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GLAHOLT BOWLES
CONSTRUCTION LAWYERS

# BUILDING INSIGHT

GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE



## Beyond Automatic Stays: *Urban Electrical v Welland* and the Future of Partial Settlement Disclosure

### INTRODUCTION

On May 19, 2026, the Court of Appeal released a landmark decision in *1086289 Ontario Inc (Urban Electrical Contractors) v Welland (City)*, 2026 ONCA 352, overturning the precedent in *Handley Estate* regarding the disclosure of partial settlements to non-settling parties.

*Handley Estate v DTE Industries Limited*, 2018 ONCA 324, provided that where parties enter into a partial settlement agreement that changes the adversarial landscape of the litigation, the agreement must be disclosed immediately to the non-settling parties and the court. Failure to disclose would automatically be found to be an abuse of process and a permanent stay of proceedings was the only available remedy to the court – notably, prejudice was not a considered factor.

In a rare and full-throated unanimous decision, the five-member panel fully overturned *Handley Estate*, finding that it had been "wrongly decided" and contained "erroneous reasoning". Going forward, failures to disclose partial settlement agreements are to be assessed under ordinary abuse of process principles, which require careful consideration of the appropriate remedy. A stay of proceedings remains available, but only in the clearest of cases where the prejudice to a party or to the integrity of the judicial process is such that no lesser remedy would suffice. In other cases, courts retain the discretion to impose a range of remedies responsive to the circumstances, including those now reflected in Rule 49.14 of the *Rules of Civil Procedure*.

**THE *HANDLEY ESTATE* RULE**

*Handley Estate*, released by the Court of Appeal in 2018, rested on six propositions:

1. A plaintiff may settle an action against one or more other parties while leaving the action to continue against the remaining parties.

2. Such a settlement agreement can change the adversarial position of the settling parties as set out in their pleadings into a co-operative one and could "change entirely the landscape of the litigation."

3. The settlement agreement must be immediately disclosed to the non-settling parties and the court. The disclosure obligation extends to terms of the agreement relevant to the litigation.

4. Failing to disclose such a settlement agreement is an abuse of the process of the court.

5. The party moving for a stay based on a failure to disclose need not prove that the responding party's failure to disclose prejudiced the moving party. Prejudice is not relevant to the abuse of process inquiry.

6. The "only remedy for this abuse of process is to stay the claim of the non-disclosing party".

**UNCERTAINTY AND CHALLENGE CAUSED BY *HANDLEY ESTATE***

The *Handley Estate* rule sat uncomfortably within the abuse of process doctrine within the common law, which requires a contextual assessment of the impugned conduct and a proportionate remedy. The purpose of the abuse of process doctrine is to preserve the integrity of the judicial process across all types of proceedings. *Handley Estate* removed discretion at both stages of the analysis, requiring an automatic finding of abuse of process where a party failed to immediately disclose a settlement and a permanent stay of proceedings regardless of whether there was any actual prejudice or unfairness to the non-settling parties.

The unduly harsh consequences of the *Handley Estate* rule resulted in significant satellite litigation (i.e., ancillary disputes over procedural requirements rather than the merits of the underlying case) over its precise requirements. The disclosure obligation applied only to those partial settlement agreements that "change entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation". Despite the rule's requirement of "immediate" disclosure, the precise meaning of immediacy was repeatedly litigated. Parties also litigated the extent of disclosure required, both respecting the types of agreements to be disclosed and the exact terms. The rule created significant uncertainty for lawyers and litigants and interfered with having cases heard and determined on their merits.

**OVERTURNING *HANDLEY ESTATE***

In *Welland*, the Court heard four separate appeals together, all of which raised the common issue of the disclosure obligation for partial settlement agreements in multi-party litigation. In clear and certain terms, the Court stated that it overruled *Handley Estate*, and that it had been wrongly decided because it departed from the discretionary approach that is at the heart of the abuse of process doctrine. Now, prejudice to the parties or to the administration of justice is a central consideration in the abuse of process analysis, a factor that had no role under the automatic *Handley Estate* framework. Courts will now weigh factors such as the nature and extent of the non-disclosure, any resulting prejudice to the non-settling parties, the stage of the proceedings, and the impact on the integrity of the judicial process.

**THE COMMON LAW FRAMEWORK AND RULE 49.14 OF THE *RULES OF CIVIL PROCEDURE***

In response to the concern and controversy caused by *Handley Estate*, the Civil Rules Committee added a new rule for the disclosure of partial settlement agreements. The new Rule 49.14 came into force on June 16, 2025.

Rule 49.14 requires a party to a partial settlement agreement to disclose the terms of the agreement, aside from the monetary amount, to every other plaintiff and defendant who is not a party to the agreement:

(a) immediately after the agreement is reached, if the hearing has already commenced; or

(b) if the hearing of the proceeding has not commenced, by the earlier of,

(i) seven days after the agreement is reached, and

(ii) the taking of any further step in the proceeding by any party to the agreement.

Rather than an automatic stay, the new subrule 49.14(7) provides a range of possible consequences for breaches of the Rule, including costs, further examinations for discovery, striking evidence, staying proceedings, and other appropriate orders.

Rule 49.14 addresses four key concerns arising from *Handley Estate*:

(a) the available remedies to address non-disclosure are expanded;

(b) the rule applies to any partial settlement agreement, not merely those that entirely change the litigation landscape; and

(c) the rule clarifies what must be disclosed: all terms of the settlement aside from the monetary amount; and

(d) the rule sets a deadline for disclosure, replacing the "immediacy" requirement that was the source of many motions in the wake of *Handley Estate*.

