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GLAHOLT BOWLES
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BUILDING INSIGHT

GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE

Key Changes Coming to Ontario's *Construction Act*: What Bill 216 Means for Holdback, Adjudication, and More

In February 2015, nearly a decade ago, Bruce Reynolds and Sharon Vogel were appointed by the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure to conduct an expert review of Ontario's *Construction Lien Act*. Their review culminated in a comprehensive 435-page report, published in 2017, which included 100 recommendations for legislative reform. Many of these recommendations were adopted by the legislature and integrated into the updated *Construction Act*.

One of the key recommendations was for an independent review of the *Act* to be conducted within five years of the new legislation's enactment, with subsequent reviews every seven years thereafter.

The first of these independent reviews was completed by our firm's founder, Duncan Glaholt, whose report, *2024 Independent Review: Updating the Construction Act*, was released on October 30, 2024. The report includes 44 new recommendations for further reforms. As Mr. Glaholt notes, through consultations with stakeholders, three major themes emerged: holdback, adjudication, and administration.

Coinciding with the release of Mr. Glaholt's report, Bill 216, *Building Ontario For You Act (Budget Measures), 2024*, went through its first reading on the same day. By November 6, 2024, Bill 216 had passed its second and third readings and received Royal Assent.

Schedule 4 of Bill 216 introduces amendments to the *Construction Act*, which, upon proclamation by the Lieutenant Governor, will come into force on a yet-to-be-determined date. A review of the Bill reveals that, once again, the legislature has largely embraced the recommendations from Mr. Glaholt's 2024 *Independent Review*.

Key Changes in Schedule 4 of Bill 216

Mandatory Annual Holdback Release:

One of the most significant changes is the introduction of mandatory annual holdback release. Under section 26(4), an owner shall make payment to a contractor of all the accrued holdback in respect of services or materials supplied by the contractor during the year immediately preceding the anniversary, unless a lien has been preserved or perfected and not discharged, vacated, or satisfied.

Notices of annual release of holdback must be issued by owners in the prescribed form no later than 14 days after the anniversary date. Liens arising from the supply of services or materials covered by a notice of annual release of holdback will expire 60 days after the notice is published.[1]

The new holdback provisions also establish deadlines for payments at various stages of the contracting chain. Contractors must pass on accrued holdback to subcontractors within 14 days of receiving payment from the owner, unless a lien has been preserved or perfected. Similarly, subcontractors must pay sub-subcontractors within 14 days of receiving their holdback payment.

Holdback and Designers:

A new provision under section 14(4) addresses situations where an owner retains a holdback for the supply of a design, plan, drawing, or specification for a planned improvement that is never started. In such cases, the holdback provisions of section 14(1) will apply, unless the owner proves the value of their interest in the land has not been enhanced.

Proper Invoices and Prompt Payment:

Section 6.1 has been amended to refine the criteria for a proper invoice. Invoices must now include details such as the period, milestone, or payment entitlement, contract identifiers (e.g., contract number or purchase order number), and any additional information requested by the owner to facilitate the accounts payable process. If an invoice is missing any of these details, it will still be considered a proper invoice unless the owner notifies the contractor in writing within seven days, specifying what is required.

Adjudication Process:

Significant changes have been made to the adjudication regime, including the ability for adjudications to be conducted by private adjudicators, provided they are qualified by the Authorized Nominating Authority. The scope of adjudications is now governed by Regulations rather than being explicitly listed in the *Act*. Additionally, parties may refer disputes to adjudication on any matter agreed to in the contract or prescribed by Regulation.

Regarding the availability of adjudication, Bill 216 modifies the availability of adjudication from being tied solely to "completion", and provides that:

- An adjudication in respect of a contract may not be commenced if the notice of adjudication is given more than 90 days after the date on which the contract is completed, abandoned or terminated, unless the parties to the adjudication agree otherwise.

- An adjudication in respect of a subcontract may not be commenced if the notice of adjudication is given more than 90 days after the earliest of,

    * the date on which the contract is completed, abandoned or terminated, unless the parties to the adjudication agree otherwise;

    * the date on which the subcontract is certified to be completed under section 33; and

    * the date on which the subcontractor last supplies services or materials to the improvement.

Another key update is the ability to object to an adjudicator's jurisdiction during the adjudication process, and the ability of the adjudicator to make determinations regarding his or her own jurisdiction, mirroring the competence-competence principle in arbitration. Adjudicators can also correct errors or amend determinations to address oversights, on their own initiative or upon request.

1. See, however, subsections 27(3), (4), and (5) regarding the expiry of liens that do not expire under setion 27(2).

Housekeeping Amendments:

Several administrative updates have been introduced.

For instance, the definition of "price" has been expanded to allow the Regulations to set a price for contracts or subcontracts in situations where the parties fail to agree on one, other than the market value of the services or materials supplied. Additionally, the definition of "written notice of a lien" now includes a copy of any claim for lien registered or given under section 34.

Mr. Glaholt's report also recommended that the Regulations explicitly permit the joinder of trust claims in lien actions, with the court having the discretion to sever claims or require separate trials or procedures as needed. In response, Bill 216 includes a new section 50(4), which states that "the procedures prescribed for the purposes of this Part may provide for the joinder of a lien claim with another claim in an action, in which case this Part applies to the other claim as it does to the lien claim." As a result, it is anticipated that the Regulations will allow for the joinder of lien and trust claims.

However, as of the date of this article, the Regulations have yet to be amended to implement the intended changes.

Additionally, a new section 1(5) is being introduced to clarify that when multiple improvements are to be made under a single contract, and those improvements are to lands that are not contiguous, then, if the contract so provides, each improvement will be considered as part of a separate contract.

Transition Provisions:

Upon proclamation, most amendments in Bill 216 will take effect immediately, applying to all improvements in the province, including those under contracts entered into prior to the amendments' effective date.

However, there are some exceptions. For instance, the first anniversary date for mandatory annual release of holdback under the new rules will be the second anniversary of the contract, following the enactment of the amendments.

