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GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE

Arbitrating Lien Claims

Introduction

Arbitration is becoming more and more prevalent as a means to resolve construction industry disputes, including claims under the *Construction Act*. Many standard form contracts in use in Canada now provide for a tiered dispute resolution process culminating in arbitration following unsuccessful negotiation and mediation. Under some contracts, parties agree to make arbitration mandatory, others make arbitration voluntary. Under the CCDC 2, for example, parties must arbitrate once one of the parties refers the matter to arbitration, while the OAA 600 – 2021, makes arbitration subject to mutual agreement after the dispute arose.

Arbitration has been defined as a process in which two or more parties submit a dispute to a neutral third person or persons and contract with each other to be bound by that person's determination of their dispute: D.W. Glaholt, M. Rotterdam, *The Law of ADR in Canada: An Introductory Guide*, 3rd ed. (Toronto: LexisNexis, 2022) at p. 64.

The power of an arbitrator, or arbitration panel, to decide a dispute must be granted to the arbitrator by the parties to the arbitration. You must agree to arbitrate. You can agree before a dispute arises, or after a dispute arises, but you must agree.

Arbitrators make final and binding decisions which are enforced as a judgment of the court. Unlike court decisions, however, arbitration

decisions are not published. Arbitrations do not take place in public. Although evidence in an arbitration is often transcribed, just like it is at a trial, none of this evidence is available to the public.

Arbitration looks and feels a lot like litigation. There are still pleadings, hearings, rulings, and evidence, but the arbitrator and the parties have almost unlimited scope to shape the proceeding to the parties' needs. Provided that each party is given an equal opportunity to make its case and meet the case made against it, parties can work with the arbitrator to make the proceedings as efficient as possible for the kind of dispute in question.

Most arbitration clauses are of the "final and binding" type, which means that unless the arbitrator exceeds his or her jurisdiction, or does something very wrong, the arbitration "award" is final and binding and enforceable without appeal. Some arbitration clauses allow for limited rights of appeal on errors of law. If the arbitrator sticks to his or her jurisdiction, however, and does a reasonable job of determining and applying the applicable law to the facts as presented by the parties, the chances of overturning an award on appeal are slim to none.

Arbitration can be cheaper than litigation, but not always. You must work with the other side and your arbitrator to make that happen. Arbitration is much more adaptable than litigation. With a little co-operation from the other side and a little assistance from your arbitrator, arbitration can be made to fit the case, instead of fitting the case to the arbitration. Usually the shorter the arbitration, the cheaper it is for the parties. Too short, however, and the parties may not feel they got an opportunity to make their cases or respond to the case made out against them. Too long, and the parties will wonder why they chose arbitration over litigation.

The parties are free to make their own rules or adopt one of the many existing rules already in place. The CCDC, for example, publishes Document 40 – Rules for Arbitrations and Mediations. These are very useful as a guide. In addition, the Ontario *Arbitration Act, 1991* provides access to Ontario's courts in aid of arbitrations.

The choice of arbitrator is important. You want an arbitrator (or panel) that is experienced. The fact that an arbitrator is chosen for his or her subject matter expertise will be a consideration in the court's review of their conduct of the arbitration. Courts will give such arbitrators considerable latitude in establishing the facts of the case: see *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485.

There are two types of expertise: subject matter expertise and process expertise. Subject matter expertise means working knowledge about your industry and the sources of disputes in that industry. Process experience means working knowledge of dispute resolution, including how trials work, how pre-trial processes work, how evidence works, how counsel work, and, most importantly, how to write a good, binding award based on the law and facts of the case that does real justice among the parties. Usually, this experience is found in former judges and senior lawyers. This experience can also sometimes be found in senior engineers with several completed, litigated claims in their CVs. With a sole arbitrator, you need both kinds of experience in one person. With a three person "arbitral tribunal" the chair should have strong "process" experience, and the two other appointees can add the "subject matter" expertise.

Arbitrability of Lien Claims

Lien claims can be arbitrated. Neither s. 4 nor s. 5 of the *Construction Act* preclude the arbitration of lien claims. Section 62(6)(b) of the *Act* expressly contemplates joinder in a lien action of persons with perfected liens whose lien actions are stayed by reason of an order under the Ontario *Arbitration Act, 1991*.

In *Automatic Systems Inc. v. Bracknell Corp. (1994)*, 18 O.R. (3d) 257, the Ontario Court of Appeal held that the *Construction Lien Act* anticipates that some issues will be resolved by arbitration and expressly accommodates arbitration. The court held that in light of the strong commitment made by the legislature to the overall policy of commercial arbitration through the adoption of the *International Commercial Arbitration Act and the Model Law*, it would require very clear language to preclude arbitration, and the court found no such language in the Ontario Act. The court further held that no distinction should be made in this regard between domestic and international arbitration or, for that matter, between domestic and interprovincial arbitration.

The Supreme Court of Canada, in *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17, held that parties have virtually unfettered autonomy in identifying disputes that may be subject of arbitration proceeding, pretty much ending the debate on arbitrability in Canada. Consequently, there are few if any things that an arbitrator cannot decide between parties to an arbitration agreement.

As discussed above, an arbitrator's power to decide a dispute flows from an agreement by the parties to give the arbitrator that power.