In *Welland*, the Court confirms that Rule 49.14 and the common law are now "consistent with one another" and that the rule reinforces the "discretionary and proportionate approach" that governs the abuse of process analysis.

## *WELLAND'S* APPLICATION IN *PENINSULA EMPLOYMENT SERVICES*

The Court of Appeal has already applied *Welland*. On June 17, 2026, the Court allowed the appeal in *Peninsula Employment Services Ltd v Castillo*, 2026 ONCA 450, setting aside the motion judge's decision to stay the action due to non-disclosure of a partial settlement agreement. The motion judge had decided the motion prior to the decision in *Welland* and applied the zero-tolerance approach for failure to immediately disclose that was mandated by *Handley Estate* and subsequent authorities. The motion was remitted to the motion judge for re-determination based on the current law.

## IMPACT ON CONSTRUCTION PARTIES AND OTHER CIVIL LITIGANTS

*Welland* is a welcome clarification for construction litigation, which is dominated by multi-party disputes and complex webs of interest and adversariness. The *Welland* appeal arose from exactly this type of dispute over the design and construction of the Welland International Flatwater Centre which involved three main actions, involving counterclaims, crossclaims, and third- and fourth-party claims relating to non-payment, design deficiencies, and construction delays. For construction law practitioners and litigants, *Welland* replaces procedural uncertainty and its associated risks with principles that support having cases heard on their merits, while still protecting against the abuses *Handley Estate* sought to deter.


# Talisman's "Snowblower": Ontario Court Rejects Surety's Attempt to Avoid Performance Bond Liability

The Ontario Superior Court of Justice recently considered the purpose of a performance bond and the scope of a surety's duties in investigating a claim in *Graphic Packaging International Canada, ULC v 2477621 Ontario Inc and Talisman Casualty Insurance Company*, 2025 ONSC 7210.

**BACKGROUND**

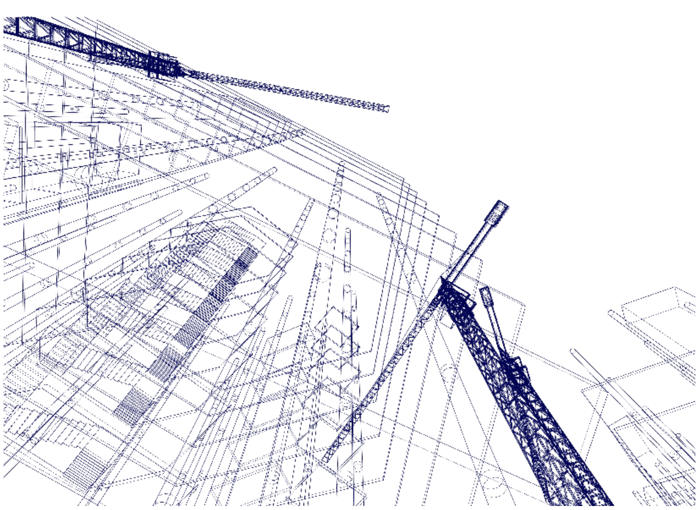
The case arose from a Quebec project but was litigated in Ontario. Graphic Packaging International Canada, ULC ("Graphic") sold a contaminated former paper mill in Jonquière, Quebec to 2477621 Ontario Inc. ("247").

Although Graphic sold the property, Quebec environmental law still required Graphic, as the last operator, to complete the site rehabilitation. Under the Agreement of Purchase and Sale ("APS"), 247 assumed responsibility for demolishing the mill structures and provided a $2 million performance bond from Talisman Casualty Insurance Company ("Talisman") naming Graphic as the obligee. The APS required 247 to provide a demolition scope of work within 30 days and complete the demolition within 24 months. It did neither.

247's default had immediate consequences. Demolition was the first stage of the rehabilitation process. Without it, Graphic could not properly advance the cleanup, and the Quebec regulator began increasing pressure on Graphic to act. Graphic therefore turned to the bond for the protection it had bargained for.

**TALISMAN'S RESPONSE**

Graphic notified Talisman that it was considering declaring contractor default and requested the conference contemplated by the bond. Talisman did not respond.



Graphic later declared 247 in default and notified Talisman of its principal's default. Talisman responded with a broad request for documents and later denied liability on multiple grounds, including alleged owner default, deficiencies in the default notice, failure to satisfy the "Balance of the Contract Price" requirement, prejudice, and variation of the bonded contract.

**THE COURT'S RESPONSE**

Under pressure from the Ministry to complete the cleanup and faced with 247's delays and Talisman's denial, Graphic took matters into its own hands. It obtained injunctive relief, retook possession of the paper mill property, hired its consultants and contractors to carry out the work remaining under 247's contract, and then brought an action against 247 and Talisman in Ontario under the bond. In that action, Graphic moved for summary judgment to enforce its claim against 247 for the expenses and against Talisman for breach of the performance bond.

The court was unimpressed with Talisman's response. In particular, it held Talisman's document request to be unsupported by the wording of the performance bond, describing it as "a snowblower approach" to bury Graphic in a document and data request resembling documentary discovery in litigation. The request for a long list of largely irrelevant documents, the court said, telegraphed an intention to renege on the performance bond. The court concluded that, instead of honouring its obligations, Talisman had chosen "inaction, obstruction, and ultimately an illogical statement of denial of liability."

Talisman unsuccessfully alleged as follows:

1. Graphic failed to satisfy the conditions precedent to Talisman's obligation. The court disagreed, holding that Graphic was not in default and that it had provided the requisite notices to the surety as required by the bond. The court also construed correspondence from Graphic indicating that it was retaining a demolition contractor as satisfying the bond's requirement to agree to pay the balance of the contract price to Talisman or a selected contractor.