Additionally, the new transition provisions (section 87.4) do not affect the existing transition provisions (section 87.3) related to the 2017 amendments. Specifically:

- the amendments in Bill 216 will not apply to an improvement if the contract was entered into or the procurement process commenced on or before June 30, 2018;[2] and
- the amendments in Bill 216 respecting Part I.1 (Prompt Payment) and Part II.1 (Adjudication) will not apply to an improvement unless the contract was entered into or the procurement process commenced on or after October 1, 2019.[3]

2. By operation of subsection 87.3(1) the *Construction Lien Act* continues to apply to such improvements.

3. By operation of subsection 87.3(4) the *Construction Act* applies but Parts I.1 and II.1 do not apply to such improvements.

Conclusion

The recommendations from Mr. Glaholt and the amendments in Bill 216 demonstrate an ongoing effort to streamline and modernize the *Construction Act*. Notable updates, particularly those related to the availability of adjudication and mandatory release of holdback, are poised to have a significant impact on Ontario's construction industry. Owners, contractors, and subcontractors need to be mindful of their updated obligations, particularly around holdback retention and payment, lien expiry deadlines, and adjudication timelines.

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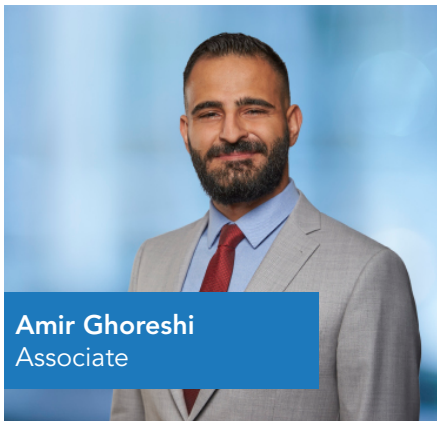

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ODACC 2024 Annual Report in Review

This year marks another pivotal period in the evolution of construction law in Ontario. Most notably, Bill 216, *Building Ontario For You Act* (*Budget Measures*), 2024 resulted in the passage of amendments to the *Construction Act*, RSO 1990, c C.30 (the "***Act***"), receiving Royal Assent on November 6, 2024. These amendments are discussed by Jacob McClelland and Amir Ghoreshi in this newsletter.

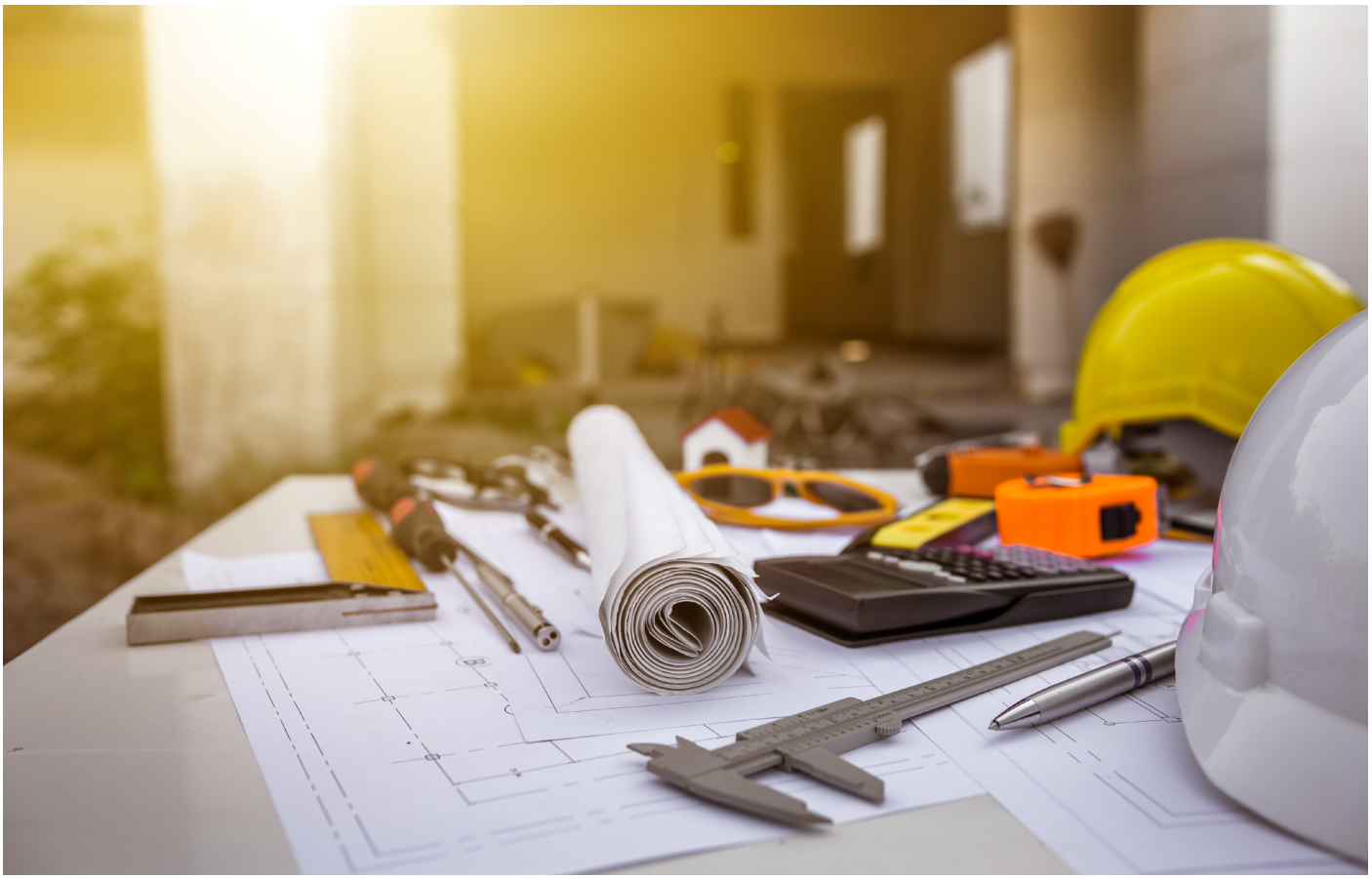
The amendments coincide with the release of the Ontario Dispute Adjudication for Construction Contracts ("**ODACC**") 2024 Annual Report (the "**Report**"). The Report marks five years since the introduction of adjudication in Ontario. In this article, we review ODACC's Report and key takeaways for the fiscal year 2024 and compare certain findings to the first year of adjudication. We also present suggestions for how, going forward, the ODACC Reports might unpack interesting aspects of the adjudication process and provide further insight into its growing use since it was first installed in Ontario as a dispute resolution mechanism.