Therefore, there will likely be no issues where no parties other than the arbitrating parties are affected by the arbitration.

However, things become complicated when one tries to bind non-parties, or, in a lien context, even complete strangers to the construction contract involving the arbitration clause, such as a mortgagee for example.

In any given case, there may be ten lien claimants and no dispute about the amount of holdback to be shared. Two of the ten lien claimants go into an arbitration with the owner and the general contractor, and an arbitral award determines the size of their liens and therefore their right to participate with the other eight lien claimants, who are not parties to the arbitration.

In another example, an owner and general contractor agree to arbitrate. The mechanical and electrical subcontractors join the arbitration. The arbitrator's finding on the amount of holdback as between owner and general could not be binding upon other subcontractors, who might argue that it should be more. The parties to the arbitration might agree to the amount of holdback, but why would that bind the other subcontractors who did not participate in the arbitration? These issues become important when it comes to staying proceedings in favour of arbitration.

Stay Issues

Where parties to a lien action have agreed to have disputes arbitrated, an application for an order directing the parties to proceed with the arbitration should generally succeed and the arbitral issues incorporated into the lien proceeding should be stayed until the completion of the arbitration.

There are two bases for stays, s. 7 of the *Arbitration Act, 1991* and s. 106 of the *Courts of Justice Act*. The reason both provisions are important in an arbitration context is that s. 106 is available to both the plaintiff and the defendant, while s. 7 is available only to "another party", i.e., not the party that commenced the action.

Another important distinction is the mandatory language in the *Arbitration Act* compared with the discretionary language in the *Courts of Justice Act*. Where the applicant for a stay moves under s. 7, the stay of the court action must be granted, subject to certain limited exceptions.

Where the applicant for a stay is also the plaintiff in court and therefore has to move under s. 106, i.e., where a party seeks to stay its own proceeding, the stay is discretionary.

As pointed out above, things become more complicated when multiple parties and multiple issues are involved.

Generally speaking, s. 138 of the *Courts of Justice Act* tasks the courts with avoiding a multiplicity of proceedings. The question therefore arises as to if and when courts should enter a stay to prevent a multiplicity of proceedings that might arise when a dispute (or aspects of it) is both litigated and arbitrated. Courts have generally held that the prospect of a multiplicity of proceedings in and of itself is not a valid reason for refusing to refer the parties to arbitration.

However, until recently, courts have sometimes refused to stay an action in the face of numerous proceedings raising various issues, among them the validity and timeliness of liens, which were outside the scope of the agreement to arbitrate. See, for example, *Tricin Electric Ltd. v. York Region District School Board*, 2009 CarswellOnt 2452 (S.C.J.).

Similarly, courts have refused to stay proceedings between a general contractor and an owner-developer where the general contractor would have been required to contemporaneously or subsequently relitigate many of the same issues in court with subcontractors and sub-subcontractors who had registered liens. In *Carillion Construction Inc. v. Imara (Wynford Drive) Ltd.*, 2015 ONSC 3658 (Master), an owner/developer had waited seven months after the action was started before applying for a stay, resulting in a large quantity of lien claimants being added. The court held that having started its own action, the owner/developer had waived arbitration and was estopped from invoking it. If the stay had been granted, there would still have been over 50 liens claims left in court, which the general contractor/construction manager would have had to respond to. In those circumstances, being forced to participate in the arbitration and also litigate the same issues in court with the subcontractors would have constituted unfair treatment of the general contractor/construction manager. The distinguishing factor in that case, however, was the absence of a harmonized arbitration process among all levels of contractors on the project. Had there been such a process, the court would likely have granted the stay:

> 33 In *Cityscape Richmond Corp. v. Vanbots Construction Corp.*, 2001 CarswellOnt 217, twenty-five consolidated lien claim actions were before the court by way of a construction lien reference. Delay was a significant issue. Master Sandler had already commenced the reference. When Cityscape applied under the *Arbitration Act, 1991* for an order requiring the parties to proceed to arbitration Justice Trafford stayed the court litigation.
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> 34 The facts in *Cityscape* are distinguishable in a significant way. At paragraph 21 of the decision Justice Trafford noted that the primary contract required the general contractor, Vanbots, to include similar arbitration clauses in its subcontracts with the sub-trades. The arbitration process was harmonized for all levels of contractors working on the project. On that basis, Justice Trafford concluded, Vanbots could invoke the arbitration clauses with its sub-trades to avoid a proliferation of legal proceedings and the arbitrator could hear all of the disputes together. The arbitration would cover the issues in dispute in all twenty-five construction lien claims that were before the court in the reference. Justice Trafford ordered that all disputes between Cityscape and Vanbots arising under the contract be arbitrated together and include all disputes raised in Vanbots' statement of claim and proposed third party claims in the lien reference, as well as all issues raised in Cityscape's defence and counterclaim in the lien action.

The Supreme Court of Canada and the Ontario Court of Appeal have now clarified the availability of arbitration where multiple proceedings would result. In *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, the Supreme Court of Canada ruled that when arbitrable and non-arbitrable matters are combined in a single court proceeding, under s. 7(5) of the Ontario *Arbitration Act, 1991*, the motion judge cannot refuse to stay the court proceeding in respect of the matters dealt with in the arbitration agreement. Commenting on this case, the Ontario Court of Appeal held that *Wellman* expressly overturned earlier case law on the interpretation of s. 7(5) in which courts refused a stay and allowed the action to proceed on the basis that only some of the litigants were bound by an arbitration clause and the claims were so closely related that it would be unreasonable to separate them.