2. Graphic's conduct prejudiced Talisman's rights under the bond by failing to provide the requested documents and retaining a contractor and arranging to perform the work without Talisman's consent, among other things. However, the court held that the bond contained no right to ask for the information or documents in Talisman's request; it did contain a right to a meeting, but Talisman did not respond to Graphic's request for one. As for moving ahead without Talisman's

consent, the court held that Talisman's history of tardy or counterproductive responses meant that Graphic's actions were reasonable.

3. Graphic materially varied the contract to Talisman's detriment without Talisman's consent by providing 247 with periods of grace. The court held that allowing the contractor more time to perform the work could not prejudice Talisman. By providing Talisman timely notice of 247's delay and anticipatory notice of Graphic's intention to declare a default, Graphic provided Talisman with ample opportunity to engage with 247 and make plans to substitute 247.

The court held that the cost of demolition exceeded the limits of the $2 million bond. It held Talisman to be liable to Graphic under the performance bond up to $2 million and the balance of damages remained recoverable against 247.

**ANALYSIS**

Arguably, *Graphic Packaging* should be read carefully because it involved a bespoke, non-Canadian bond and contains several generalized statements about surety law that may go too far.

In our view, that caution is fair, but only up to a point. The decision should not be read as holding that a surety has no meaningful right to request information or documents unless the bond expressly grants one.

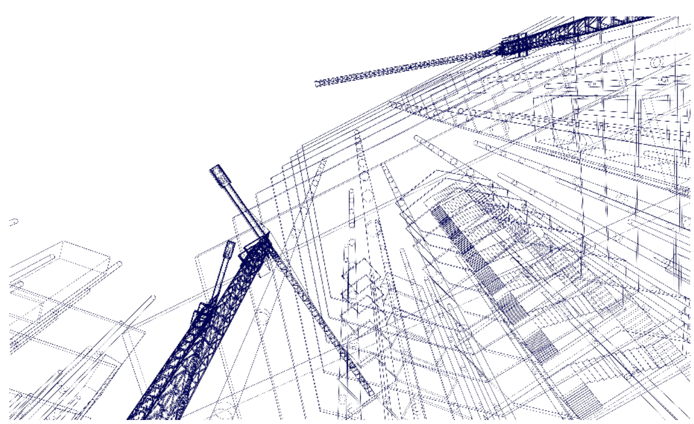
Read broadly, some passages of the judgment could be taken that way, and that would sit uneasily with established surety practice. But the better reading of the case is narrower. The real problem was not that Talisman investigated; the problem was that the court viewed the investigation as inadequate. The surety's investigation amounted to a request for documents that the court found to be overbroad, largely irrelevant, and deployed in place of meaningful action while the obligee was under mounting regulatory pressure. On that narrower reading, the criticism is fair as a doctrinal caution, but it does not undercut the result on these facts.

Likewise, as a general proposition, it is too broad to say that giving the contractor more time "cannot" prejudice a surety. In some cases, extensions or indulgences may materially alter the surety's risk. The safer reading is that, on these facts, the indulgences given to 247 did not prejudice Talisman because 247 was already in obvious default, Talisman had early notice of that default, and the extra time simply gave the contractor another chance to do what it should have done from the outset.

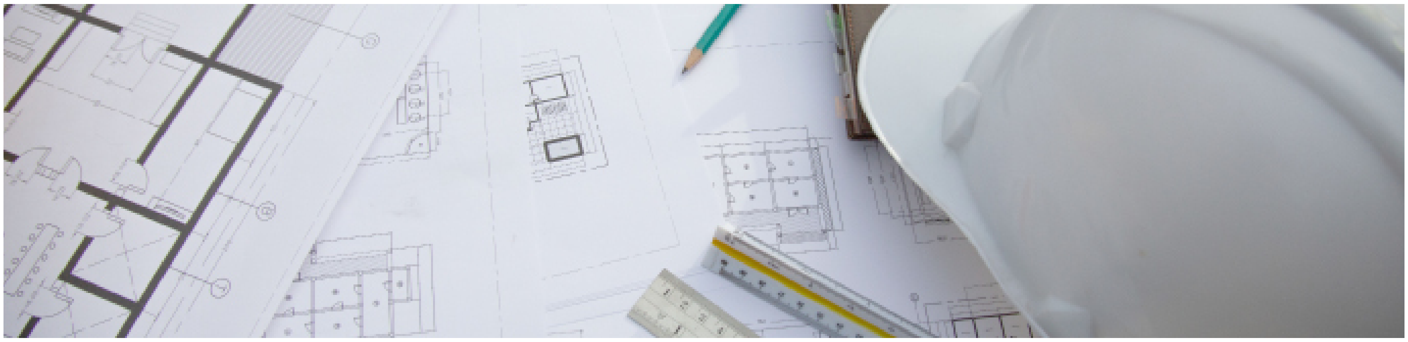
Such critiques are fair as cautions against overreading the judgment, but not fair if they are taken to diminish the force of the decision on its facts. This was not a marginal case. The contractor had not delivered the required scope of work, had not completed the demolition, and had not meaningfully started the work within the contractual timeframe. Talisman received repeated notices, did not respond to the requested conference, made an overbroad document demand, advanced a late and unsuccessful owner-default theory, and ultimately denied liability on grounds the court found unpersuasive.

