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IN THIS ISSUE

Construction Act Trust Claimants in Insolvencies – A Shift in Ontario Law

***Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197**

On March 11, 2020 the Court of Appeal released a precedent setting decision on the *Construction Act* trust remedy that would have undoubtedly received more attention than it did, had the decision not been released on the same day as the World Health Organization declared the novel coronavirus to be a global pandemic. *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, however, is required reading for anyone advising construction industry clients in an insolvency proceeding. Until recently, when lien or trust claimants sought advice from construction lawyers on their rights in an insolvency context, they used to be told that bankruptcy and insolvency legislation was federal, while lien legislation was provincial, that the former took precedence over the latter and that therefore they could not rely on the rights they would have had but for the insolvency.

That advice was based on case law such as *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062, in which the court held that a supplier's trust claim under the Act

did not survive Atlas's bankruptcy. Section 67(1)(a) of the *Bankruptcy and Insolvency Act* (the "BIA") provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person". The Supreme Court of Canada, in *British Columbia v. Henfrey Sampson Belair Ltd.*, [1989] 2 S.C.R. 24, held that the three elements of a common law trust had to be present before a statutory trust could fall under s. 67(1)(a) BIA: certainty of intention, certainty of subject matter, and certainty of object.

Based on that Supreme Court decision, the court in *Atlas Block* held that s. 67(1)(a) of the BIA did not extend to assets subject to a deemed trust created by provincial statute where such deemed trust did not otherwise have all the attributes of a valid trust at common law. Since the funds from the projects in *Atlas Block* were commingled with funds from other sources, there was no certainty of subject matter and consequently no common law trust. In the words of the court, "once co-mingling has occurred, that is the end of the matter".

The first Ontario Court of Appeal decision to breathe life back into the rights of *Construction Act* claimants in insolvency situations was *The Guarantee Company of Canada v. Royal Bank of Canada*, 2019 ONCA 9. The Court of Appeal found:

- The Supreme Court in *Henfrey* contemplated that a provincial statute could supply the required element of certainty of intention for a statutory trust.
- The trust created by the *Construction Act* does not give rise to an operational conflict with the BIA. Accordingly, the doctrine of paramountcy does not apply.
- The mere fact that trust funds are paid into the same account does not mean that certainty of subject matter is lost. That only happens once tracing becomes impossible.
- Therefore, trust funds under s. 8 of the *Construction Act* can satisfy the requirements of a common law trust, and they did in *GCNA v. Royal Bank*.
- Consequently, the s. 8 trust funds were not property of the bankrupt and were not available for distribution to the bankrupt's creditors.

While *GCNA v. Royal Bank* concerned a contractor's trust under s. 8 of the Act, *Urbancorp Cumberland 2 GP Inc. (Re)* concerned the scope and effectiveness of a vendor's trust under s. 9(1) of the Act in an insolvency proceeding.

A condominium developer, the Cumberland Group, was granted protection under the BIA and continued under the *Companies' Creditors Arrangement Act* (the "CCAA"). It owned unsold condominium units in a project it constructed. Contractors which had supplied work and material to these units were owed just under $4 million. When the units were sold during the insolvency proceedings for more than $11 million, the contractors claimed that a s. 9 trust arose over the proceeds to the extent of the amounts owing to them.

The Monitor brought a motion under the CCAA for a determination by the court of whether the sale proceeds were impressed with a trust in the contractors' favour. The motion judge held that they were not, finding that he was bound by the 2005 Ontario Court of Appeal decision in *Veltri Metal Products Co.*, Re, 2005 CarswellOnt 3326 (C.A.). The motion judge held as follows:

> Regardless of whether one could argue that *Veltri* does not give sufficient recognition to the position of lien claimants, the Court of Appeal has ruled that the prerequisites of a ss. 7 or 9 trust are not met where a Monitor ultimately receives the proceeds of sale to be held for creditors.

The motion judge found that the condominium sales were not made "by the owner", given the Monitor's control over the developer's activities, especially with respect to the sales process, and that the proceeds of sale were not "received by the owner" but rather by the Monitor on behalf of creditors. Therefore, according to the motion judge, there was nothing to distinguish the case before him from *Veltri* and he was bound to dismiss the trust claims.

The contractors appealed, arguing that *Veltri* was either distinguishable or wrongly decided. They argued that each condominium sale was a sale by the developer as "the owner" because the sale agreements were entered into on the developer's behalf by the Monitor as a representative, and that the consideration from the sales was "received" by the developer as "owner" since the sale proceeds were deposited into bank accounts opened on the developer's behalf and not the Monitor's. The contractors also argued that the "value of the consideration" exceeded both the expenses of the sale and the amount of mortgage

indebtedness, resulting in a positive balance that could constitute a trust fund for their benefit.

