. However, Welcome Homes refused to pay the adjudicator's award and instead served Atlas Granite with a notice to prove lien under the PPCLA, seeking to establish that the lien was invalid. The parties applied to the Court for advice and direction regarding whether the adjudicator's determination was subject to and contingent on the validity of the underlying lien.

Applications Judge Schlosser noted that, while the lien may well have been subject to timing concerns that could impact its validity and enforceability, such issues were irrelevant to the adjudication determination, which ruled on the underlying contractual dispute as opposed to the lien itself. He then went further, stating that the adjudication process was only designed to

[1] 2024 ABKB 301
[2] RSA 2000, c. P-26.4.

Distinction Without a Difference? The First Judicial Ruling on Alberta Adjudication and the Law of Unintended Consequences

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
XV. Adjudication
Jurisdiction:
Alberta
Author:
Peter A.K. Vetsch, Rose LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

handle contractual disputes and that an Alberta adjudicator could not rule on any aspect of the lien:

> The crucial point is that an adjudicator determines contractual rights; not lien rights, even when they overlap. As I read it, the amended *Act* does not permit an adjudication between a subcontractor and an owner (for example), where the lien rights are the only basis for a direct claim. The amendments are designed to deal only with contractual rights between contracting parties in a construction dispute; though a lienable right gives access to this procedure and the lien frames the dispute.[3]

Section 19 of the *Prompt Payment and Adjudication Regulation* (the "Regulation") issued under the PPCLA outlines what matters are permitted to be submitted to adjudication, and begins by confirming that it is only a process that can be accessed between parties to the same contract:

> 19 A party to a contract or subcontract may refer to adjudication a dispute with **the other party** to the contract or subcontract, as the case may be, respecting any of the following matters:
>
> (a) the valuation of services or materials provided under the contract or subcontract…;
>
> (b) payment under the contract or subcontract…;
>
> (c) disputes that are the subject of a notice of non-payment under Part 3 of the Act;
>
> (d) payment or non-payment of an amount retained as a major lien fund or minor lien fund and owed to a party during or at the end of a contract or subcontract, as the case may be;
>
> (e) any other matter in relation to the contract or subcontract, as the case may be, that the parties in dispute agree to, regardless of whether or not a proper invoice was issued or the claim is lienable.[4]

[3] *Welcome Homes*, *supra* note 1 at para 18.

[4] *Prompt Payment and Adjudication Regulation*, Alta Reg 23/2022 at s. 19. Emphasis added.

Distinction Without a Difference? The First Judicial Ruling on Alberta Adjudication and the Law of Unintended Consequences

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
XV. Adjudication
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Alberta
Author:
Peter A.K. Vetsch, Rose LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

Subsection 19(e) may have itself been dispositive to the case at bar, as it expressly permits contracting parties to adjudicate any matter in dispute relating to their contract, whether or not it is lienable or subject to the prompt payment regime. Since Welcome Homes and Atlas Granite had agreed to submit their countertop dispute to adjudication, this provision made it clear that the adjudicator could rule on it regardless of the claim's underlying lienability. This was also a dispute about contractual rights and obligations associated with "the valuation of services or materials provided under the contract", independent of the lien that resulted from it. Atlas Granite's lien, had it been valid, may have provided Atlas Granite with additional security in respect of its claim for payment, but even absent such security, the contractual claim remained intact. Applications Judge Schlosser confirmed: "The determination of the validity of a lien is not something that would affect the outcome. The adjudicator determines contractual rights, not lien rights. The lien rights are superfluous and in the circumstances do nothing other than to frame the dispute and give access to the procedure."[5]

This conclusion was sufficient to resolve the issue before the Court. However, Applications Judge Schlosser then continued to discuss the adjudication regime generally, particularly identifying that "[t]here is an important difference between the Ontario and the Alberta legislation"[6] in respect of the legal effect of an adjudicator's determination. While the Ontario adjudication regime has been consistently held to be an interim dispute resolution process that is only temporarily binding on parties, providing an efficient way to get project funds flowing pending the final resolution and determination of a matter, Applications Judge Schlosser held that "an adjudication under the Alberta *Act* is intended to be final and binding with respect to the parties to the matter in dispute, except where the Court makes an order, or an application for judicial review provides a different result."[7]

This purported distinction was based on minor variations in the wording of each province's legislation: while the Ontario Act states that an adjudicator's determination is binding on the parties "***until*** a determination of the matter by a court, a determination of the matter by way of an arbitration…or a written agreement between the parties respecting the matter"[8], the Alberta Regulation states that an adjudicator's determination is binding on the parties ***except where*** a court order is made, an arbitrator has been appoint-

[5] *Welcome Homes, supra* note 1 at para. 26. The comment in this last sentence is likely inaccurate: as noted above, under subsection 19(e) of the Regulation, the parties had access to the adjudication procedure regardless of whether lien rights were triggered, as long as they mutually agreed to it.