*Graphic Packaging* stands on its facts but should be read with caution considering some of those facts are unique. With that qualification, sureties would do well to ensure that a timely, targeted and meaningful investigation is undertaken, and avoid the "snowblower" approach.





# Mistaken Bid Entries in Tendering: The Risks to Contractors and Subcontractors



## OVERVIEW

• A subcontractor's bid does not automatically create a binding Contract A with a general contractor. Courts will instead consider whether the parties intended to create contractual relations through a structured bidding process or through an offer capable of acceptance.

• In the absence of a formal bid depository system or a clear tendering framework established by the general contractor, courts may be reluctant to find contractual obligations between a general contractor and a subcontractor.

• A subcontractor seeking to rely on Contract A principles must demonstrate that its bid was legally compliant. Material conditions, exclusions, or qualification may render a bid non-compliant and incapable of forming Contract A.

• Even where liability is alleged, damages for lost profit must be proven with reasonable certainty and remain subject to the duty to mitigate. Profits earned on other projects may substantially reduce or eliminate damage recovery.

## THE CASE

In *1114136 Ontario Inc v Feltz Design Build Inc*, 2026 ONSC 1512, the Ontario Superior Court considered whether a subcontractor could enforce alleged bidding obligations against a general contractor after the general contractor mistakenly identified the subcontractor in its tender submission. The Court ultimately dismissed the action and provided a useful review of when Contract A principles apply in the subcontractor context.

The dispute arose from renovations and additions to Stratford Central Secondary School. The Avon Maitland District School Board ("Board") issued a call for tenders in April 2019. Feltz Design Build Inc. ("Feltz"), a pre-qualified general contractor, submitted a successful bid as the general contractor.

Core Tec, a masonry subcontractor, submitted an unsolicited bid to Feltz shortly before the tender closing deadline for subtrades. Its bid was approximately $769,000 plus HST, was open for 30 days, and contained several exclusions for the masonry scope of work. Another masonry contractor, Con-Tact Masonry Ltd., submitted a lower-priced bid of approximately $758,000 plus HST with fewer and narrower exclusions.

Feltz's tender manager testified that he reviewed both bids and selected Con-Tact. However, during the rush of finalizing the tender submission before the deadline, "CORE TECK" was mistakenly entered on the tender form instead of "Con-Tact". Feltz subsequently awarded the masonry contract to Con-Tact and never communicated with Core Tec regarding the project. Months later, Core Tec discovered that its name had appeared on the tender submission and commenced an action claiming that a binding contract had been formed and breached by Feltz.

## THE ISSUES

1) Was there a binding contract between Core Tec and Feltz?

i) If so, did Feltz breach the contract by retaining Con-Tact?

ii) If there was a breach, did Core Tec prove recoverable damages?

## THE DECISION

<u>The *Ron Engineering* Framework</u>

Justice Smith began by reviewing the well-established tendering framework from *The Queen v Ron Engineering*, [1981] 1 SCR 111, under which:

• "Contract A" is the bidding contract created during the tender process.

• "Contract B" is the construction contract formed upon acceptance of a successful bid.

The Court emphasized that Contract A does not arise automatically whenever a bid is submitted. Whether Contract A exists depends on whether the parties intended to create contractual relations through the tendering process and whether there was an offer that could be accepted by submission of a compliant bid.

The Contract A/Contract B framework has been extended to the subcontractor level. In *Naylor Group Inc v Ellis-Don Construction Ltd*, [2001] 2 SCR 943, the Supreme Court of Canada held that where a general contractor "carries" a subcontractor's bid through a formal bid depository system, a Contract A is formed requiring the prime contractor to award the subcontract to the named firm absent a reasonable objection. The existence and content of Contract A at this level depends on the facts of each case, including whether the parties structured their bidding process to create contractual obligations. The present case is distinguishable from Naylor because Feltz did not solicit Core Tec's bid, did not submit it through a bid depository system, did not "carry" Core Tec's bid intentionally, and had no structured tendering framework for subcontractors.

Feltz never intended to contract with Core Tec

The Court accepted the Feltz tendering manager's evidence that he intended to select Con-Tact because it offered the lower price and that the inclusion of "CORE TECK" on the tender form was simply a clerical error. Justice Smith found this explanation commercially logical as Feltz had no incentive to select the higher-priced bid when both subcontractors were qualified to perform the work.

The Court also accepted that last-minute bid reviews and tender submission mistakes are common occurrences in the construction industry.

The Court concluded that Feltz never intended to contract with Core Tec.

No Offer, No Contract A

The Court's central finding was that Feltz never made an offer capable of acceptance by Core Tec.

Unlike the Board's tender call to general contractors, Feltz did not issue a tender call to masonry subcontractors, establish tender terms, solicit bids, create a formal bidding structure, or communicate with Core Tec before receiving its unsolicited quotation. Under the Ron Engineering framework, the invitation to tender constitutes the "offer" which bidders "accept" by submitting compliant bids. Here, Core Tec's unsolicited quotation inverted this sequence; it was Core Tec that made the offer, not Feltz. Since Feltz never accepted that offer, no Contract A could have been formed.

The Board's Approval of Substitution

Core Tec attempted to rely on a provision in the Board's tender documents prohibiting the substitution of subcontractors without the Board's approval. However, the Court rejected this argument because (1) Core Tec was not party to the contract between the Board and Feltz and (2) once the error was discovered, Feltz informed the Board and the Board approved Con-Tact's continued involvement on the project, fulfilling the contractual requirement between the Board and Feltz.

Core Tec Submitted a Non-Compliant Bid

Even if Contract A principles could apply, the Court found that Core Tec's bid was materially non-compliant as it was subject to Core Tec's review of final working drawings, making it conditional rather than final.

