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GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE

Navigating Arbitral Challenges: Contravention of *Browne v. Dunn* and Reasonable Apprehension of Bias Not Enough to Set Aside Arbitral Award

Introduction

Vento Motorcycles, Inc. v. United Mexican States concerns an Application by Vento Motorcycles, Inc. ("**Vento**") to the Ontario Superior Court of Justice to set aside an arbitral award which dismissed a claim alleging a breach of obligations under the subsequently replaced North American Free Trade Agreement ("**NAFTA**"), on two procedural grounds: (1) Vento's alleged inability to present its case; and (2) a reasonable apprehension of bias within the arbitral tribunal.

The Court ultimately dismissed Vento's Application, holding that, despite technical breaches in both procedural grounds, these breaches, when assessed in conjunction with other factors, were not significant enough to justify setting aside the award on procedural grounds.

Factual Background

Vento, the Applicant, was a US-based motorcycle manufacturer that sought to export its US-built motorcycles into Mexico under NAFTA's preferential ad valorem import tariffs. Mexico had denied Vento the preferential tariff, which, according to Vento, ultimately culminated in the destruction of its Mexican joint-venture. Subsequently, Vento initiated an arbitration claim under Chapter

11 of NAFTA to challenge Mexico's denial, with the International Centre for Settlement of Investment Disputes ("**ICSID**") overseeing the arbitration.

As stipulated by *NAFTA Art. 1123*, the arbitral tribunal ("**Tribunal**") was comprised of three arbitrators. Each party appointed one arbitrator, and the Tribunal president was selected through a mutually agreed-upon process.

Adhering to ICSID Rules, each arbitrator submitted a statement of independence and impartiality, detailing past and present professional, business, and other relationships with the involved parties, including any circumstances that may cast doubt on the arbitrator's reliability for independent judgment.

Mexico's appointee, Mr. Perezcano, disclosed familiarity with officials in Mexico's Ministry of Economy, a friendly relationship with one of Vento's counsel, and one of the other arbitrators. Importantly, Mr. Perezcano stated that he ceased working for the Mexican government more than seven years prior to the arbitration. Given this disclosure, Vento did not raise any challenges over Mr. Perezcano's appointment.

After the panel was confirmed, the Tribunal directed that pleadings, which included exhibited witness statements, expert reports, and supporting documentation, were to be filed in the following sequence: Vento's Memorial, Mexico's Counter-Memorial, Vento's Reply, and, finally, Mexico's Rejoinder.

Within its arbitral claim, Vento argued that Mexican tax authorities unfairly targeted Vento, contending that it received discriminatory treatment due to explicit orders from higher officials. To support this claim, Vento adduced reply evidence from Mr. Ortúzar, a former official in the Mexican taxation authority. Mr. Ortúzar's witness statement outlined the pressure exerted on him and his team and the existence of "marching orders" to deny Vento the preferential tariffs.

In response, Mexico submitted rejoinder evidence from Ms. Martinez, which included a covertly recorded conversation between her and Mr. Ortúzar, among others. Mexico asserted that this recording contradicted and undermined Mr. Ortúzar's evidence regarding the pressure to deny the preferential tariffs and, in particular, the "marching orders."

Vento sought to exclude the recording and related evidence or, in the alternative, requested that Mr. Ortúzar be permitted to present additional evidence to address the recording. The Tribunal dismissed Vento's motion to strike the evidence while also denying Mr. Ortúzar the opportunity to respond to Ms. Martinez's evidence.

Ultimately, the Tribunal unanimously found that Mexico did not breach its NAFTA obligations and dismissed Vento's claims on the merits. In particular, the Tribunal rejected Vento's claim of breach of *NAFTA Article 1105* for lack of due process, arbitrariness, or discriminatory treatment. In so doing, the tribunal rejected Vento's argument that the Mexican authorities who denied the preferential rate were under

"marching orders" to discriminate against Vento.

Post-arbitration, Vento discovered that Mr. Perezcano had engaged in undisclosed communications with members of the Mexican Government, including Mexico's lead arbitration counsel, during the arbitration. These communications involved discussions about the potential inclusion of Mr. Perezcano in Mexico's roster of tribunal chairpersons under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership and another trade agreement. Additionally, based on the Tribunal's statement of costs, it appeared that Mr. Perezcano undertook a significant share of the Tribunal's workload to deliver the award.

Vento's Application

Due to the Tribunal's treatment of Mr. Ortúzar's evidence and Mr. Perezcano's undisclosed communications, Vento sought to set aside the Award on two procedural grounds:

1. Vento was unable to present its case because the Tribunal refused to allow one of its witnesses, Mr. Ortúzar, to testify in response to evidence used to impeach his credibility; and

2. There was a reasonable apprehension of bias because Mexico had offered undisclosed opportunities to its appointee, Mr. Perezcano, while the arbitration was ongoing.