In *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12 (S.C.J.), the court summarized this new line of cases as follows:

> The most recent pronouncements from the Supreme Court of Canada in *TELUS Communications Inc v Wellman*, 2019 SCC 19, as discussed in subsequent Court of Appeal decisions such as *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612 (CanLII) and 2021 ONCA 360 (CanLII) mandate that civil litigation be stayed pending arbitration even where a multiplicity of proceedings may result. The policy favouring respect for the parties' right to choose their dispute resolution process overwhelms the statutory policy to guard against the inefficiency of multiplicity "as far as possible".

Therefore, it is now clear that unless a basis to refuse the stay exists under s. 7(2) of the statute, the unreasonableness of bifurcating the proceedings under s. 7(5) on its own does not authorize the court to refuse the mandatory stay of the proceeding: *Star Woodworking Ltd. v. Improve Inc.*, 2021 ONSC 4940. Cases like *Tricin Electric*, mentioned above, are therefore no longer good law.

What is less clear is how all of this would look in practice in a complex lien proceeding with multiple parties. In the above example where an owner and general contractor agree to arbitrate, the mechanical and electrical subcontractors join the arbitration and the arbitrator makes a finding on the amount of holdback as between owner and general, what happens with the other subcontractors who did not participate in the arbitration?

It seems that there are two ways to address these issues. The first is the one taken by the parties in *Cityscape*. Parties on any given project should ensure that a harmonized arbitration process among all levels of contractors on the project is in place.

A second way would be to refer the matter to the chosen neutral under s. 58(1)(b) and turn the whole process into a reference, thus giving the "arbitrator" all the jurisdiction, powers, and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action. If that route is taken, of course, parties must be aware that their dispute is now subject to the *Construction Act* rather than the *Arbitration Act, 1991*, with all that entails. Instead of getting an award under the *Arbitration Act, 1991* parties would get a report under the *Construction Act*, which would mean, among other things, that appeals would be governed by s. 71 of the *Construction Act* rather than the much more limited options available under ss. 45 and 46 of the *Arbitration Act, 1991*. Also, once a motion is made to the Superior Court to oppose confirmation of the report, nothing is confidential any longer. In other words, while references do offer jurisdictional advantages, many of the core reasons why parties choose arbitration are lost.

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Portable Classrooms Are "Improvements" under the *Construction Act*

The Ontario Superior Court of Justice has shed new light on the meaning of an "improvement" under the *Construction Act*. In *On Point Ltd. v. Conseil des Écoles Catholiques du Centre Est et al.*, 2023 ONSC 1341, the court held that portable classrooms are "improvements" within the meaning of the *Construction Act* and that the construction and installation of the same is a lienable supply.

Background

In July 2019, Conseil des Écoles Catholiques du Centre Est ("CECCE") contracted Ty Corporation ("Ty Corp") to supply 14 portable classrooms to one of CECCE's school properties for the upcoming school year. Ty Corp then subcontracted the construction portion of its work to OnPoint.

OnPoint started to construct the portable classrooms in Vars, Ontario. One of Ty Corp's other subcontractors then delivered the partially completed classroom portables to site (a secondary school in Stittsville, Ontario). Once delivered, OnPoint completed the roofing, siding, stairs, landing and window casings. Another subcontractor arranged by Ty Corp then moved the completed portable classrooms to their final resting spot.

By August 13, 2019, it became clear that Ty Corp was not going to be able to supply all 14 portable classrooms by September 2019, so CECCE ended its contract with Ty Corp and hired Multi-Service Restoration ("MSR") to build and install the remainder. MSR then partnered with Provision Construction Management Inc. ("PCM").

OnPoint was not fully paid by Ty Corp and proceeded to preserve and perfect a construction lien against the school property. In response to the lien, CECCE brought a motion for summary judgment on the basis that OnPoint's supply of portable classrooms was not a lienable supply. Notably, MSR and PCM were permitted to participate in the motion as intervenors.

Analysis

The main issue on the motion was whether the portable classrooms were "improvements" under the *Act*, thus triggering the availability of lien rights against the school property.

The parties' respective positions were as follows.

Position of CECCE

- This was an appropriate case for summary judgment because the issue could be determined on the record filed by the parties and that motion would dispose of the action in its entirety.
- The jurisprudence supported the position that portable classrooms, which were created as temporary solutions to fluctuating increases of student population, were not improvements within the meaning of the *Act*.

Position of OnPoint

- There was a genuine issue requiring a trial and material facts were in dispute, particularly in light of CECCE's failure to admit many facts set out in the Request to Admit, including why CECCE retained a 10% holdback.
- The intent of the *Act* is to prevent owners of land from receiving benefits of buildings erected and work done on their land at their instance without paying. The portable classrooms were a "capital repair" within the meaning of an improvement.

Position of MSR and PCM

- A summary judgment should issue finding that the portable classrooms built were "improvements" within the meaning of the *Act*.
- The portable classrooms installed on CECCE school premises had improved the value and productivity of the land and were substantially attached to the premises on which they were installed.