Adjudication Then and Now

In 2020, Glaholt Bowles LLP published a special edition newsletter entitled *Adjudication: One Year in Review*. In one of the articles, we discussed interesting findings in the first annual report from ODACC. Today, in addition to highlighting how adjudication has played out in Ontario in fiscal year 2024, we also draw some comparisons between the first and fifth year of adjudication to reveal several insights.

First, the raw data shows that 32 matters were commenced in the first year of adjudication, but in 2024 that number has increased nearly nine-fold to 277. As stakeholders in the industry have become more familiar with the adjudication process, and perhaps how it can be beneficial to keeping projects on target through quick resolution, the use of adjudication has exploded.

Second, because of the increased use of adjudication, the number of disputes reaching a determination have also soared. In 2024, 151 determinations were made, totaling $30 million in awards required to be paid. In comparison, in the first year of adjudication, only 3 determinations were made with a total amount of awards sitting at $30,000. The tremendous shift in the size of these



awards from $30,000 to $30 million in only five years signals the growing value that adjudication is having on keeping money flowing on projects.

Third, like in the first year of adjudication, residential matters continue to dominate the pool of disputes with 40% coming from residential construction. However, adjudications of disputes in the transportation and infrastructure sectors are gaining momentum in second place with approximately 30% of the matters coming from these sectors. This is in comparison to the first year of adjudication, where transportation and infrastructure disputes comprised only 3 of the 32 disputes (9%). None of the 3 transportation and infrastructure disputes during the first year of adjudication actually resulted in a determination.

Fourth, in terms of the nature of the disputes that resulted in determinations in fiscal year 2024, the top two categories, which made up 80% of the cases, were:

a. disputes that dealt with payment under the contract, including in respect of a change order, whether approved or not, or a proposed changed order (50%); and

b. disputes that dealt with the valuation of services or materials provided under the contract (30%).

Fifth, in terms of the decision makers themselves, there was a drop in the number of adjudicators from the first year (65) to the fifth year (52). The distribution of professional training of the adjudicator is consistent. In our newsletter, *Adjudication: One Year in Review*, we noted that notwithstanding the limited cases where an adjudicator has more than one profession, most were engineers or project managers, with lawyers being the third most prevalent profession. Five years later, this distribution largely remains the same. We also continue to see a dearth in the number of architects, despite the regular role of architects as consultants on a wide range of construction projects. In the first year of adjudication, two adjudicators were professionally trained as architects. Today, that number has only increased to three.

Lastly, the Report pointed to an increase in consolidated adjudications where multiple parties with disputes related to one construction project resolved their dispute together. There were no such cases noted in the first annual report, which is likely explained by the smaller pool of cases and limited number of large infrastructure projects where there are typically numerous disputes and therefore more potential for consolidation. Still, the increase in consolidated cases by 2024 is a very good indication of adjudicators and the parties making concerted efforts to streamline disputes and focus on efficient resolution in real time which reflects the legislative intent for adjudication.

Overall, the above comparison between the first and fifth year of adjudication illustrates how its use has expanded exponentially across the province, as well as the importance of the adjudication process in keeping funds flowing within the construction pyramid.

Expanding the ODACC Annual Reports

Each year, ODACC's Annual Report is much anticipated by the construction law community as it provides us with a bird's eye view of the landscape of adjudication. However, the opportunity exists for these reports to uncover much more of what is happening "on the ground", and the following represents some topics of interest for further exploration:

1. **The Parties to Adjudication.** The use of adjudication has picked up in pace and will continue to move rapidly given the recent amendments to the Act. One area of interest is getting a better sense of the parties electing to start an adjudication and perhaps signaling increased trust in the process. For instance, are more public entities (typically the owners on major infrastructure projects) taking the initiative to start adjudication proceedings? How often do professional consultants initiate proceedings as compared to contractors and subcontractors? Given the dominance of residential matters, are parties to those disputes often self-represented and how does this compare to other industry sectors? Are there any notable trends in determinations for matters where one of the parties is self-represented?

2. **Surveys of Participants.** If ODACC conducts annual surveys of the participants' experience of adjudication (including that of the adjudicator), to consider incorporating a section in the annual reports to discuss some of those findings. If ODACC does not do any surveying, it may be worthwhile in terms of identifying areas for improving the experience. Surveys may also uncover the reason for current trends such as the lack of experienced architects as adjudicators.

3. **Selection of Adjudicators.** What, if any, trends do we see regarding the professional background of adjudicators initially selected by the parties and, of the determinations rendered

each fiscal year, the professional background of the adjudicators in those cases? For instance, do lawyers dominate across the dispute categories? Are project managers only utilized for specific types of disputes, etc.?

4. **Awards.** The ODACC analysis of the awards paid out each fiscal year excludes determinations where the adjudicator ruled that no awards should be paid. Arguably, trends related to these determinations are just as insightful as the cases where awards are paid and therefore should be included in the analysis each year.

5. **Appeal of Determinations.** Understanding how the judiciary engages with adjudication determinations is always an area of interest for construction lawyers, particularly when it comes to advising clients in the dispute resolution process. Another insightful addition for future Reports is to include a section on appeals. A starting point is to highlight how many determinations are appealed each year, the basis for appeal, and whether these appeals are upheld or dismissed.