The Rule in Browne v. Dunn and Vento's Alleged Inability to Present its Case

Under the *International Commercial Arbitration Act, 2017*, which incorporates the UNCITRAL Model Law on International Commercial Arbitration, the Ontario Superior Court of Justice can set aside an arbitral award if an applicant can furnish proof that it was unable to present its case within the arbitration. The standard of review is onerous and well recognized and was agreed upon by the parties: any alleged violation of the due process requirements under the Model Law must be "so serious that it cannot be condoned under Ontario law" or, in other words, must be "sufficiently serious to offend our most basic notions of morality and justice."

In explaining this standard, the Court highlighted two principles arising out of foreign case law interpreting the equivalent provisions within the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Firstly, a court, in this process, should recognize and apply basic minimum requirements that are generally acknowledged, even if not universally, as essential for a fair hearing across the international legal order. Secondly, if a sufficiently serious violation of due process is demonstrated, there is no need to establish a causal link between the violation and the award's outcome. However, a court may exercise its discretion to not set aside an award when it is "clear beyond doubt" that the violation did not change the outcome.

Vento's argued grounds as to why it was unable to present its case centered on the Tribunal's decision to not allow one of its witnesses, Mr. Ortúzar, to respond to evidence that Mexico adduced to impeach his credibility. This inability for Mr. Ortúzar to respond, Vento argued, allowed Mexico to impugn Mr. Ortúzar's credibility while preventing Vento from adduced further, relevant evidence in support of its argument that Mexican authorities were under "marching orders" to discriminate against it.

In support of its position, Vento relied heavily on the rule in Browne v. Dunn, which requires that a party seeking to impeach the credibility of a witness through contradictory evidence, must give the witness an opportunity to provide an explanation for the contradictory evidence.

While acknowledging the rule, the Court also acknowledged the leniency with which Ontario courts have applied the rule: "as a rule of fairness, it is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case. Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination," quoting from *R. v Quansah*.

This leniency is further reflected in the remedies available when there is a breach of the rule. As the Court noted, a court, when confronted with a breach of the rule, can decline recalling the witness whose credibility is being impeached and take the breach into consideration when assessing the reliability of the evidence.

With that, the Court held that Vento had failed to show that it was unable to present its case and that there was no breach of procedural fairness arising out of the rule in Browne v. Dunn. Without wading into a discussion about whether there was a breach of the rule, the Court found that any potential breach was remedied through the Tribunal's treatment of Mr. Ortúzar's evidence, which in the Court's opinion was not "disregarded or rejected." Rather, the Court was satisfied that the Tribunal placed significant weight on Mr. Ortúzar's evidence and refrained from making adverse credibility findings against him.

This finding is not surprising. As alluded to above, there is significant judicial leniency towards technical breaches of the rule in *Brown v. Dunn*, and courts, such as the one here, have adopted a "so what" approach in assessing the prejudicial effects of these breaches. A mere technical breach is not enough; there must be enough to show that the witness' credibility, in the context of the proceedings, was adversely affected, thereby affecting the reliability of his or her evidence. Thus, while not becoming an exercise to wade into the merits of a case, any challenge as to the fairness of a decision must exhibit strong indicators that the technical breach actually caused a misassessment of the material evidence and its underlying facts. Only then should a more robust analysis into the effects of the misassessment on the ultimate decision be undertaken.

Reasonable Apprehension of Bias

Vento raised a two-pronged argument asserting a reasonable apprehension of bias on the part of Mexico's nominee, and the Court agreed that a sufficient basis for a reasonable apprehension of bias had been made. Firstly, Vento contended that Mexico's appointee was presented with "prestigious and potentially lucrative opportunities to be listed on panels of arbitrators under two different trade agreements" while the arbitration was ongoing, creating a reasonable apprehension of bias. Vento also referenced the UK Supreme Court's decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, submitting that the failure of the Mexican appointee to disclose the impugned communications alone raised justifiable doubts about his independence and impartiality.

The Court, referencing the *IBA Guidelines on Conflicts of Interest in International Arbitration*, noted the absence of the circumstances in this case in the IBA Guidelines' list of situations that are meant to provide guidance as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed, necessitated a case-specific assessment. The Court also referred to Halliburton, establishing that a failure to disclose could contribute to doubts regarding an arbitrator's impartiality.

While acknowledging a reasonable apprehension of bias due to Mexico's offers to its appointee, the Court declined to set aside the award. Citing *Popack v. Lipszyc*, the Court affirmed its discretion to deny relief in set-aside applications under Art. 34, even when grounds under Art. 34(2) are established.

The Court reasoned that the lack of impartiality and independence of Mexico's appointee did not necessarily affect the other two arbitrators, who retained a strong presumption of independence and impartiality. With a unanimous award, the Court concluded that the reasonable apprehension of bias in relation to Mexico's appointee did not compromise the reliability of the result or cause real unfairness or practical injustice. In doing so, the Court likened the tribunal to the Supreme Court of Canada stating that "each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the panel before the hearing. After the case is heard, each judge on the panel expresses his or her opinion independently."