Furthermore, the bid contained numerous exclusions from the masonry scope, which undermined the scope and pricing certainty that a structured tendering process would ordinarily provide.

Justice Smith held that these qualifications created material uncertainty regarding both price and performance. Hence, Core Tec's non-compliant bid amounted to a counteroffer rather than acceptance capable of forming Contract A.

Although unaddressed in the decision, this finding is consistent with the principle, established in *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619, that only compliant bids are capable of acceptance under Contract A. A materially non-compliant bid amounts to a counteroffer rather than an acceptance capable of forming Contract A (see *Double N Earthmovers v Edmonton (City)*, [2007] 1 SCR 116, on the distinction between material non-compliance and minor irregularities).

No Breach

Having found that no Contract A existed, the Court proceeded to address breach and damages as alternative findings in the event its primary holdings were overturned on appeal.

The Court held that even if a Contract A somehow existed, Feltz would not have breached it as Feltz fairly reviewed and compared the competing masonry bids before selecting Con-Tact for their lower pricing.

Once Con-Tact was selected and engaged, any obligations arising from the bidding process would have been discharged. As an unsuccessful bidder, Core Tec had no standing to challenge the resulting subcontract.

Damages, Expected Profit, and Mitigation

Core Tec sought approximately $128,000 in alleged lost profits. However, the Court found that this figure was not a reliable measure of profit because it was derived largely from an "administration" amount that included overhead and other operating expenses. The evidence did not establish what portion of that amount, if any, represented actual profit. The Court also noted that Core Tec's estimate summary sheet suggested it had removed its anticipated profit from the final bid in an effort to secure the project.

The Court further found that Core Tec failed to properly account for mitigation. While it initially claimed that it had not obtained other work after May 2019, the evidence showed that it completed 4 projects during the relevant period and earned approximately $120,000 in profit. Those earnings substantially offset the damages claimed and significantly weakened Core Tec's position.

Even if a contract had existed and been breached, the Court held that Core Tec had failed to establish any recoverable damages.

The damages analysis underscores the evidentiary rigour required in construction litigation. Lost profits must be established with reasonable certainty and cannot rest on speculative or internally inconsistent figures. The Court's observation that Core Tec may have removed its anticipated profit from its bid to secure the project is particularly significant, as it raises the question of whether any expectation damages existed even in principle.

**PRACTICAL TAKEAWAYS**

1) Do not assume subcontractor bids create binding obligations.

2) For a general contractor, lacking a structured bidding framework can preserve flexibility in selecting subcontractors.

3) For a subcontractor, that same lack of structure can make it harder to claim Contract A obligations arose merely from placing a bid.

4) Scrutinize bid compliance early and carefully as conditions and exclusions can render bids non-compliant.

5) Ensure damage claims are supported by truthful and consistent financial evidence. Always investigate and document mitigation income as failing to do so can undermine credibility and/or eliminate damage recovery entirely.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# On Jurisdiction and Reasonable Apprehension of Bias: Ontario Superior Court of Justice Sets Aside Arbitral Award

In *Grace v The United Mexican States*, 2026 ONSC 2104, the Ontario Superior Court of Justice (Commercial List) set aside an arbitral award for claims under the *North American Free Trade Agreement* (the "NAFTA"). In applying the correctness standard of review, Dietrich J found that the arbitral tribunal erred in determining that it lacked jurisdiction to hear claims submitted by Dual National applicants and hear claims for indirect loss. Justice Dietrich also concluded that there was a reasonable apprehension of bias with respect to one of the tribunal members.

## BACKGROUND

The applicants were a group of investors that owned approximately 43.2% of a Mexican holding company, referred to as "Oro Negro". Between 2013 and 2015, Oro Negro leased its oil rigs to Mexico's state-owned oil company, "Pemex". The applicants alleged that Pemex drove Oro Negro out of business first by unilaterally making adverse amendments to the contracts, and later by terminating the contracts.

In 2018, the applicants commenced an arbitration, alleging that Mexico's breach of the NAFTA caused them damages. The parties appointed a three-member tribunal, and the hearing was held in Toronto in April 2022. Both Canada and the U.S. also participated as non-disputing parties.

The tribunal issued an award in August 2024. It determined that it had no jurisdiction over two of the applicants who were Dual Nationals, and over the remaining applicants' claims that were for indirect loss.

The applicants sought to have the award set aside, arguing that the tribunal erred in determining the jurisdiction issues and that there was a reasonable apprehension of bias for one of the tribunal members.

## ISSUES

The issues decided by Dietrich J were:

a. Whether the tribunal properly declined jurisdiction in respect of the Dual National applicants;

b. Whether the tribunal properly declined jurisdiction on the basis that the remaining applicants' claims were for indirect loss and therefore not covered by Article 1116 of the NAFTA; and

c. Whether one of the tribunal members, Mr. Andrés Jana Linetzky, suffered from a reasonable apprehension of bias.

## THE STANDARD OF REVIEW

As the arbitration was held in Toronto, the *International Commercial Arbitration Act, 2017* (the "*ICAA*") gave the Court supervisory jurisdiction over the arbitration. The *ICAA* provides that a court can determine jurisdictional issues decided by a tribunal and set aside awards.

The Court of Appeal in *Mexico v Cargill*, 2011 ONCA 622 ("*Cargill*") held that tribunals' determinations on issues of jurisdiction attract the standard of correctness when reviewed by the courts. When applying the correctness standard, courts should intervene rarely on jurisdiction questions and should not address the merits of those questions.