Amendments to the Act and Adjudication

The coming into force date of the new amendments of the Act has not been announced but the construction industry is already anticipating the impact of these legislation changes, including the impact on adjudication. The ODACC annual reports are the best source for tracking the evolution of these new changes if ODACC can expand the types of data that it collects and how it is communicated to the public. For instance:

1. Whether the parties to adjudication will continue to utilize adjudication for "real time" dispute resolution as intended, or whether the new amendments to allow for adjudication for completed contracts will see more post-project (completion, abandonment or termination) adjudication.

2. Any noticeable trends in comparing the outcomes of adjudications by private adjudicators versus parties formally going through the ODACC process with an assigned adjudicator.

3. Whether the ability to appoint private adjudicators will result in the dominance of cases being heard by a select group of adjudicators (e.g., lawyers).

4. Whether the instances of appeal will be reduced given the new ability of the adjudicator to make determinations regarding their jurisdiction, mirroring the competence-competence principle in arbitration.

In the years to come, the evidence points to a growing reliance on adjudication as a means of dispute resolution. The evolution of construction law in Ontario continues and creating a robust means to track and critically assess the use of adjudication will serve the legal community well going forward.

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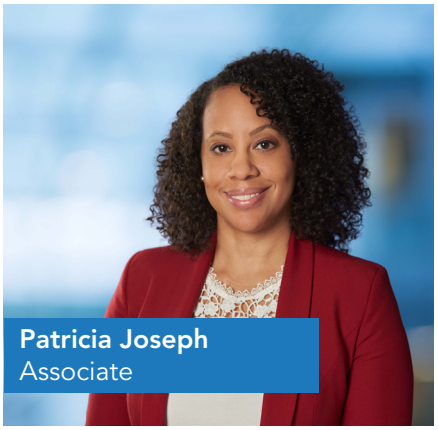

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Purchasers Do Not Owe A Duty of Fairness to Bidders' Subcontractors During Tender Process, Confirms the Court of Appeal for Ontario: *Canada Forgings v. Atomic Energy of Canada*, 2024 ONCA 677

Key Takeaways

- The limitation period for procurement law claims based on the duty of fairness starts to run from the time the claimant had the requisite knowledge of the material facts to ground a plausible inference of liability for a breach of the duty of fairness claim. This only requires that the claimant knew or ought to have known of the alleged unfairness, there is no need to have seen the details of documents which evidence the unfairness.

- Subcontractors and suppliers are not parties to the contract between a purchasing entity and bidders during the tender progress ("**Contract A**") so there is no duty of fairness owed by a purchaser to a bidder's subcontractor or supplier.

Background

Canada Forgings Inc. ("**CanForge**"), the claimant/appellant, produces custom steel forgings including end fitting forgings for the nuclear industry. Atomic Energy of Canada Limited ("**AECL**"), the defendant/respondent, designs and refurbishes CANDU nuclear reactors[1] around the world.

CanForge's claim arose out of its perception that AECL was purposely ignoring it as a supplier of forgings for the nuclear industry and that AECL was denigrating CanForge's products to others.

There were two potential refurbishment projects in the planning stages in early 2004, one by Bruce Nuclear in Ontario ("**Bruce**"), and another in Point Lepreau, New Brunswick. AECL hoped to secure contracts for both.

In 2004, AECL was retained by the CANDU Owners Group ("**COG**")[2] to prepare an industry capacity assessment report to determine current capabilities to undertake multiple refurbishment projects, if called upon. To produce that report, AECL contacted three machine shops to inquire about their rates and timeframes for supplying materials. Those machine shops were Precision Nuclear Inc. ("**Precision**"), Donlee Precision ("**Donlee**"), and Invar. AECL eventually contracted with Invar.

CanForge learned of the potential refurbishment work, and in July 2004, CanForge sent quotations for end fitting forgings to Precision, Donlee and Invar. Donlee had requested a quotation from CanForge, but the quotations to Precision and Invar were unsolicited.

CanForge's main competitor for this supply was another end fitting forgings producer, Patriot Force Co. ("**Patriot**"). Invar's evidence was that Patriot was Invar's sole supplier and Invar was satisfied with Patriot's pricing and workmanship. Even though CanForge's unsolicited quote was $50 cheaper, Invar did not think the price difference warranted looking into changing suppliers. Only Precision included CanForge as a supplier in its bid.

In September 2004, in anticipation of a contract for Bruce, AECL issued a call for tenders to the three machine shops, Invar, Precision and Donlee. As part of their bid, these machine shops were to obtain pricing from their own chosen subcontractors and suppliers. Before the bid deadline, CanForge sent fresh quotes to Donlee and Precision but not Invar, while Patriot sent quotes to all three machine shops. Importantly, AECL did not issue any tender for end fitting forgings to CanForge or Patriot.

Invar, whose bid included Patriot as a supplier but not CanForge, had the lowest technically compliant bid; Precision, whose bid carried both CanForge and Patriot, was technically non-compliant because Precision was not yet qualified to manufacture end fittings; and Donlee's bid was roughly $5 million more expensive than Invar's. AECL therefore selected Invar.

However, by April 2005, the expiration date of the submitted tenders, AECL had not awarded anyone a contract for end fittings because it had not finalized its contract with Bruce. In fall 2005, the contract was still not finalized, but without disclosing that Invar was its presumptive choice,

1. CANDU (CANada Deuterium Uranium) is a unique nuclear reactor system developed in Canada.

2. The CANDU Owners Group (COG) is a private, not-for-profit corporation funded voluntarily by CANDU operating utilities worldwide.

AECL sought confirmation from Invar that it would hold its price. Also, to ensure a timely supply of materials, AECL issued a letter of intent to Patriot. That letter of intent included an indemnification to Patriot to cover its out-of-pocket expenses should it ultimately not receive a purchase order from any machine shop for the Bruce project.