Legal Framework

The court engaged in a fulsome review of case law and commentary on the meaning of an "improvement" and "lienable supply" under the *Act*. In doing so, the court reaffirmed that whether or not a person is entitled to a lien should be strictly construed. However, as demonstrated by the court's analysis, such a determination requires a highly fact-driven analysis.

In coming to its finding that the portable classrooms were "improvements" and as such a lienable supply, the court undertook a detailed analysis of the following four factors:

1. Intentions of the parties: In this case, the contracts between CECCE and Ty Corp and Ty Corp and OnPoint did not contemplate lien rights and/or holdback or make any reference to the *Act* whatsoever. However, CECCE

did retain 10% from payments to Ty Corp, which the court inferred was indicative of CECCE operating on the basis that it had statutory holdback obligations. Additionally, the court noted that the parties intended for the portable classrooms to remain on CECCE's property. The intentions of the parties weighed in favour of a finding that the portables are improvements under the *Act*.

2. Construction: While the court acknowledged that the portable classrooms had an "inherent impermanence", it also noted that removing them was not a simple task. After considering other aspects of their attachment to the lands in question, the court concluded that the construction of the portable classrooms was a factor that weighed in favour of a finding that the portables are improvements under the *Act*.

3. Installation: In the court's view, the concept of the lien is rooted in adding value or utility to the land. Here, there was a direct connection/attachment between the work performed to construct and erect/install the portables and enhancing the utility of the school. The portables were partially built on-site and positioned on concrete pads, with servicing done. The installation of the portable classrooms weighed in favour of finding that the portables were improvements under the *Act*.

4. Building features: The court observed that the supply of services or materials will give rise to lien rights where the construction parties and, particularly, the owner considers the subject services or materials necessary for the completion of the project, among other things (i.e., the "nexus test"). Here, the portable classrooms added sufficient utility to the school: they enabled the school to receive further student population without the expense of expanding the school building. The building features of the portable classrooms weighed in favour of a finding that the portables were improvements under the *Act*.

Key Takeaways

In deciding that OnPoint's work was lienable, the court did not follow earlier cases that held that the supply of modular homes (*Hank's Plumbing and Gas Fitting Ltd. v. Stanhope Construction Ltd.*, 18 A.R. 417) or portable classrooms (*Inesco Ltd (Trustee of) Re.*, 1986 CarswellOnt 1023) was not lienable. Justice Doyle based her decision in part on the definition of "improvement" in s. 1(1) of the *Act*, which now includes the construction or installation of any equipment that is "essential to the normal or intended use of the land", finding that the classrooms were indeed essential to the normal use of the land in this case.

That part of the definition of "improvement" was added to the *Act* in the aftermath of the Court of Appeal decision in *Kennedy Electric Ltd. v. Rumble Automation Inc.*, 2007 ONCA 664. This decision appears to be the first to apply that expanded definition to the construction and installation of portable classrooms. This is no doubt a significant development given the rising trend in modular construction. Owners, developers, contractors and suppliers alike would be well advised to carefully consider whether the *Act* applies to their projects and take the appropriate steps to ensure they are compliant.

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The Court of Appeal Clarifies the Principles Relating to the Appealability of an Arbitration Award on a Question of Law

The central issue in the recent Ontario Court of Appeal decision in *Baffinland Iron Mines LP v Tower-EBC G.P./S.E.N.C.*, 2023 ONCA 245 was whether the arbitration agreement entered into by the two parties precluded an appeal on questions of law related to an award exceeding $100 million made by the majority of a three-member tribunal.

The Ontario *Arbitration Act* contemplates three possible scenarios regarding an appeal of an arbitral award on a question of law: (1) the arbitration agreement expressly provides a right to appeal, (2) the arbitration agreement is silent on the subject of appeals, and (3) the arbitration agreement expressly precludes a right to appeal.

The Court was tasked with determining whether the appeal before it fell within the second or third scenario, by dissecting the language used in the arbitration agreement and applying the interpretative principles laid down in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

Background

In a December 9, 2020 arbitral award issued by a three-member tribunal pursuant to the ICC Arbitration Rules, the majority awarded the respondent, Tower-EBC G.P./S.E.N.C ("TEBC"), an amount in excess of $100 million. Notably, the dissenting arbitrator, the Honourable Justice Ian Binnie, formerly of the Supreme Court of Canada, said that he would have deducted approximately $54 million from the award because of disagreements with the majority on how Ontario law applied to the contract in question.

The appellant, Baffinland Iron Mines LP ("BIM"), sought leave to appeal to the Superior Court of Justice on the basis that the arbitration agreement was silent on the right to appeal, and therefore fell under the second scenario, which entitled them to appeal by first seeking leave to appeal. BIM also submitted that Justice Binnie's dissent and the difference in the damages he would have awarded highlighted the existence of consequential questions of law.

The application judge dismissed BIM's request for leave to appeal, holding that the arbitration agreement expressly precluded a right to appeal for two reasons: first, by incorporating the ICC Arbitration Rules, the parties included the rule stating that the parties agreed to carry out any award and waived any form of recourse; and second, by determining that the words "finally settled" meant the same as "final and binding" in arbitration clauses. On this basis, the application judge dismissed the application for leave to appeal without needing to consider whether BIM's submissions met the test for leave to appeal set out in section 45(1) of the *Arbitration Act*.