The Court's decision not to set aside the award in spite of the finding of a reasonable apprehension of bias and a lack of impartiality on behalf of Mexico's appointee is an unanticipated one. As outlined in the arbitrator's statement of costs, Mexico's appointee evidently played a significant role in the formation of the arbitral award. In an administrative law context, the mere presence of bias in one tribunal member has been found to be enough to disqualify the entire panel, even if that member only participated as an observer during the hearing without actively engaging in it or subsequent deliberations: *Surrey Knights Junior Hockey v. The Pacific Junior Hockey*

League. Again, Mr. Perezcano did not merely act as an observer, he had significant involvement in the deliberation of the award. Despite Mr. Perezcano appearing to have spent significantly more time on the matter than the other two arbitrators and, inferentially, may have performed a significant part of the drafting of the Award, the Court found that this did not mean that the other two arbitrators were not involved in the drafting and passively accepted Mr. Perezcano's views.

There also exists a compelling practical rationale that supports the notion that the partiality or lack of independence of a single arbitrator should be found to compromise the entire tribunal. The fundamental issue lies in the practical impossibility of definitively confirming such biases haven't permeated and tainted the tribunal as a whole. If one member is found to be partial and the arbitral award is not set aside, an inherent uncertainty that inevitably casts doubt on the integrity of the arbitral process is created.

The Court further reasoned that balancing the potential prejudice that would result from redoing the arbitration, namely; the wasted time, resources, fees, and reduced recollection of events on behalf of the witnesses was not insignificant and stood to support the dismissal of the application.

Take Aways

- Ontario courts employ a rigorous standard for setting aside arbitral awards, demanding proof of serious due process violations that offend basic principles of justice.
- The court adopted a pragmatic "so what" approach to breaches of the rule in Brown v. Dunn, requiring a demonstrated impact on a witness' credibility and the overall reliability of evidence to challenge arbitral awards successfully.
- The judicial approach to the issue of a reasonable apprehension of bias of a singular member within an arbitral panel illustrates that the identification of bias in an individual arbitrator may not be determinative in setting aside an award.
- The applicant is tasked with establishing that the partiality exhibited by the arbitrator had a pervasive influence on the entire panel, to the extent that it materially altered the award's outcome.
- A strong presumption of impartiality on behalf of the arbitrators and/or significant prejudice in restarting the arbitration process can serve as a counterbalance to findings of a reasonable apprehension of bias and should be noted prior to any challenge to an award on the basis of bias.

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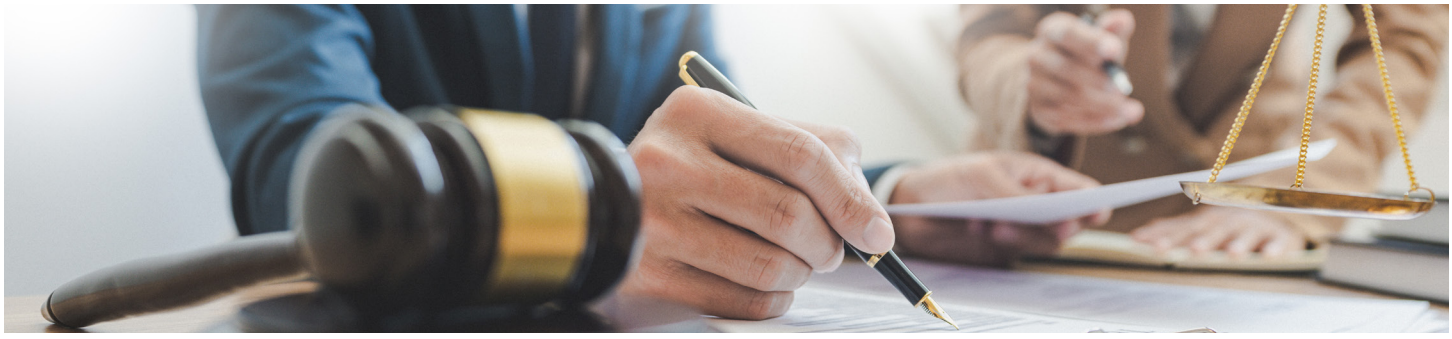

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Court Enforcement of Construction Act Adjudication Determinations

As construction industry participants become more comfortable with the use of *Construction Act* adjudications as a means to resolve disputes during the lifespan of a project, questions as to the methods of enforcing of determinations have become common.

I. Filing a determination

Section 13.20 of the *Act* provides that a party to an adjudication may, within two years of the later of the communication of the determination or the completion of any application for judicial review thereof, file a certified copy of the determination with the court. The determination may be filed electronically, and, upon filing, is enforceable as if it were an order of the court.