In late 2005, the scope of the Bruce project was reduced, and this was communicated to Invar, not Donlee or Precision, by an "addendum" which referenced the original tender. CanForge argued that this was an extension of the expired tender process. AECL's evidence was that the term "addendum" was only used at the request of AECL's engineering department to update the technical specifications.

Invar was finally officially awarded the Bruce contract in December 2005, and Invar issued a purchase order to Patriot for the end fitting forgings.

CanForge commenced an action against AECL in 2005 on several grounds but not including a procurement law claim. In April 2009, CanForge amended its claim to include a procurement claim that AECL had breached its duty of fairness.

Limitation Issue

The trial judge had held that CanForge's duty of fairness procurement claim was statute barred. The Court of Appeal agreed.

The courts held that the procurement claim was discoverable by CanForge prior to April 2007, i.e., two years before CanForge brought it. A key piece of evidence was a letter written by CanForge's lawyer in December 2005 which complained that AECL had negotiated a deal directly with CanForge's competitor,

Patriot, agreeing to pay a price higher than CanForge's price. There had also been a meeting, a subsequent phone call, and CanForge's original statement of claim, which all showed that CanForge had the requisite knowledge of the alleged unfairness. CanForge argued that document discovery was not until late 2007 and CanForge only gave its lawyers a copy of the letter of intent in 2008. However, the court held that CanForge knew or ought to have known they had a procurement claim before they read the full letter of intent.

Even though the limitations issue disposed of the appeal, the Court went on to explain why it would uphold the trial judge's reasons on the procurement law question.

A Refresher on the Basics of Procurement Law

The Court of Appeal summarized the basics of procurement law as follows:

> "When a business wishes to procure services, and issues a 'request for proposal', or "RFP", inviting suppliers to bid for a contract, the law divides the procurement process into two separate contracts: "Contract A" and "Contract B". Contract A is the agreement entered into when a bidder submits a compliant bid in response to an invitation to tender. It imposes certain obligations on the procuring authority about how bidders will be treated. Contract B is the agreement between the procuring authority and the winning bidder.[3]
>
> "…Contract A can only be formed between a procuring authority and compliant bidders; in other words, a procuring authority is contractually obliged, by Contract A, to accept only compliant bids and, more importantly for present purposes, only compliant bidders have legal remedies arising from the procurement process as against the procurement authority. Whether Contract A is formed depends on the parties' intentions to create a legal relationship through a call for tenders and the submission of a compliant bid."[4]

3. *Canada Forgings* at para 38, referencing *The Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111

4. *Canada Forgings* at para 38, referencing *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

The Court's Decision on the Procurement Law Issue

The Court of Appeal pointed out that CanForge incorrectly framed the issue as whether AECL complied with its obligations under Contract A. That was not the issue. The issue was whether Contract A had been created in the first place between AECL and CanForge. It had not. Therefore, AECL had no obligations to CanForge.

The Court of Appeal stated, "The bottom line is, there can be no breach of a duty of fairness in procurement law when there is no Contract A." CanForge was not a party to the original Bruce tender. AECL's Bruce tender was between AECL and the three bidding machine shops and not their suppliers and subcontractors. CanForge was therefore not a party to any Contract A formed in relation to the Bruce Tender. It followed that AECL had no duty of fairness, implied or otherwise, to CanForge. The Court of Appeal affirmed the trial judge's finding that CanForge could not avoid the established principle that subcontractors are not party to Contract A.

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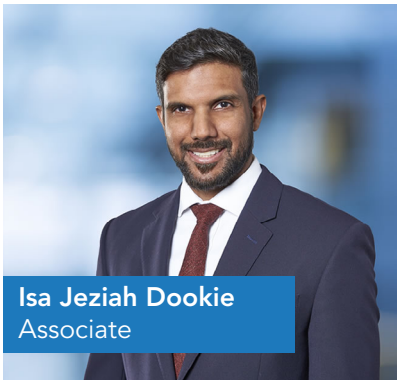

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The Use of Injunctions in Tendering Situations: *Daniels Sharpsmart Canada Ltd. o/a Daniels Health v. Alberta Health Services*, 2024 ABKB 282

When the contract for medical waste management and disposal with Alberta Health Services' ("**AHS**") current service provider was set to expire with no further extensions available, AHS issued a Request for Proposals for the provision of medical waste management services for specified facilities.

Daniels Health submitted a proposal in response to the RFP but was advised that it was not the successful proponent. AHS commenced negotiations with another proponent, Stericycle, although to date no contract had been finalized between Stericycle and AHS.

Daniels Health sought to halt the negotiations between Stericycle and AHS by commencing an application on an urgent basis seeking an injunction preventing AHS from continuing to negotiate or enter into a Services Agreement with Stericycle.

The court applied the established test for injunctive relief:

1. Is there a serious issue to be tried?

2. Will the party seeking the injunction suffer irreparable harm if the injunction is not granted? and

3. Does the balance of convenience favor the granting of the injunction?

On the first leg of the test, the court noted that while usually, an applicant need only establish that the case is neither vexatious nor frivolous, the test in this case was elevated because the requested relief, if granted, would have the same effect as a final determination of the issues. AHS would be precluded from pursuing a contract for medical waste management services with its proponent of choice, Stericycle. Given that AHS required a new service provider in place by the end of July 2024, an injunction preventing it from negotiating with Stericycle would force it to pursue a contract with another provider instead of its preferred provider. It would be too late to revisit Stericycle's proposal once an action had been determined fully on its merits.

Accordingly, Daniels Health had to demonstrate that it had a strong *prima facie case*.

The court proceeded on the basis that although this was an RFP process and not a formal tendering process, there was a duty on AHS to act fairly, to treat all responders to its RFP consistently and not to ignore, alter or delete RFP criteria as they please except in accordance with the terms of the RFP.

Daniels Health argued that Stericycle's bid did not meet the technical requirements set out in

the RFP and that by proceeding to negotiate with Stericycle, AHS had unilaterally and unfairly changed the terms of the RFP to the detriment of Daniels Health.