[6] *Ibid* at para 19.

[7] *Ibid* at para 23. Emphasis added.

[8] Construction Act, RSO 1990, c C.30 at s. 13.15(1). Emphasis added.

Distinction Without a Difference? The First Judicial Ruling on Alberta Adjudication and the Law of Unintended Consequences

Welcome Homes Construction Inc v Atlas Granite Inc.

LU #167 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Secondary Topic:
XV. Adjudication
Jurisdiction:
Alberta
Author:
Peter A.K. Vetsch, Rose LLP

CanLii Reference:
2024 ABKB 301

ALBERTA

ed, a party applies for judicial review, or the parties enter a written agreement resolving the matter. Applications Judge Schlosser acknowledged that both provinces' Acts expressly state that nothing restricts a court's authority to consider the merits of a matter previously determined by an adjudicator, but then stated that "the mechanism for challenging an adjudicator's order in Alberta is judicial review".[9]

With respect, this does not appear to be an accurate reading of the Alberta legislation, and it does not fully reflect the history of Alberta's legislative prompt payment amendments. While it is possible to challenge an adjudicator's determination using judicial review, section 34 of the Regulation makes it clear that the permitted grounds for judicial review are exceedingly narrow and are limited to significant concerns relating to procedural fairness, such as fraud, the reasonable apprehension of bias, the use of an unqualified or uncertified adjudicator, or a party's legal incapacity. The much broader avenue available to parties in Alberta for challenging an adjudicator's result is exactly the same as it is in Ontario: relitigating the dispute before a fresh trier of fact, who is permitted to reconsider its merits *de novo* without deference to the adjudicator's prior conclusions.

It is notable that the initial draft of the adjudication regime proposed by the Alberta Legislature in Bill 37 (the original 2020 version of the lien legislation amendments that eventually became the PPLCA) contained language that aligned much more directly with Applications Judge Schlosser's conclusions in *Welcome Homes*, but this wording was significantly revised and adjusted in the final version of the legislation that was actually passed. Originally, section 33.6(4) of the draft PPCLA in Bill 37 read: "Subject to section 33.7 [Judicial Review], the determination of a matter by the adjudicator is final and binding on the parties to the adjudication." This aligns with the reasons in *Welcome Homes* almost verbatim. However, after additional consultation, the Legislature altered and clarified this wording into its current form:

> **33.6(5)** The determination of a matter by the adjudicator is binding on the parties to the adjudication, *except where*
>
> (a) a court order is made in respect of the matter,
>
> (b) a party applies for a judicial review of the decision under section 33.7,

[9] *Ibid* at para 20.

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(c) the parties have entered into a written agreement to appoint an arbitrator under the Arbitration Act, or

(d) the parties have entered into a written agreement that resolves the matter.[10]

The word "final" was intentionally removed from the version of this section that became law in Alberta, and it was replaced with a list of the various mechanisms that could prevent an adjudication ruling from becoming the final word on a dispute, a list that is nearly identical to that found in the Ontario Act. The primary typographical difference from the equivalent wording in Ontario's legislation is the use of the words "except where" as opposed to "until" in the description of the binding duration of the adjudication order. However, practically speaking, this difference in terminology is not likely to make any difference in application: in both cases, an adjudicator's determination has immediate effect and is binding until the parties otherwise agree on a different result or until a more formal arbiter rules on the dispute. If no subsequent agreement or ruling comes about, the determination stands, in either province.

On a plain reading of the two sections at issue, there does not appear to be any "important difference" whatsoever between how the adjudication regimes in Alberta and Ontario are intended to function. While any semantic difference is likely largely illusory in function, such difference is now the subject of express judicial recognition and is embedded in our case law. This could take future PPCLA jurisprudence in Alberta down unexpected interpretive paths that were neither foreseen nor intended by our Legislature, particularly if it means that existing Ontario adjudication jurisprudence can be distinguished and disregarded on this basis. While the primary decision in *Welcome Homes* is undoubtedly correct, this additional commentary on the legal effect of adjudications in Alberta as opposed to Ontario may not be, and its ultimate impact is not yet clear.

[10] PPCLA, supra note 2 at s. 33.6(5). Emphasis added.

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