The filing party will be required to provide the court with a copy of the certified determination, requesting that it be "issued and entered" as if it were an order of the court, pursuant to section 13.20 of the *Act* and in accordance with Rules 59.04 and 59.05. When filing, it is helpful to assist the court, especially in jurisdictions outside Toronto, by providing an accompanying memo supporting your submission request which should include a reference to the relevant adjudication provisions of the *Act*, a description of the determination received, and an explanation of the intent for the filing. Where there is no action, the memo should request that the court assign a file number (i.e., similar to court file numbers assigned to vacating motion materials filed before the subject lien is perfected). Where there is a contemporaneous action between the parties that encompasses the matter that is the subject of the determination, the determination may be filed under that court file number.

If the determination is successfully filed, the court will return the certified determination with a court seal and file number. The filing party will need to ensure the determination is also entered with the court in accordance with Rule 59.05. While some jurisdictions will issue and enter the determination at the same time, others may require the filing party to submit the determination again for entering.

Once the determination is successfully filed, subsection 13.20(3) of the *Act* requires the filing party to give notice of the filing to the other party within 10 days.

II. Methods of enforcement

The process for enforcing adjudication determinations is similar to enforcing a judgment in a regular civil action. Once the filing party receives the filed determination from the Court and has given notice to the other party, the filing party may then proceed with the methods of enforcement of an order for the payment of money available under Rule 60 of the *Rules of Civil Procedure*, including:

1. a writ of seizure and sale (Rule 60.07);
2. garnishment (Rule 60.08);
3. a writ of sequestration (Rule 60.09 – leave is required);
4. a writ of possession (Rule 60.10); and
5. the appointment of a receiver.

In enforcement proceedings, the following clerical matters should be considered and included in the parties' materials:

1. The parties are to be referred to as creditor and debtor, and not lien claimant/applicant and respondent on court documents. Although the Adjudicator, in their certified determination, will still refer to the parties as claimant and respondent, it is important

to make this distinction in enforcement court documents; otherwise, the Court may reject filing. It is also important to refer to the *Construction Act* in the style of proceedings as you would in a lien action. You can also refer to an adjudication with Ontario Dispute Adjudication for Construction Contracts (ODACC) for further clarification.

2. The determination is to be referred to as an order of the court. For example, the parties' materials could refer to the determination as follows: "Under an Order of this Court, in the form of an issued and entered Determination of ODACC, bearing ODACC File No.: _____, made on _____, certified on _____, and filed with the Court on _____, in favour of the creditor".

3. The ODACC case file number should be included and appear under the court file number.

III. Things to Consider

Parties seeking to enforce an adjudication determination, should also consider the following:

1. **Lien Deadlines**

If the adjudication determination relates to an issue of non-payment for which a lien arose under the *Act*, the party with such lien should take note of the lien preservation and perfection deadlines specified under sections 34, 36 and 37 of the *Act*. Even if the determination has been filed with the court and is being enforced as an order, the filing party must ensure that it complies with the lien deadlines specified under the *Act* if the party intends to enforce its lien.

2. **Enforcement Costs**

The party seeking enforcement of an adjudication determination will be required to pay the fees of the court and sheriff for enforcement of the adjudication determination, as these fees are not exempt. It is also important to consider that, once a writ has been directed to the sheriff to enforce the sale of a property, the typical deposit requested by the sheriff ranges from $5,000 to $7,500 and could be more in some instances. The sheriff will also request copies of the following documents, without limitation, for which the enforcing party will bear the costs of obtaining and providing:

a. a full legal description of the property,

b. a copy of a recent property abstract where the land is situated along with copies of all documents supporting any charges, mortgages or liens on the property,

c. up-to-date statements showing the balance outstanding on all encumbrances currently registered on the property,

d. municipal tax statements, and

e. a certified appraisal of the property obtained within the last two months or a certified letter of opinion from qualified appraiser.

3. **Interest**

Subsection 13.19(1) of the *Act* provides that interest begins to accrue on determination amounts not paid when due at the greater of the prejudgment interest rate determined under subsection 127(2) of the *Courts of Justice Act* and the interest rate specified in the contract or subcontract, if any. Unless the interest amount has been calculated by the adjudicator, the enforcing party should include the prejudgment calculation in its materials in the enforcement proceeding.

As with all *Construction Act* matters, it is important for parties to consult with their lawyers to assist them with navigating the adjudication provisions of the *Act* and their interface with the relevant legislation, case law and *Rules of Civil Procedure* regarding enforcement of determinations.

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Pay-When-Paid Clauses and Prompt Payment

Thirty-five years ago, the Ontario Court of Appeal, in *Timbro Developments Ltd. v. Grimsby Diesel Motors Inc.*, upheld the following clause: "Payments will be made not more than thirty (30) days after the submission date or ten (10) days after certification or when we have been paid by the owner, whichever is the later." Subsequent cases have confirmed that at least in Ontario, such clauses, known as pay-when-paid clauses, can operate as conditions precedent to payment as long as they are drafted in a clear and specific manner.

When the new prompt payment provisions of the *Construction Act* came into force, questions were raised about the continued validity of pay-when-paid clauses. There has been debate as to whether such provisions are void or whether "pay-when-paid" is now effectively legislated. Similar debate has arisen in Alberta, where lien legislation has also been amended to include prompt payment schemes.