## DUAL NATIONALITY

Two of the applicants were Dual Nationals, and so a live issue in this dispute was whether the rules of the arbitration allowed them to proceed in their claim against one of their states of nationality, namely, Mexico.

Both Canada and the U.S. submitted that a Dual National could submit a claim under NAFTA if the adverse NAFTA Party is not of the national's "dominant and effective nationality". The U.S. further specified that permanent residency was not considered nationality. In contrast, Mexico argued that Dual Nationals could not pursue claims against their own state, only accepting the "dominant and effective nationality" test in the alternative.

The tribunal applied this test, finding that the dominant and effective nationality of the two Dual National applicants was Mexico. Therefore, it determined that it did not have jurisdiction over their claims.

Justice Dietrich noted that there was no consensus in previous tribunals on this issue and that the NAFTA Parties themselves did not share a "clear, well-understood, agreed common position" as required by *Cargill*. Instead, she found that an ordinary interpretation of the NAFTA did not prohibit the Dual Nationals from pursuing their claim against Mexico. Therefore, the tribunal incorrectly assessed its jurisdiction relating to the claims by the Dual National applicants.

## INDIRECT LOSS

The NAFTA Parties generally agreed that Article 1116 of the NAFTA did not allow claims for indirect loss. As a result, Oro Negro would need to bring the claim directly, and not the investors on its behalf. However, they differed in their interpretations of what constituted an indirect loss relating to shareholders and Oro Negro.

The applicants disagreed, arguing that the NAFTA supported claims for both direct and indirect investments. They relied on Cargill which required a reading of the definitions to ensure that the investments claimed were the type contemplated by the NAFTA.

Justice Dietrich agreed with the applicants. In applying the rules of interpretation from the *Vienna Convention of the Law of Treaties*, she found that Article 1116 did not prohibit indirect losses. Accordingly, she found that tribunal also incorrectly decided this jurisdiction issue.

## REASONABLE APPREHENSION OF BIAS

The applicants alleged that after his appointment to the tribunal, Mr. Jana engaged in activities that led to a reasonable apprehension of bias. They further alleged that Mr. Jana did not comply with his duty to disclose those actions, essentially depriving the applicants of the opportunity to inquire further and potentially request his recusal.

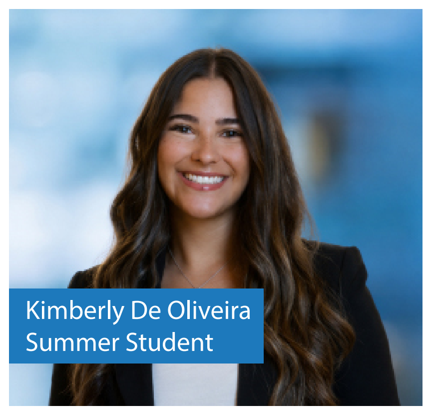
After his appointment to the tribunal, Mr. Jana became counsel for Honduras in a separate arbitration (the "Arguello Arbitration"), where he defended the state against a very similar argument that the applicants in this arbitration had put forward. Mr. Jana also opened his own law practice where he only represented states in arbitrations.

Justice Dietrich applied the objective test for reasonable apprehension for bias from *Aroma Franchise Company Inc. v. Aroma Espresso Bar Canada Inc*, 2024 ONCA 839, which, presuming that the arbitrator is impartial, considers the circumstances from the perspective of a "fair-minded and informed observer". She concluded that Mr. Jana had a duty to disclose his involvement in the Arguello Arbitration. Ultimately, his involvement in the Arguello Arbitration alone was enough to find a reasonable apprehension of bias.

## TAKEAWAYS

Finding in favor of the applicants on the issues of jurisdiction and reasonable apprehension of bias, Dietrich J. set aside the arbitral award.

The decision underscores the importance of arbitrator independence and ongoing disclosure obligations throughout an arbitration. Parties, counsel, and arbitrators should remain vigilant to potential conflicts and overlapping mandates that arise after an arbitrator's appointment. In complex construction arbitrations, where arbitrators often maintain active practices as counsel, undisclosed engagements involving similar issues may place an award at risk, even absent evidence of actual bias.



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# The 2025 ICC Arbitration Rules: Key Changes for Construction Disputes

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The revised ICC Rules of Arbitration came into force on 1 June 2026, replacing the 2021 edition that had governed ICC arbitrations for the preceding five years. For parties involved in international construction projects, where disputes are often high-value, multi-party, and document-intensive, several of the amendments are of particular practical significance. This article summarises the most important changes and considers their implications for construction arbitration.

## FAREWELL TO THE TERMS OF REFERENCE

Perhaps the most structurally significant change for construction practitioners is the elimination of the Terms of Reference. Under the 2021 Rules, the arbitral tribunal was required, within 30 days of receiving the file, to draw up a document defining the parties, their claims, the relief sought, a list of issues, and other procedural particulars, which then had to be signed by the parties and the tribunal or approved by the Court. This requirement has been removed entirely in the 2026 Rules. In its place, the tribunal must hold an initial case management conference ("CMC") within 30 days of receiving the file from the Secretariat. During or shortly after this CMC, the tribunal establishes the procedural timetable for the efficient conduct of the arbitration.

For construction disputes, which frequently involve evolving claims, complex quantum issues, and multiple work-streams, the abolition of the Terms of Reference removes what was often a time-consuming procedural bottleneck. It also aligns the Rules more closely with the approach of other major arbitral institutions and eliminates the practical difficulty of defining issues at an early stage in disputes where claims may still be crystallizing.