Daniels Health alleged that Stericycle's medical waste management equipment suffered from design flaws that could result in containers being overfilled and a risk of needle sticks. They further alleged that the design of Stericycle's containers could allow someone to reach inside a container containing hazardous medical waste and that containers could leak if dropped or topple over and spill their contents. Finally, there was an allegation that the labelling and color coding of the containers provided by Stericycle did not meet required standards.

The evidence that Daniels Health relied on were affidavits from its Chief Financial Officer who claimed that it was his "understanding" that Stericycle's containers did not meet CSA and ISO requirements, among other things, and they therefore did not meet the standards required by the RFP. The basis for his understanding was not disclosed. He did refer to a Stericycle brochure, but that brochure clearly stated that Stericycle's containers are "designed to meet the most recent CSA and ISO standards on reusable sharps containers."

The affidavits also referred to an undisclosed person acting on behalf of Daniels Health who observed Stericycle containers being delivered to the hospital, and to an undisclosed individual assessing and inspecting a Stericycle container provided by an anonymous client. Based on those undisclosed sources, the affiant formed his opinion that the Stericycle containers were deficient.

The court held that that evidence constituted hearsay. Besides, the person swearing the affidavit was the company's chief financial officer, and there was nothing in his evidence that would suggest he had the training, knowledge, or experience to be evaluating equipment utilized by a competitor or opining on whether such equipment might be compliant with various technical standards.

The most that could be said of the evidence proffered was that Daniels Health has some concerns about whether Stericycle's response to the RFP was compliant with its stated requirements. The RFP only required a proponent to certify compliance with the mandatory requirements. It did not require third party verification of the stated compliance.

Stericycle did certify compliance with all the mandatory requirements in its response to the RFP. Daniels Health's stated concerns, based primarily on hearsay and speculation were, in these circumstances, insufficient to establish that it had a strong prima facie case against AHS for being unfair in the conduct of its RFP process.

Daniels Health effectively attempted to alter the RFP process by suggesting there should be some form of third-party verification of information provided by proponents in the RFP process. There was no basis to do so.

Even if Daniels Health was concerned that equipment Stericycle has used in other provinces or for other customers was not sufficient to meet the mandatory requirements set out in the RFP, that did not give it the right to demand the RFP process be changed to assuage its concerns.

Daniels therefore failed to establish a strong *prima facie* case.

While that would have been good enough to dismiss the application, the court commented on the two remaining steps, irreparable harm and the balance of convenience.

Daniels Health claimed that it would suffer irreparable harm if the injunction was denied because there was a meaningful risk that it would suffer a loss of market share and a loss of reputation, neither of which could be adequately compensated with an award of damages. That was rejected by the court because of a complete lack of evidence regarding a potential loss of market share or harm to reputation.

Daniels Health then raised an innovative argument in support of irreparable harm based on a limitation of liability clause found in the RFP, which limited AHS' liability to the lesser of the Proposal preparation costs or $5,000. According to Daniels Health, that clause made the harm to it irreparable in the sense that it could never collect more than the lesser of its costs of preparing its response to the RFP or $5,000 even though the losses associated with not being the successful proponent would far exceed those amounts. That argument ignored the fundamental premise that when considering irreparable harm, the term "irreparable" refers to the nature of the harm suffered rather than its magnitude and was also dismissed. In any event, there were sound policy reasons for rejecting Daniels Health's argument that the limitation of liability clause in the RFP gave rise to a claim of irreparable harm. Daniels Health was fully aware of the existence of the limitation of liability clause in the RFP when it decided to submit a response. Having accepted that limitation of liability clause by engaging in the process, it could not now convert its acceptance of that clause into a claim of irreparable harm. To allow it to do so would undermine the integrity of the RFP process and create significant uncertainty in the process for a party issuing or engaging in a request for proposals process.

Finally, the balance of convenience favoured AHS. If the application for an injunction was dismissed, Daniels Health could still pursue a claim against AHS for any damages it alleges it suffered because of AHS engaging in allegedly unfair practices. It would not be prejudiced in that regard. On the other hand, any delay at this stage in AHS's process to replace its medical waste management and disposal services would be detrimental to AHS and potentially to its workers and the public. AHS engaged in an RFP process and ought to be able to conclude that process to ensure there is no interruption in the handling and disposal of the medical waste generated at its facilities.

The application for an injunction was therefore dismissed.

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Director of Research

One Improvement, One Act; But Can Two Acts Apply to the Same Contract?

In a previous article, we discussed the decision in *DNR Restoration Inc. v. Trac Development Inc.*, 2023 ONSC 1849 ("***DNR***"), where the Court clarified the transition provisions of the *Construction Act*, which replaced the *Construction Lien Act*. The Court, reaffirming the decision in *Crosslinx Transit Solution Constructors v. Form & Build Supply (Toronto) Inc.* 2021 ONSC 3396 ("***Crosslinx***"), confirmed that one *Act* is to apply to the entirety of an improvement, and the contracts and subcontracts for that improvement, to ensure consistent rights, obligations, and remedies for parties involved in the same improvement.

In other words, one *Act* per improvement.

But what happens when a contract is in respect of two improvements governed by different *Acts*? The Divisional Court answered this question in its recent decision in *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555.

The short answer is that different *Acts* can apply to the same contract, if the contract is for two (or more) improvements.

Background and Relevant Facts

The decision centers on the judicial review of an adjudicator's decision under the *Construction Act*, focusing on jurisdictional issues relating to the transitional provisions. The central question was whether the adjudicator had jurisdiction over claims arising from a construction contract (the "**Contract**") between the Applicant, the Corporation of the Town of Caledon ("**Caledon**") and 2220742 Ontario Ltd. o/a Bronte Construction ("**Bronte**").

The work in dispute concerned the clean-up of two stormwater ponds, Pond #7 and Pond #14.