Part I.1 of Ontario's *Construction Act* requires owners to pay a proper invoice with 28 days of receipt, unless a notice of non-payment is given, and contractors to pay their subcontractors within seven days of receipt of the owners' payment, again unless a notice of non-payment is given. Subcontractors, in turn, must pay their suppliers and subcontractors within seven days of receiving the contractors' payment, subject to the non-payment notice.

In the consultation process leading up to the new *Act*, the prohibition of pay-when-paid clauses was expressly contemplated. In their report *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, the authors note that when prompt payment and adjudication were introduced in the U.K., the U.K. Construction Act was amended to include the following prohibition:

> 113 Prohibition of conditional payment provisions. (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

That prohibition of "pay when paid" provisions was later extended to "pay-when-certified" provisions, which had been used to circumvent the prohibition on pay-when-paid provisions subsequent to the initial amendment. The Report noted that similar prohibitions are in place in Ireland, Australia, New Zealand and a number of U.S. states.

Submissions were made to the Ontario Expert Review by multiple stakeholders advocating for a similar express prohibition in Ontario. Such clauses were therefore very much a live issue before the Expert Review.

In the result, however, the authors decided not to recommend a prohibition:

> In our view, the policy reasons for permitting pay-when-paid clauses continue to apply, such that a lack of payment by an owner constitutes a valid reason not to pay a sub-contractor, subject to the observation that the ability of general contractors, and downstream payers, to rely on such clauses should be circumscribed by requiring that appropriately detailed notices be provided to subcontractors in a timely way notifying that payment that has been withheld by an owner, or downstream payer, providing the reasons for non-payment, and undertaking to commence or to continue proceedings necessary to enforce payment.

As a result, no prohibition of pay-when-paid clauses made its way into the new *Construction Act*.

To the contrary, non-payment of the contractor by the owner was expressly endorsed as a valid reason for the contractor not paying a subcontractor. While section 6.5(4) of the *Construction Act* generally states that if the owner does not pay some or all of a contractor's proper invoice within the stipulated time, the contractor must still pay subcontractors included in the proper invoice within 35 days. This obligation is made subject to giving a notice of non-payment as follows:

Exception, notice of non-payment if owner does not pay

(5) Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (7), the contractor gives to the subcontractor, in the prescribed manner,

(a) a notice of non-payment, in the prescribed form,

(i) stating that some or all of the amount payable to the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the owner,

(ii) specifying the amount not being paid, and

(iii) providing an undertaking to refer the matter to adjudication under Part II.1 no later than 21 days after giving the notice to the subcontractor; and

(b) a copy of any notice of non-payment given by the owner under subsection 6.4 (2).

Therefore, a pay-when-paid clause does not violate the spirit of the *Construction Act*, as long as it is in line with s. 6.5(5) and as long as the contractor follows the steps mandated in the Act. The contractor must give the notice of non-payment, in the prescribed form, stating that money owing to the subcontractor is not being paid by the owner, and must undertake to send the matter to adjudication within 21 days of that notice.

Not only are pay-when-paid clauses still valid, arguably they have now been made part of every subcontract by virtue of s. 4 and s. 5 of the *Construction Act*, which, read together, provide that an agreement by a party who supplies services or materials to an improvement that the Act does not apply is void and that every contract or subcontract related to an improvement is deemed to be amended to conform with the *Act*. Since s. 6.5(5), cited above, gives the general contractor the right to withhold payment, and in light of ss. 4 and 5, every subcontract in Ontario now effectively includes a pay-when-paid clause as long as the contractor complies with its statutory prompt payment obligations.

That does not leave an unpaid subcontractor without recourse, however.

To begin with, where the contractor does not give a notice of non-payment, it must pay its subcontractors as outlined above, whether it is paid by the owner or not, and regardless of any contractual pay-when-paid clause.

Further, where the owner does give the contractor a proper notice of non-payment and the contractor in turn gives a notice to its subcontractors, the contractor must also provide an undertaking that the matter will be referred to adjudication within 21 days of that notice, leading to a determination one way or another.

Finally, where the owner does not pay the general contractor for the subcontractor's work because the general contractor fails to include the subcontractor's work in its proper invoice to the general contractor, the subcontractor can refer that matter to adjudication under s. 13.5(2).

In sum, Ontario's Construction Act does not prohibit pay-when-paid clauses, with the reasoning set out in the report, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. Ontario courts have not yet had to consider this issue, perhaps due to the availability of statutory adjudication. Subcontractors and suppliers now have a legislated path towards resolution of unpaid invoices within an expedited timeframe, even where pay-when-paid clauses exist, if contractors fail to comply with prompt payment rules.