## EXPANDED MULTI-PARTY AND MULTI-CONTRACT PROVISIONS

Construction projects routinely involve employers, contractors, subcontractors, engineers, and other participants operating under interrelated contracts. The 2026 Rules make several refinements to the multi-party framework that are directly relevant.

Under the 2021 Rules, joinder of additional parties after the confirmation or appointment of any arbitrator required the additional party to accept the tribunal's constitution and agree to the Terms of Reference. The 2026 Rules retain the requirement that the additional party accept the tribunal's constitution, but now require the tribunal itself to decide whether to accept the joinder request, taking into account whether it has prima facie jurisdiction, the timing of the request, possible conflicts of interest, and the effect on the arbitral procedure. This provides a clearer and more structured framework for late joinder applications, which is not uncommon in construction disputes where parties further down the contractual chain may be brought in after proceedings have started.

The multiple contracts provision remains substantively similar: claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more arbitration agreements under the Rules. This continues to facilitate the resolution of disputes spanning multiple contracts between the same parties.

## EARLY DETERMINATION OF CLAIMS

An entirely new mechanism introduced by the 2026 Rules is the early determination procedure under Article 30. Any party may apply to the arbitral tribunal for early determination of one or more claims or defences on the grounds that they are manifestly without merit or manifestly outside the tribunal's jurisdiction. If the tribunal allows the application to proceed, it has discretion to adopt whatever procedural measures it considers appropriate, after consulting the parties.

In construction arbitrations, where parties sometimes face unmeritorious counterclaims or jurisdictional objections that threaten to extend proceedings and inflate costs, this provision offers a valuable tool for disposing of weak claims efficiently. It may prove especially useful in cases involving claims against parties whose contractual obligations are clearly defined, or where jurisdictional issues can be resolved on the documents alone.

## EMERGENCY ARBITRATOR AND PRELIMINARY ORDERS

Construction disputes often require urgent relief. For example, to prevent the drawing of performance bonds, to preserve evidence on site, or to ensure continuity of works. The 2026 Rules refine the emergency arbitrator framework in several notable respects.

The scope of the Emergency Arbitrator Provisions has been broadened. Whereas the 2021 Rules applied the provisions only to signatories of the arbitration agreement and their successors, the 2026 Rules extend their reach to any party for which the President is satisfied, based on information in the Application, that an arbitration agreement binding such party may exist.

An entirely new addition is the preliminary order mechanism in Article 7 of Appendix IV. A party may now request a preliminary order directing another party not to frustrate the purpose of the Application. Such a request may be made and decided upon without notice to the other parties, although the emergency arbitrator must immediately afford the other parties a reasonable opportunity to present their case thereafter. For construction disputes, where the subject matter of urgent relief, such as calls on performance guarantees, like letters of credit, or the removal of equipment from site, can be rendered moot within hours, this ex parte mechanism adds a meaningful layer of protection.

## PROCEDURAL EFFICIENCY: EXPEDITED AND HIGHLY EXPEDITED PROCEDURES

The 2026 Rules increase the threshold for automatic application of the Expedited Procedure Provisions to US$4,000,000 for arbitration agreements concluded on or after 1 June 2026, up from US$3,000,000 under the 2021 Rules. Within expedited proceedings, the tribunal retains broad discretion to limit or prohibit document production and to restrict the number, length, and scope of written submissions and witness evidence.

The 2026 Rules also introduce an entirely new "Highly Expedited Arbitration" procedure (Appendix VI), available where all parties agree. This procedure requires the tribunal to render its final award within three months of the initial CMC. Joinder and consolidation are not permitted under this procedure. While the three-month timeline may be too aggressive for complex construction disputes, it could prove suitable for discrete, lower-value issues that arise during a project, like disputes over variation orders or payment certifications, where commercial certainty is paramount and cash flow implications require quick determinations.

## TRIBUNAL SECRETARY PROVISIONS

The 2026 Rules formalise the role of the tribunal secretary for the first time. Article 44 provides that the arbitral tribunal may, after consulting the parties, appoint a tribunal secretary to work under the tribunal's direction and control, without delegating its decision-making authority. Tribunal secretaries must satisfy the same independence, impartiality, and confidentiality requirements as arbitrators and must sign a statement of acceptance before appointment. Importantly, the tribunal may claim reimbursement only for a tribunal secretary's reasonable and justified expenses; direct fee arrangements between the tribunal and the parties regarding the secretary's fees are prohibited.

For construction arbitrations, which frequently involve voluminous documentation, complex expert evidence, and extended timelines, the codification of the tribunal secretary's role provides welcome clarity regarding the permissible scope of administrative support.

## CHANGES TO COSTS AND FINANCIAL ADMINISTRATION

The 2026 Rules transfer a number of costs-related decisions from the Court to the Secretary General, including the fixing and readjustment of the advance on costs. The advance is now calculated in accordance with the amount in dispute and the Schedule of Fees, rather than being fixed at the Court's discretion.

The Rules also provide more structured guidance on instalment payments, with the Secretary General now empowered to authorise payment of advances in instalments. Bank guarantees remain available for amounts exceeding a threshold, and the provisions governing their use have been consolidated into a single article.

For high-value construction disputes, where the advance on costs can be substantial, the streamlined administration and the formalization of instalment and guarantee arrangements should assist parties in managing cash-flow burdens at the outset of proceedings.