Caledon issued a Request for Proposals on November 1, 2018, for design, contract administration and site inspection for clean-up work on four stormwater ponds, including Pond #7. Caledon later entered into a contract with WSP as a result.

Similarly, Caledon issued a Request for Proposals on March 20, 2020, for design, contract administration and site inspection for clean-up work on three different stormwater ponds, including Pond #14. Caledon later entered into a contract with Matrix as a result.

In or around May 2021, Caledon, after issuing a Request for Tenders, entered into the Contract with Bronte for the clean-up of Pond #7 (based on WSP's design), and Pond #14 (based on Matrix's design). Bronte performed work under the Contract until it was terminated by Caledon, after which Bronte delivered a Notice of Adjudication seeking payment of approximately $145,000.

In the adjudication, the adjudicator first determined that he had jurisdiction over disputes relating to both Pond #7 and Pond #14, and subsequently awarded $93,445.92 to Bronte with respect to both ponds.

Caledon brought this application for judicial review, seeking to set aside the adjudicator's determination. Caledon took the position that the Contract was for a single improvement and subject to the *Construction Lien Act,* which does not provide for adjudication of disputes. Alternatively, Caledon took the position that the earlier version of the *Act* should apply, if the Contract covers multiple improvements.

In response, Bronte argued that the Contract may cover multiple improvements, and that the latest version of the *Act*, being the *Construction Act* which provides for adjudication of disputes, should apply.

The case turned on the Divisional Court's application of the transition provisions of the *Construction Act* to the Contract and the improvement(s), and whether, as a result, the adjudicator had correctly determined his own jurisdiction.

Court's Considerations

Justice Corbett began his analysis by summarizing the transition provision in section 87.3 of the *Construction Act* into three categories:

1. The *Construction Lien Act* applies where a "procurement process **for the improvement**" was commenced before July 1, 2018;

2. The *Construction Act* applies, but Parts I.1 and II.1 (which provide for Prompt Payment and adjudication) do not apply where a "procurement process **for the improvement**" was commenced on or after July 1, 2018 and before October 1, 2019; and

3. The *Construction Act* applies in its entirety where a "procurement process **for the improvement**" was commenced on or after October 1, 2019.

In other words, adjudication is only available for improvements falling in the third category.

The Court also reiterated the limited grounds available to the Court to set aside an adjudicator's determination and that "[a]djudicators must be correct in finding a legal basis for their jurisdiction; their findings of fact in connection with their jurisdictional determinations are entitled to deference."

Justice Corbett grappled with applying these transition provisions to a contract or subcontract that is in respect of more than one improvement. Potential options included applying the earliest or latest applicable version of the *Act* to the entire contract, or applying different *Acts* in respect of different improvements.

Relying on the decisions in *DNR* and *Crosslinx*, the Court found that the only solution consistent with the intent of the Legislature that one *Act* apply to the whole improvement was to apply different versions of the *Act* to contracts in respect of multiple improvements. In the Court's view, while not perfectly straightforward, there was no insurmountable or great difficulty in applying different versions of the *Act* to the same contract. The Court's guidance in avoiding any potential difficulties was to avoid bundling multiple improvements in one contract.

In applying that finding to the facts of this case, the Court relied on the definition of "improvement" in the *Act*, and found that Pond #7 and Pond #14 were in fact two separate improvements as they were located on separate lands.

Therefore, given that the procurement process for Pond #7 was commenced between July 1, 2018, and October 1, 2019, the prompt payment and adjudication provisions of the *Construction Act* did not apply to this improvement. As a result, the Court set aside the portion of the adjudicator's determination relating to Pond #7, while upholding the balance of the determination relating to Pond #14, reducing the amount awarded in the determination to $11,638.17 plus taxes and interest.

Takeaways

1. **Multiple improvements in a single contract can trigger different versions of the *Act*:** The Court confirmed the intent that one *Act* is to apply to the entirety of an improvement, and that separate improvements within one contract may fall under different versions of the *Construction Act*, depending on when the procurement processes began for each improvement.

2. **Adjudicators must correctly apply the law to determine jurisdiction, but their factual findings are entitled to deference:** The Court reiterated the limited grounds for judicial review under the *Construction Act*. It cannot intervene unless specific procedural or jurisdictional errors occur, ensuring that adjudications remain efficient and interim in nature. The Court stepped in to set aside a portion of the adjudicator's determination where the adjudicator had incorrectly applied the provisions of the *Act* in determining his own jurisdiction. However, the Court refrained from interfering with the adjudicator's factual findings.

The Divisional Court's decision clarifies how the transitional provisions of the *Construction Act* apply when a contract covers multiple improvements. It highlights the importance of properly categorizing projects to ensure compliance with the relevant version of the *Act*. The ruling reinforces that bundling multiple improvements in one contract can complicate the application of adjudication provisions, and parties must carefully structure their contracts and procurement processes to avoid such issues.

While we are moving away from the transition timelines of the current *Construction Act*, this decision, and those in *DNR* and *Crosslinx*, will continue to be important, particularly with further upcoming revisions to the *Construction Act* and the inevitable transition on the horizon.

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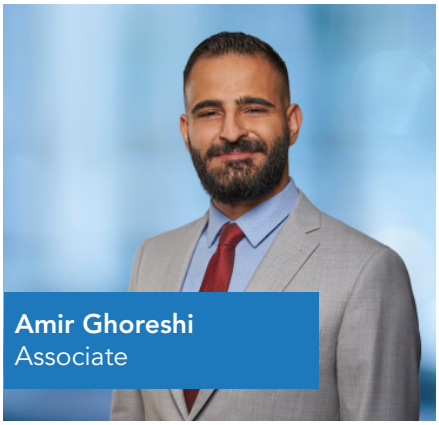

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Follow-Up: Challenge to Letters of Credit as Lien Security in Ontario Resolved: *TruGrp Inc. v. Karmina Holdings Inc.*, 2024 ONSC 4643

In the Spring 2024 issue of this newsletter, we commented on the decision of Associate Justice Robinson in *TruGrp Inc. v. Karmina Holdings Inc.*, 2024 ONSC 2165, which concerned the sufficiency of the letter of credit commonly used for the purpose of vacating liens in Ontario.