Parties' Positions

Before BIM's appeal was heard, the respondent, TEBC moved to quash BIM's appeal. They argued that BIM had no right to appeal to the Ontario Court of Appeal after a judge denied leave to appeal at the Superior Court level. This motion to quash was heard first and was dismissed.

The Court then moved to BIM's substantive appeal of the application judge's dismissal of their application for leave to appeal, arguing that the application judge's interpretation of the arbitration agreement was subject to appellate review on a standard of correctness. BIM's argument that the judge's interpretation was incorrect and tainted with extricable legal error was premised on the assertion that the application judge misconstrued and misapplied two principles of contractual interpretation: 1) the principle that presumes consistent expression; and 2) the principle that apparently inconsistent terms are to be reconciled in accordance with the priority the parties had agreed.

1. The presumption of consistent expression: a contractual principle which presumes that the use of the same words means the same thing, while the use of different words indicates an intention to mean something different. BIM submitted that because the arbitration agreement used the wording "finally settled" as opposed to "final and binding", the presumption of consistent expression should be applied and this verbiage should not be interpreted to preclude appeals. They argued that the use of "finally settled" meant that the parties meant something other than "final and binding" which is common in agreements of this nature and has been the subject of many previous decisions before the Court.

2. Inconsistent terms are to be reconciled in accordance with their priority: BIM argued that the application judge failed to apply priority of documents correctly, and in doing so used documents that were lower in priority to reach its determination.

TEBC maintained that the application judge's decision should be upheld on the basis that the arbitration agreement precluded a right to appeal, and that in any event, BIM's proposed grounds did not meet the test for leave to appeal.

The Decision

Justice of Appeal Benjamin Zarnett wrote the decision of the court. In it, he provides reasons not only for dismissing the appeal, but also for dismissing TEBC's motion to quash.

The Court dismissed the respondent's motion to quash because the appellant's appeal fell within a narrow category in which a party may appeal a Superior Court judge's refusal to grant leave to appeal. Zarnett J.A. used *Denison Mines Ltd. v Ontario Hydro*, 56 O.R. (3d) 181 as the governing precedent for this issue. *Denison* provides an exception to the general rule that the *Arbitration Act* does not provide for an appeal to the Ontario Court of Appeal after leave to appeal is refused by a Superior Court judge: "where the appeal from the refusal to grant leave to appeal is *premised on a submission that the judge refusing leave to appeal mistakenly declined jurisdiction to consider whether leave was warranted.*" [emphasis added]

The application judge refused BIM leave to appeal because he interpreted the arbitration agreement as precluding appeals; because of this, he did not consider the grounds on which BIM sought leave to appeal and whether they were deserving of it. It is for this reason that the Court dismissed TEBC's motion to quash.

However, even though the Court held that this was one of a narrow category of cases where a party could appeal to the Ontario Court of Appeal after a refusal from a Superior Court judge to assert jurisdiction, it ultimately dismissed BIM's appeal. Zarnett J.A. did not accept BIM's argument that "finally settled" meant something different than "final and binding." In fact, when he applied the presumption of consistent expression, he found that the use of the word "final" in both "finally settled" and "final and binding" implied intent that the phrases should be interpreted to mean the same thing, and therefore the arbitration agreement precluded appeals, as the application judge held.

On the issue of priority, Zarnett J.A. held that BIM's argument presupposed that the provisions were inconsistent, but this was not the case. An interpretation of both these provisions led to a determination that precluded an appeal of an arbitral award.

Conclusion

There are two important takeaways from this case for both lawyers and parties to arbitration agreements. First, the Court identifies the only scenarios under which a party may appeal an arbitral award on a question of law. Second, the decision provides insight into the Court's approach in interpreting arbitration agreements, providing lawyers and judges with valuable guidance how the wording used in an arbitration agreement can impact a party's right to appeal an arbitral award.

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Which Act Applies? The Transition from the *Construction Lien Act* to the *Construction Act*

When the *Construction Act* ("*CA*") came into effect on July 1, 2018, replacing the *Construction Lien Act* ("*CLA*"), it included provisions governing the transition from the *CLA* to the *CA*.

Section 87.3 of the *CA* provides that the *CLA* continues to apply if: (i) a contract for the improvement was entered into before July 1, 2018, or (ii) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises.

The objective was to avoid a sudden change in the legislation applicable to contracts and projects already in place. Despite the provision appearing to be fairly straightforward, the courts have had to step in to clarify it. A recent instance of this was *DNR Restoration Inc. v. Trac Development Inc*, 2023 ONSC 1849.

Background

Trac, the owner, intended to build a residential condominium and entered into a construction management contract on March 23, 2018. Trac then entered into a contract with DNR on November 1, 2019 for supply and installation of formwork. DNR's work commenced in April 2020. In 2022, issues regarding delays and non-payment arose between Trac and DNR. The parties were unsuccessful in their attempts to resolve the issues. As a result, DNR suspended its work on August 1, 2022. Subsequently, on August 17, 2022, Trac terminated DNR.