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Fatal Project Outcomes and the Role of Constructor

Background

Ontarians will recall the tragic 2009 case where on Christmas Eve, four workers who had recently immigrated from Eastern Europe plunged 13 stories to their death from a swing stage while completing restoration work on an apartment building in Toronto. Numerous charges were laid including against the contractor, Metron, for failing to take all or any reasonable precautions such as ensuring the workers were adequately trained for the work or that a worker maneuvering on a suspended platform/ scaffold wore a full body harness connected to a fall arrest system. There were 6 men on the swing stage but only 2 lifelines. In a separate proceeding, the project manager was sentenced to 3.5 years in prison and was the first person to be convicted and sentenced for failure to ensure safety under the *Criminal Code*, R.S.C. 1985, c. C-46 (the "***Code***").

In British Columbia, J. Cote & Son Excavating had a municipal contract installing a combination storm and sanitation sewer line. During construction, a retaining wall fell onto two pipelayers, killing one 28-year-old man and severely injuring another worker. It is alleged that the company failed to recognize hazards on site. Nearly 11 years later, on November 14, 2023, the criminal negligence case against the company and its former foreman is expected to be heard by the B.C Supreme Court.

Recent Case

Projects across the country, no matter the size, must pay heed to the serious ramifications, not only for the victims and their families, but the impact these tragic circumstances have on the industry. Discussions concerning the importance of construction site safety often reemerge with the occurrence of tragic events, including a recent occurrence in New Brunswick that led to the decision in *R. v. King*.

Michael Henderson was an 18-year-old high school graduate who had secured a job working for Springhill Construction on a sewage plant project. The company contracted with the City of Fredericton to expand their Wastewater Treatment Plant. Jason King was the construction site supervisor.

Part of Springhill's scope of work was to build a large wastewater treatment clarifier, which looks similar to a concrete, circular pool-like structure. The clarifier contained an eight-foot-deep, four-foot-wide concrete hole at its center with a pipe that ran half-way up and half-way into the hole. King instructed Henderson to clean out the bottom of the hole. At some point, Henderson left for lunch and King decided to conduct a leak test which required inserting a large rubber plug and filling the clarifier pipe with water. Though King was aware that Henderson had returned from lunch and was working at the bottom of the hole he allowed the leak test to continue. Sadly, during the leak test, the plug deflated, and thousands of litres of water rushed into the hole drowning Henderson in the process.

Trial and Ruling

Both Springhill and King were charged with criminal negligence causing death. On June 5, 2023, King was convicted for the death and in September 2023 he was sentenced to a 3-year prison term. Justice Thomas Christie, in sentencing King, referenced the importance of both denunciation of King's actions and deterrence as key factors in his decision. Specifically, that deterrence was necessary to convey to the

public that criminal acts would not go unpunished and to avoid similar outcomes on construction sites in the future. King has since filed a motion to appeal his conviction and, as of October 6, 2023, is out on bail pending the outcome of the appeal.

Analysis

The above cases, including the most recent conviction and sentencing of a site supervisor in New Brunswick, serve as yet another reminder of the responsibility involved with taking on the role of constructor, and in a more limited sense, an employer on any construction project.

While it is the case that each "employer" at a project site has their own responsibilities for the health and safety of their workers, it is the constructor that has the greatest degree of control over health and safety of the entire project and is ultimately responsible for all workers.

One life lost should be enough to consider the immense impact and sometimes irreversible outcome of negligent behavior or an innocent oversight on a project.

A key piece of legislation that govern the actions of parties in control of construction sites includes is *Occupational Health and Safety Act,* R.S.O. 1990, CHAPTER O.1 ("**OHSA**") which requires that one person have the overall authority for health and safety matters on a construction project (the "constructor"). Section 1 of OHSA defines the constructor as "a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer". Furthermore, OHSA also defines "employer" as including contractors and subcontractors. Put simply, a party undertakes a project if they assume responsibility for it. The constructor must ensure that all the employers and workers on the project comply with OHSA and its regulations.

Another important piece of legislation is the *Code*, which lays out in sections 217 and 217.1 the obligations of, among others, constructors given their position to direct how another person works or performs a task. Constructors have a legal duty to take reasonable steps to prevent bodily harm arising from the work or else they can be found criminally negligent.

It is probably the case that most owners do not begin a project envisioning a worst-case scenario of a worker losing their life in the process and, fortunately, such occurrences are exceptional. Still, the designation of constructor should not be a rote exercise.

Both the owner and constructor should have a full awareness and ongoing discussions of the significantly increased risk that the legal obligation of a constructor presents. Also, how to improve systems to avoid these types of outcomes. Practically, the history of a party's involvement in past safety incidents on a construction site should be a strong consideration in assessing the ability to fill the role of constructor. An audit of safety protocols of constructors and ensuring that all workers are trained in those protocols is another practical approach. Owners are not able to wash their hands of responsibility on the project simply by hiring someone in the role of constructor. There remains overlap between expectations of an owner and constructor when it comes to health and safety on a construction site, as recently affirmed by the Supreme Court of Canada in *R. v. Greater Sudbury (City).*

The City of Sudbury had subcontracted with a third-party construction firm, Interpaving Limited, to repair a water main. During the repairs, an employee of Interpaving Limited struck and killed a pedestrian while engaged in the work. The City conceded it was an owner of the construction project but not an "employer" and lacked control over the repair work. The SCC's decision was split, meaning that there is no binding precedent for owners, employers, and regulators to follow. The Court of Appeal for Ontario decision has not been overturned. Therefore, as it stands, a project owner retains overlapping duties as an "employer" to ensure worker health and safety in the workplace under OHSA.