Back in April, 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. The lien claimant, TruGrp, had 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 the owner, Karmina, was allegedly seeking to sell the liened premises, TruGrp was 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.

Associate Justice Robinson considered, but did not finally resolve, the issue of the sufficiency of the letter of credit. Instead, he directed that the motion be served on the Accountant of the Superior Court of Justice and the bank who provided the letter of credit, and that they be given an opportunity to be heard.

As we previously commented, this unresolved challenge left some possible doubt as to the use of letters of credit as security for vacated liens. The form is not statutorily mandated, but appears as an appendix to *Conduct of Lien, Trust and Adjudication Proceedings*.

Both the Accountant and the Bank of Montreal have now weighed in on the matter. The Accountant submitted its position as follows:

> The letter of credit with standard form provisions permitting the issuing bank to decline renewal of the letter upon providing the Accountant with at least thirty days' notice as well as a bank draft for the amount of letter of credit, less any payments already made under it, is sufficient authority for the Accountant to accept and deposit the bank draft provided that a court Order has permitted the payment into Court of the letter of credit with these provisions.

BMO agreed with that position.

The Accountant clarified that a further court order would only be necessary in circumstances where parties other than the issuing bank seek to substitute the letter of credit with a bank draft, a scenario not contemplated by the approved letter of credit.

In other words, the Accountant confirmed that it will accept and deposit a bank draft submitted by the issuing bank in accordance with the terms of the letter of credit, provided that the letter of credit with such terms has been posted pursuant to a court order approving that form, and BMO agreed.

As we argued in the Spring, this makes sense. 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.

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.

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

It is now clear that that view is shared by the Accountant and the bank. Considering this development, TruGrp confirmed that its concerns were satisfied. Subject to costs which are yet to be determined, the motion is resolved. Of general interest, the issue of the sufficiency of the commonly accepted form of letter of credit as security to vacate a lien has been affirmed.

In light of this resolution to TruGrp's motion, statutory adoption of the form of letter of credit as lien security by designating it as a form to the *Construction Act* regulations, as suggested in our prior case comment, may be unnecessary. However, having a statutory form of letter of credit, just as we have a statutory form of lien bond, would at least remove any lingering doubts created by the arguments canvassed by Associate Justice Robinson.

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Notable Case Law

***Blackstone Paving and Construction Ltd. v. Barrie (City of)*, 2024 ONSC 4556 (Div. Ct.)**

An attempt to argue that typographical errors and a failure to identify all reasons for non-payment in a notice of non-payment vitiated that document failed. The argument was that the non-paying party had raised issues and arguments in its written submissions to the adjudicator that had not been identified in the notice. The adjudicator implicitly accepted the city's characterization that it did no more than "elaborate" the reasons it gave for non-payment in the notices. That finding was upheld in the Divisional Court.

The adjudicators' decision not to permit reply submissions was not inconsistent with the process prescribed by the *Act* or with the process agreed by the parties with the adjudicators, and the Divisional Court dismissed the application for judicial review.

***Electricon Services Inc. v. 2622059 Ontario Ltd.*, 2024 ONSC 5072 (A.J.)**

The Court summarized the key principles applicable to assessing extras as follows:

a. For fixed price contracts, in the absence of a contractual provision addressing how extras are to be dealt with, an express or implied agreement is required covering the supply of, and payment for, work beyond the scope of the contract.

b. A contractor who performs work or supplies materials not called for by the contract, and who does so without instructions or consent of the owner (either express or implied), is not entitled to charge for that extra work.

c. What amounts to instructions from the owner will depend on the circumstances relating to each item of work, but an owner may be found to impliedly assent or acquiesce to the extra by conduct such as knowingly permitting the contractor to perform work without giving definite instructions.

d. There are three primary considerations in assessing extras, namely (i) whether the base contract scope of work changed so fundamentally that the contract price no longer applies to the services and materials actually supplied, (ii) whether there was an express or implied agreement for supply of services and materials claimed as extras, and (iii) in the absence of agreement on a price for the extras, whether the value of extras has been proven on a quantum meruit basis.

***HVAC Depot & Metal Mfg. Inc. v. Global HVAC & Automation Inc.*, 2024 ONSC 5752 (S.C.J.)**

An agreement of purchase and sale does not constitute an interest in the premises for the purposes of being an "owner" under the *Construction Act*. It is only the conveyance of title that would create that interest.

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Building Insight Podcasts

Episode 40: Student Success: Insights from our Summer and Articling Students

July 2024

Robyn Jeffries, Summer Student, is joined by Justin Lyon, Summer Student, and Jacob Jones, Associate, for a discussion on all things Student Recruitment. In this episode, Robyn, Justin and Jacob discuss how to navigate the Toronto recruitment cycles and share their advice on how to succeed as summer and articling students.

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Episode 39: Careers in Construction Law: From Private Practice to In-House Counsel

March 2024

Katie McGurk, Associate, joins Barbara Capes, General Counsel at Kiewit Canada Inc., and Caitlin Steven, Legal Counsel & Contracts Manager at Chandos Construction, for a discussion on working as in-house counsel in the construction industry. In this International Women's Day episode, Katie, Barbara and Caitlin discuss the transition from private practice to working in-house, and how we can entice more female lawyers to pursue careers in construction law.

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Episode 38: Adjudicating the Future: Trends and Insights in Construction Dispute Resolutions in 2023 (Where we are and where we are going)

January 2024

Lena Wang, Partner, and Amir Ghoreshi, Associate, review and discuss the statistics, trends, and key takeaways from the recent ODACC annual reports against the backdrop of an increase in popularity of *Construction Act* adjudications and recent noteworthy court decisions that are shaping the adjudication landscape.

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