Following termination, DNR registered a lien on September 27, 2022, 42 days after the termination. Trac then brought a motion to declare the lien expired, alleging that DNR had abandoned the contract in early August 2022 and had not preserved its lien within 45 days, as is required by the *CLA*.

DNR argued that: (i) the *CA* applied to the contract, giving DNR 60 days to preserve its lien, and (ii) it had not abandoned the contract, rather Trac had terminated the contract on August 17, 2022, therefore DNR's lien was preserved in time regardless of which act applied.

Which Act Applies?

There was no dispute that Trac had entered into a construction management project prior to July 1, 2018, suggesting that the *CLA* applied. However, DNR argued that the *CA* should apply because: (i) the construction management contract was not "a contract for the improvement" to satisfy s. 87.3; and (ii) DNR's contract was entered into after July 1, 2018. The Court rejected both of these arguments and found that the *CLA* applied to the improvement and to DNR's contract.

The Court found that the construction management contract was indeed "a contract for the improvement". In making this finding, the Court relied on the fact that construction managers, despite only providing services, are afforded lien rights along with other parties who provide materials and services to an improvement.

DNR's second argument was that the concept of "improvement" in section 87.3 is tied to and limited by the concept of "a contract." As a result, the transition rule should apply uniformly to each "contract," and all work that falls within the scope of each contract, but not uniformly as between contracts even though these contracts concern the same improvement. The Court rejected this argument as well. In its reasoning, the Court found that the concept of an improvement is broader and is not limited by the concept of a contract. The Court also relied on and

affirmed the reasoning in *Crosslinx Transit Solution Constructors v. Form & Build Supply (Toronto) Inc.*, 2021 ONSC 3396, that the purpose of the transition provisions of the *CA* was to ensure one Act applies to an improvement throughout to ensure consistent rights, obligations, and remedies for parties involved in the same improvement. There would be confusion if both statutes were allowed to govern the various contracts in the same improvement.

It is important to note that despite finding the *CLA* applied, the Court also found that Trac had terminated the contract on August 17, 2022, meaning that DNR's lien was preserved in time regardless of which act applied to the contract.

Conclusion

This decision confirms that the intention of transition provisions of the *CA* is that only one statute should apply to the entirety of an improvement, either the *CLA* or the *CA*, not both. The deciding factor is the date when either the procurement process was commenced or the date a contract for the improvement was entered into, and whether that date is before or after July 1, 2018. The decision also confirms that a construction management contract is a contract for the improvement, just like any other contract for the supply of services and/or materials.

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Joining Lien and Trust Claims - Impossible Again

In previous newsletters, we discussed a number of cases in which courts disagreed on whether legislative amendments to the *Construction Act* precluded the joinder of trust claims and lien claims. The Divisional Court has now weighed in on the issue and ruled that under the current legislation, such joinder is indeed prohibited.

By way of a short reminder, the former *Construction Lien Act* contained a provision prohibiting the joinder of trust claims with lien claims. Section 50(2) provided that "a trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction". However, since nothing in the *Act* stated that a lien action and trust action could not be heard at the same time or one immediately after the other, parties often requested and obtained a "connecting order" from a master or judge to procedurally connect lien and trust actions, with common discoveries, pre-trial conferences and settlement meetings. As pointed out in a previous newsletter, since all of that seemed counterproductive, the *Expert Review of Ontario's Construction Lien Act* (the "Report"), recommended the repeal of section 50(2):

> The removal of the prohibition against joinder of lien and trust claims would make the Act consistent with legislation from the other provinces, where such a prohibition does not exist. It is particularly concerning because the prohibition of joinder can be circumvented by a court order for a trial together or one after another, resulting in unnecessary costs and delays. The very problem this provision seeks to address is exacerbated by the duplication of proceedings it can cause, contributing to the courts' backlog and costs to the parties. The provision has been heavily criticized by stakeholders, most of whom have suggested its removal, and none of whom proposed its retention. In keeping with the summary procedure provisions of the *Act*, parties should be able to join lien and trust claims without leave of the court, subject to a motion by any party that opposes the joinder on grounds that the joinder would cause undue prejudice to other lien claimants or parties.

That recommendation was followed by the legislature and section 50(2) was not carried forward into the *Construction Act*. However, the old *Act* also provided in section 55(1) that "a plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract." That provision was originally also omitted from the new *Act*, but was added again *verbatim* later, in 2019, to O. Reg. 302/18 as section 3(2).

In two decisions, *Damasio Drywall v. 2444825 Ontario Limited*, 2021 ONSC 8398, and *6628842 Canada Inc. v. Topyurek*, 2022 ONSC 253, Associate Justice Charles Wiebe held that the fact that the Legislature reintroduced the old section 55(1) indicated that it simply changed its mind and meant to again prohibit joinder of trust claims, and that the decision not to carry forward the old section 50(2) did not change that result. According to His Honour, the permissive joinder of contract claims, by implication, precluded permissive joinder of trust claims.

The same issue came before the court in *SRK Woodworking Inc. v. Devlan Construction Ltd.*, 2022 ONSC 1038. Justice Harper of the Superior Court of Justice referred to the two decisions by Associate Justice Wiebe but declined to follow them. As we discussed in another newsletter, His Honour reasoned that the deletion of the previous section 50(2) in the new *Act* was an overt indication that the legislature did not intend to prohibit such a joinder any longer, and the re-introduction of section 55(1), permitting joinder of contract claims into O. Reg 302/18, did not change that analysis.