## CONCLUSION

The 2026 ICC Rules represent a measured modernization rather than a radical overhaul, but they introduce several changes that are of real practical significance for construction arbitration. The abolition of the Terms of Reference, the new early determination procedure, the expanded emergency arbitrator framework with preliminary orders, and the formalization of the tribunal secretary role collectively enhance the toolkit available to parties and tribunals in managing complex, document-heavy construction disputes efficiently. Parties with ICC arbitration agreements would be well advised to familiarise themselves with these changes and to consider whether their dispute resolution clauses should be updated to take full advantage of the new provisions.

# Notable Case Law

*Structured Restoration Inc v Chaly*, 2026 ONSC 1978

Rule 24.01 of the Ontario Rules of Civil Procedure, which provides for dismissal for failure to set an action down for trial within six months of the close of pleadings, is inconsistent with s. 37 and is therefore not available in a lien action.

*Mazzei Electric Ltd v Aragon (English Inn) Development Corp*, 2026 BCSC 562

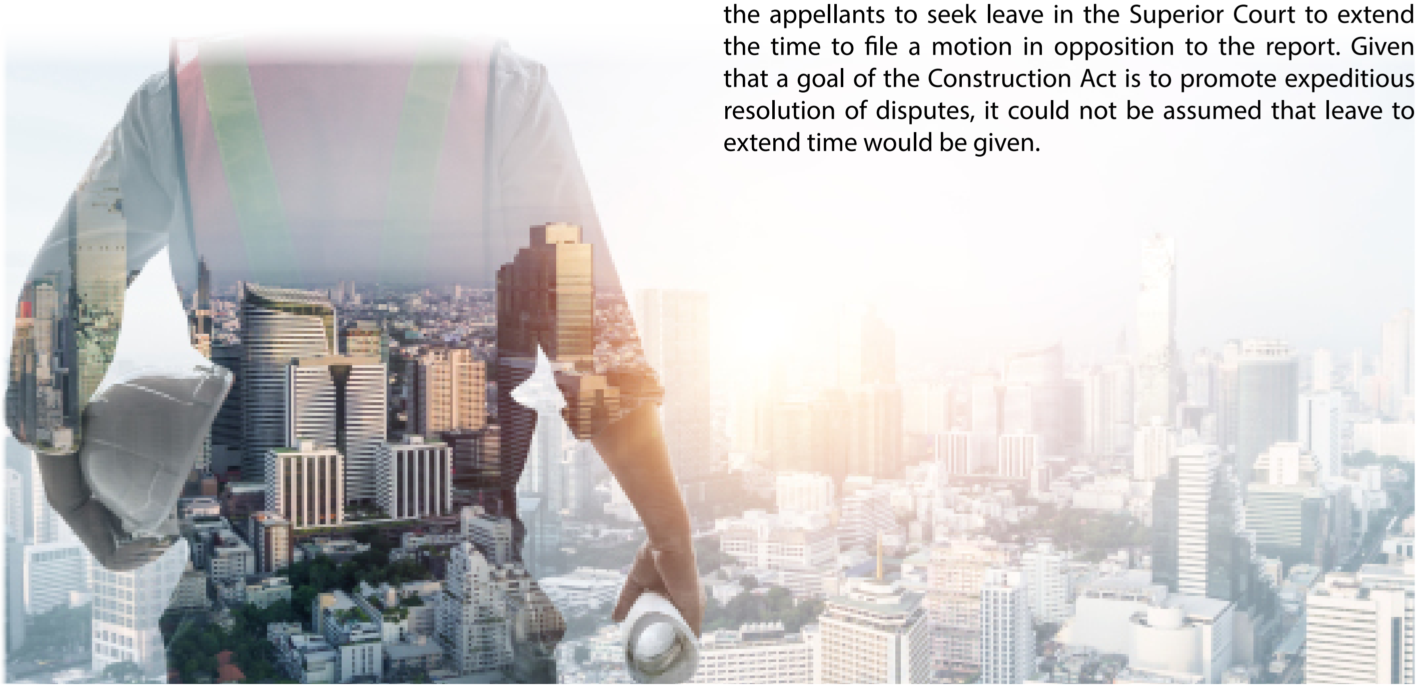
Where a lien claimant underbids on a contract, amounts spent beyond the contracted price are not lienable unless there is evidence that the parties agreed to the changes.

*Hamati Roofing Ltd v MTCC No 581*, 2026 ONSC 2348

At common law, both debtors and creditors have rights for how payments made by the debtor are allocated. Generally, when paying a debt, it is open to a debtor to specifically direct that the payment be allocated to principal or interest. When that is done, the creditor cannot apply the funds differently. These common law rights apply in the context of lien actions. They do not offend the prohibition against liening for interest in s. 14(2). While the quantum of a lien clearly cannot include interest, a payment received by a lien claimant does not necessarily have to be applied against the principal amount secured by the lien, in which case amounts properly secured by that lien could legitimately remain unpaid and owing.

*Dani Building System Inc. v. Hossain*, 2026 ONCA 362

Having found that it had no jurisdiction to hear the appeal, the Court of Appeal refused to transfer the matter to the Divisional Court. While the appellants did not have a right of appeal to the Court of Appeal, neither did they have a right to a direct appeal to the Divisional Court. The complicating factor was that they did not oppose the confirmation of the report within the requisite time period, or at all. As with references conducted under r. 54 of the Rules of Civil Procedure, there is no right of direct appeal from a reference conducted under s. 58 of the Construction Act. The proper procedure was to have opposed confirmation of the report. That did not happen. Given that the report was already confirmed, it was now necessary for the appellants to seek leave in the Superior Court to extend the time to file a motion in opposition to the report. Given that a goal of the Construction Act is to promote expeditious resolution of disputes, it could not be assumed that leave to extend time would be given.



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