The human toll resulting from flouting safety and accompanying legal duty becomes most tangible in situation like the cases described above. Based on the evidence available, there is no mistaking the fact that those deaths could have been prevented but for the action of constructors (and employers) that overlooked those duties and obligations. It is also not lost that these incidents occured on both major projects, where you might expect there to be more oversight or attention paid to safety matters, and small projects alike. No projects are immune to the worst-case scenario and so the safety protocols in place should all meet a similar high standard, notwithstanding the reputation and experience of the parties on the project or the scale of the project itself.

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Notable Case Law

2829785 Ontario Inc. v. Total Home & Yard Improvement Inc., 2023 ONSC 5855 (A.J.)

A motion to declare a lien expired may be brought without notice to any other person, as expressly set out in s. 45(1)(a) of the *Construction Act*. In reliance on that statutory permission, motions to declare liens expired are commonly brought ex parte in Toronto Region. However, A.J. Robinson points out that there is a chronic problem with these motions in that they consistently overlook the express requirement in s. 45(1)(b) that the motion must be supported by "proof" that the lien has not been preserved or perfected within the time allowed.

As for the level of "proof" required on ex parte motions to declare a lien expired, there is a high evidentiary onus imposed on a moving party. When a motion for such a declaration is brought ex parte, the lien claimant has no opportunity to file responding materials or argue against the relief sought. It follows that the evidence filed by the moving party must support a clear finding that the subject lien has expired. That includes considering if there is any sheltering where other liens have been registered.

In this case, the lien claimant's lien was nominal. However, on an ex parte motion, the quantum of a lien is not a material factor in deciding whether there is sufficient evidence to support a declaration that the lien has clearly expired.

The owner did not assert that the contract was terminated or abandoned, but asserted that the contract was completed. The only evidence tendered in support of the lien having expired was a copy of the parties' contract, a statement by the owner that the lien claimant completed work in July 2022, and the fact that a certificate of action has not been registered. There were no other liens, so there was no issue of sheltering.

That was not enough. The owner could have tendered evidence on whether the lien claimant agreed that the scope of work outlined in the purchase order was the entirety of the contractual scope of work or supporting that the lien claimant did not dispute that it had completed its work. There was a notable absence of any correspondence to or from the lien claimant about the work performed. The lien claimant's invoices, if any, had not been tendered. Demands for payment, if any, were not in the record nor was any response to them. There was no evidence on what the lien claimant would or was likely to say comprised the contract scope of work and whether that scope was or was not complete.

The owner had already been given a second chance to bring this motion, without notice, on further and better evidence. A.J. Robinson did not extend a third chance. After two "kicks at the can", the lien claimant was now entitled to notice of any further motion to declare its lien expired. The owner's motion was dismissed without prejudice to moving again on notice to the lien claimant.

Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited, 2023 ONSC 4959 (A.J.)

The principles to be considered when deciding if a contract has been formed between two parties can be summarized as follows:

a) An enforceable agreement has five elements: offer, acceptance, consideration, certainty of essential terms, and an intention to create a legal relationship. A contract is formed where there is an offer by one party, which is accepted by the other, with the intention of creating a legal relationship, which is supported by consideration;

b) In deciding whether or not a contractual relationship existed, the court must examine the factual matrix between the parties;

c) The examination is performed on an objective standard. The court examines how each party's conduct would appear to a reasonable person in the position

of the other party, not the subjective views or understanding of the parties. It does not matter that one party may have had no intention to enter a legally binding contract. Rather, what matters is whether their conduct was such that a reasonable person would conclude that they intended to be bound. That includes considering the nature of the relationship among the parties and the interests at stake; and

d) It is not enough for there to have been an offer to perform work that was, in general terms, accepted. For there to be a binding contract, there must also be a meeting of the minds or consensus ad idem on all essential terms of the relationship. The essential terms of a construction contract are generally viewed as price, scope of work, and a schedule or completion date.

1936230 Ontario Inc. v. Hari Kaush Developments Inc., 2023 ONSC 4718 (A.J.)

On a section 47 motion, the moving party must prove that there is no triable issue as to the basis on which the lien is sought to be discharged. Both parties must "put their best foot forward" in the evidence to assist the court in making this determination, and the court is entitled to make this assumption. The lien claimant has this onus because it is invariably in the best position to provide the evidence. However, under section 47, the court does not have the "enhanced powers" of a judge on a motion for summary judgment to weigh evidence, determine credibility and draw inferences from the evidence. The evidence must indeed be clear for the motion to succeed.