On appeal to the Divisional Court, the court was therefore faced with two lower court decisions that had arrived at opposite conclusions. The Divisional Court agreed with Associate Justice Wiebe's legislative interpretation and set aside the decision of Justice Harper. Justice Corbett, writing for the court, agreed that by expressly permitting joinder of contract and subcontract claims, by implication the Regulation precluded joinder of any other claims, applying the well-known legislative interpretation principle of *expressio unius est exclusio alterius* - the expression of one or more things of a particular class may be regarded as impliedly excluding others.

The court also agreed with Justice Wiebe that the *Act* provides for as far as possible a summary procedure and that adding a breach of trust claim would result in adding further issues that would significantly complicate the narrow issues of breach of contract in a lien action and would undoubtedly increase documentary production, examinations for discovery and the number of parties and issues to be tried, leading to an increase of costs of the proceeding and length of trial.

Justice Corbett was alive to the argument that one could infer from the repeal of the ban on joining trust claims with lien claims that the Legislature intended that trust claims could now be joined with construction lien claims. However, the court held that that line of reasoning conflicted with another principle of statutory interpretation which precludes construing a current provision on the basis of prior versions of the legislation. Instead, one is supposed to be able to divine the meaning of a statute by reading the statute, and not by reading every version of the statute that has been in effect.

In our earlier newsletter, we argued that if the effect of section 3(2) of O. Reg. 302/18 on its own were to prohibit the joinder of trust claims, then the former section 50(2) would have been superfluous, and a legislative interpretation which renders any provision of an Act meaningless or superfluous is to be avoided. However, that argument would arguably also run afoul of the principle against using prior versions enunciated by Justice Corbett.

Finally, the Divisional Court also expressly disagreed with the lower court's finding that the Regulation was *ultra vires*:

> The motions judge found that the joinder provision in the Regulation is ultra vires. With respect, I do not agree with that conclusion. The Act contemplates that Regulations may be promulgated "governing procedures that apply to [construction lien] actions" and joinder rules are squarely within that mandate. In authorizing such Regulations, the Legislature has conferred legislative authority on the Lieutenant Governor in Council in respect to matters of procedure. Of course, the legislature retains the authority to establish procedures, and to the extent that it does so, the Lieutenant Governor in Council may not enact a Regulation inconsistent with the Act. But the Act is now silent on joinder of claims. The joinder provision in the Regulation is not inconsistent with that silence.

It is not entirely clear whether notwithstanding the recommendations in the Report, the legislature indeed intended to reinstate the restriction on trust claims by reintroducing section 55(1) into the regulations, or whether the reintroduction of former section 55(1) without addressing former section 50(2) was on oversight on the part of the legislature. In our earlier newsletter, we stated that addressing this issue and carrying out the intention of the Report, if this was indeed the intention of the legislature, will require either analysis of this issue by a higher court or further act of the legislature. A higher court has now weighed in. If it was the legislature's intention to follow the Expert Report on this point, it is now up to the legislature to amend the Regulation to make that happen.

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Notable Case Law

***Anatolia Tile & Stone Inc. v. Flow-Rite Inc.*, 2023 ONSC 1291**

The Divisional Court clarified a number of issues relating to applications to set aside an adjudicator's decision under s. 13.18 of the *Construction Act*:

An application to set aside the adjudicator's determination requires leave of the Divisional Court. The normal "fairly arguable case" test for leave to bring an application for judicial review stated by the Court of Appeal does not apply to motions for leave to bring an application for judicial review of an adjudicator's decision under the prompt payment provisions of the *Construction Act*. Instead, the following test applies:

> [The] test for leave, applied to the factors enumerated in s. 13.18(5) of the Act, is analogous to the conjunctive test for leave to appeal an interlocutory order of a judge, and specifically:
>
> Either:
>
> 1. There is good reason to doubt that the impugned decision is reasonable; or
>
> 2. There is good reason to believe that the process followed by the adjudicator was unfair in a manner that probably affected the outcome below;
>
> And either:
>
> 3. That the impact of the unreasonableness or the procedural unfairness probably cannot be remedied in other litigation or arbitration between the parties; or
>
> 4. The proposed application raises issues of principle important to the prompt payment and arbitration provisions of the Construction Act that transcend the interest of the parties in the immediate case, such that the issues ought to be settled by the Divisional Court.

Failure to pay in accordance with the prompt payment requirements of the *Act* may lead the court to refuse leave.

A stay will not be granted as a matter of course when leave to apply for judicial review is granted, and where a stay is granted, securing the disputed payment will be a common term of a stay order.

Where leave to apply for judicial review is granted, the standard of review in the Divisional Court is reasonableness. While procedural unfairness could be a ground for review, such unfairness will be reviewed through the lens of the prompt and informal process envisioned for these adjudications and the limited impact of the adjudicator's decision on the final disposition of issues between the parties. The court also held that procedural irregularities can be cured during the process below, and the focus in the Divisional Court will be on whether the moving party had a fair opportunity to be heard in the adjudication process.

***Rowe v. Fred Hageman's Holdings Limited*, 2022 ONSC 7015**

The court summarized important principles concerning appeals from associate judge's decisions:

1. An appeal from an associate justice is not a rehearing.

2. On questions of fact and mixed fact and law, deference applies, and the role of the reviewing court is limited. An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the associate judge.

3. Although the standard of appellate review of palpable and overriding error applies to all factual findings, findings of fact grounded in credibility assessments are particularly difficult to disturb on appeal, in part because credibility assessments are grounded in numerous, often unstated considerations which only the judicial officer who presided the trial can appreciate and calibrate.

4. When it comes to appealing associate judge's costs awards, particular restraint is required. A court should set aside a costs award on appeal only if the decision-maker at first instance made an error in principle or the costs award is "plainly wrong". Costs awards are notoriously difficult to appeal because they represent the trier's exercise of judgment as to the overall justice of the situation that they saw unfolding before them. A reviewing court must also be mindful that a costs award is a discretionary order and the decision-maker at first instance is in the best position to determine the entitlement, scale and quantum of any such award.

***Chesney v. Malamis*, 2023 ONSC 1742**

Neither real estate consulting fees nor property management fees were lienable services. With respect to other services provided, the plaintiffs' inability to substantiate their claims with contemporaneous timesheets or other documentation to substantiate their claim for labour fees was fatal to their lien claim. The plaintiffs were given a fair opportunity to substantiate the nature and quantum of their claims in support of a lien. They did not do so. The disputed claims were excluded as being exaggerated or inflated. The security posted in respect of the plaintiffs' lien was reduced from $173,125 to $15,903.

***Tricott Developments v. Sunvest Development Corp.*, 2022 ONSC 7319**

The test for leave under s. 13 of O. Reg 302/18 where security for costs is sought is effectively the same as the threshold test under the Rules for an order for security for costs. The moving party must make out a prima facie case of one of the justifications for an order for security for costs set out in Rule 56 (in this case, that there is a good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant). The "good reason to believe" test is a "reduced," "lighter" or "modest" onus given that it rests on the shoulders of the party which has imperfect knowledge of the financial affairs of the party from whom security is sought. Nevertheless, the onus is a real one which requires the moving party to show reason for "concern" that is more than "mere conjecture, hunch or speculation". Once that threshold has been met, the onus then shifts to the plaintiff to show either that it does have sufficient assets to satisfy a costs award or that an order for security for costs would be unjust.

***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2022 MBKB 239**

The Manitoba King's Bench was the latest court to grapple with the issue whether the appellate standard of review set out by the Supreme Court of Canada in *Vavilov* applies to the appeals of commercial arbitration awards under arbitration statutes.

Following case law in British Columbia, Alberta and Ontario, the court held that "until the Supreme Court of Canada has answered the question of what effect, if any, *Vavilov* has on *Teal Cedar* and *Sattva*, those authorities remain good law and are binding on this court". The applicable standard was therefore "reasonableness".

***Soo Mill and Lumber Company Ltd. v. Pozzebon*, 2023 ONCA 215 and *East Elgin Concrete Forming Limited v. 9001522 Canada Ltd.*, 2023 ONCA 175**

Two reminders from the Court of Appeal that an appeal from a *Construction Act* matter, whether it is a lien claim or a breach of trust claim, lies to the Divisional Court and not the Court of Appeal.

***Thermo Applicators Inc. v. Razar Contracting Services Ltd.*, 2023 MBKB 52**

Expressing a sentiment equally applicable to other provincial lien legislation, the Manitoba Court of King's Bench described the province's *Builders' Lien Act* as a "jigsaw puzzle which not only has a few pieces missing, but to complicate matters further includes additional pieces from other puzzles".

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Building Insight Podcasts

Episode 32: Bidding and Tendering: Recent Developments in the Law
December 2021

Neal Altman and Brandon Keshen, associates, discuss recent developments in the law of bidding and tendering. This podcast discusses the terms of tender calls, including discretion and reprisal clauses.

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Episode 33: Sustainable Construction
January 2022

Michael Valo, partner, and Markus Rotterdam, Director of Research, discuss sustainability in construction and legal issues related to green building standards.

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Episode 34: Considerations and Best Practices when Entering into a Building Contract
March 2022

Associates, Patricia Joseph, Jackie van Leeuwen and Myles Rosenthal, reflect on construction contracts, including a discussion of some pragmatic considerations that are relevant before and during contract performance.

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Episode 35: Construction Prompt Payment and Adjudication in Canada
May 2022

John Paul Ventrella, Partner, and Matthew DiBerardino, Articling Student, discuss some key considerations regarding the conduct of a construction adjudication in Ontario and the status of prompt payment and adjudication legislation in other Canadian jurisdictions.

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Episode 36: 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings
June 2022

Partners, Brendan Bowles and Lena Wang, and Director of Research, Markus Rotterdam, discuss the 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings texts available from Thomson Reuters Canada Limited. Key updates to the books are discussed and commentary on their development is given.

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Episode 37: Bankruptcy and Insolvency in Construction
April 2023

Brendan Bowles, Partner, Markus Rotterdam, Director of Research, and Megan Zanette, Articling Student, discuss recent developments in Ontario case law surrounding bankruptcy and insolvency in the construction industry.

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