Under section 47, a defendant can have a claim for lien discharged on the grounds that it is frivolous, vexatious or an abuse of process, or "on any other proper ground." "Frivolous" is used to describe an action that is so highly unlikely to succeed that it is apparently devoid of practical merit; "vexatious" includes actions that obviously cannot succeed and that are brought for an improper purpose; "abuse of process" is a flexible doctrine that gives the court the inherent power to prevent the misuse of its process.

The test on a motion to reduce security posted for a claim for lien and thereby effectively reduce the lien under s. 44(5) "where it is appropriate to do so" is whether "the evidence supporting the calculation of the claim for lien fails to establish a reasonable basis for the amount claimed".

Sundance Development Corporation v. Islington Chauncey Residences Corp., 2023 ONSC 5239 (A.J.)

A. J. Robinson sets out the test to be met for proving repudiation of a construction contract.

- Breaching a contract and repudiating a contract are not the same. Ordinary, non-repudiatory breach is consistent with ignoring the terms of an agreement, but more is required to establish repudiation. For a contract to have been repudiated, the repudiating party must have acted in a manner showing an intention not to be bound by the contract.

- A breach giving rise to repudiation must be serious. It must deprive the innocent party of substantially the whole benefit of the contract. For that reason, repudiation is generally viewed as an exceptional remedy. It allows the non-repudiating party to elect to put an end to all unperformed obligations under a contract. It is therefore only available in circumstances where the entire foundation of the contract has been undermined, namely where the very thing bargained for has not been provided.

- Repudiation is assessed on an objective standard. A party can repudiate a contract without subjectively intending to do so. The court must ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by the contract, which requires considering the surrounding circumstances.

Backyard XP Inc. v. Cesario-Valela, 2023 ONSC 6312 (A.J.).

Parties cannot be added to a lien action by way of counterclaim. The proper scope of a counterclaim is set out in s. 2(1)(a) of *O Reg 302/18*. It limits the scope of a counterclaim, by only authorizing a defendant to "counterclaim against the person who named the defendant as a defendant in respect of any claim that the defendant may be entitled to make against that person, whether or not that claim is related to the making of the improvement". The defendant owners could counterclaim against the plaintiff for any claim that they have against it, but they were not entitled advance their counterclaim against other parties, even though they claimed that other party was the plaintiff's alter ego.

Also, the owners conceded in submissions that the purpose of the proposed third-party claim was to advance their claims against the alleged alter ego as a proper party. It was thereby not a true claim for contribution or indemnity within the meaning of s. 4 of *O Reg 302/18.*

Praxy Cladding Corp. v. Stone Lamina Inc., 2023 ONSC 5288 (A.J.)

There is no prescribed process for amending a pleading in the *Construction Act* and its regulations. A move under rule 26.01 of the *Rules of Civil Procedure*, which provides that leave to amend shall be granted unless the responding party would suffer non-compensable prejudice, is a step in a lien action requiring leave of the court.

Symtech Innovations Ltd. v. Siemens Canada Limited, 2023 ONSC 5795 (A.J.)

Notice provisions in construction contracts are strictly enforced by courts, particularly for commercial construction projects where both contracting parties are sophisticated. The purpose of binding notice provisions is to provide the other party with sufficiently detailed information to allow it to consider its options and take corrective action before the contractor pursues a claim. Compliance with a notice provision has been held to be a condition precedent to maintaining a claim in the courts, even if the provision does not contain a "failing which" clause.

On this basis, the court held that Symtech's failure to give notice of its prolongation claim was a complete bar to that claim. The lack of prompt notice by Symtech that it was incurring losses and had a claim against Siemens denied Siemens the ability to consider its options and position. It further denied Siemens an opportunity to monitor Symtech's additional costs as they were being incurred. Instead, a substantial total cost claim was presented to Siemens, but not until long after the underlying events causing delay and disruption had commenced, Symtech reasonably ought to have known that it was incurring significant losses, and those losses had ballooned. Siemens was afforded no opportunity to take steps to assist with or contain them. Since the requirement for notice was not waived and a contractually compliant notice of the prolongation claim was not given, Symtech was barred from pursing its prolongation claim on a partial summary judgment basis.

Gay Company Limited v. 962332 Ontario Inc., 2023 ONSC 6023 (S.C.J.)

"Registration" under the *Construction Act* means that an instrument must be received, certified and not withdrawn before it is certified. Only once an instrument is certified the registration is complete. In the context of an application to delete, where the application was withdrawn before certification, it was not "registered" for the purposes of the *Act*, the lien was therefore not discharged, and therefore the case law governing the irrevocability of a discharge had no application.

1814219 Ontario Inc. v. 2225955 Ontario Ltd., 2023 ONSC 4672

A site superintendent was held not to owe the owner a fiduciary duty. The supervisor had little training. On the other hand, the owner had a consulting team for the project: an architect, a structural engineer and a site servicing engineer. He could have asked the architect, among others, for a site supervisor reference. The owner was surrounded by qualified professionals but chose to not consult them. He was not vulnerable to the superintendent. He simply decided not to consult the resources that he had.

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