Finally, the contractors served the Court of Appeal with the following Notice of Constitutional Question:

> Does s. 9 of the CLA continue to have application following a bankruptcy or initial order under the CCAA?

Since the correctness of one of its earlier rulings was in issue, the court sat with a panel of five judges. Ruling on the constitutional question first, the Court of Appeal held that a BIA or CCAA proceeding does not prevent the recognition of a s. 9(1) trust and answered the constitutional question by recognizing the validity of a s. 9(1) trust in an insolvency.

Applying *GCNA*'s s. 8 analysis to the s. 9 context before it, the court held as follows:

> 35 In my view, the same reasoning applies to a s. 9(1) trust under the CLA. Section 9 is part of a series of provisions, including ss. 7 and 8, which provide for trusts in favour of specified persons (contractors or subcontractors) over specified funds in the hands of owners (s. 7), contractors (s. 8), and owners who are vendors (s. 9). The effect of s. 9(1) may include the protection of trust beneficiaries on the insolvency of the trustee (by giving them a priority over creditors), but to the extent that it creates a trust under the general law of trusts, it may do so effectively without conflict with the BIA.

> 36 Subsection 9(1) of the CLA creates a trust which comports with the general law of trusts. There is certainty of subject matter: s. 9(1) identifies precisely the subject matter of the trust as the value of the consideration on a specific sale by the owner of the owner's interest, less expenses of the sale and the amount necessary to discharge mortgage indebtedness. There is certainty of object: s. 9(1) identifies precisely the object of the trust as unpaid contractors who supplied work and material to the improvement which was sold. There is also certainty of intention: s. 9(1) deems the creation of a trust and s. 9(2) requires that trust funds not be appropriated to any purpose inconsistent with the trust: see Guarantee, at para. 20.

Just like in *GCNA*, there was no conflict between the language or purpose of the BIA, which excluded property held in trust from the definition of property of the bankrupt, and the trust provisions of the *Construction Act*, which created the kind of trust the BIA contemplated. Therefore, the doctrine of paramountcy did not render the s. 9 trust inoperative.

After answering the constitutional question, the Court of Appeal dealt with the decision in *Veltri*. In that case, a number of lien claimants had provided work or materials to a specific property that Veltri had leased. All of Veltri's assets were sold to generate the proceeds at issue which included, but was not limited to, the leasehold interest. The leasehold interest had no value, and none of the purchase price was allocated to the leasehold interest. Finally, Veltri's lenders had security over all of Veltri's assets, and the debt to the secured creditors exceeded the purchase price of the assets. In those circumstances, the Court of Appeal rejected trust claims under s. 7 of the Act.

In *Veltri*, no trust arose because the amount received from the sale of all the property was less than the amount required to discharge the lenders' security over them, and no proceeds were realized from the sale of the leasehold interest. A s. 9(1) trust only arises if the value of the consideration received by the owner from the sale of premises exceeds the amount of mortgage indebtedness. No trust arises if the value of the consideration is zero, or if the mortgage debt is equal to or greater than any sale proceeds.

The court in *Urbancorp* held that the result in *Veltri* ought to be confined to those facts:

> I do not read these conclusions as turning on freestanding considerations of the Monitor having been involved in the sale, or the proceeds having been paid to the Monitor. In my view, the operative factors were that the sale in question was of assets that extended beyond the leasehold interest; that all of the assets sold were subject to the creditors' security; that the assets could not be sold without the creditors' consent; that the court order permitting the sale preserved the ability of those secured creditors to claim against the proceeds; and that the secured creditors were owed more than the amount received on the sale. Under these circumstances, Veltri "had no interest in or right to any of the net sale proceeds", and its temporary receipt of proceeds for the purpose of paying them to the Monitor (who had the responsibility of using them to pay the claims of the secured creditors) did not mean that the sale proceeds were trust monies in Veltri's hands or received by Veltri as owner under ss. 7(2) and (3) of the CLA.

Going forward, *Veltri* should not be read as standing for the proposition that the control by a CCAA Monitor of a sales process, or the receipt by the Monitor of the proceeds of sale, without more, prevents a s. 9(1) trust arising when the proceeds of sale of the improvement are shown to have a positive value that exceeds the mortgage debt on the property.

GCNA and *Urbancorp* will have a profound impact on the rights of trust claimants under the *Construction Act*. There are limits of course, namely the priorities provided to mortgagees under the *Construction Act* still apply. Had there been a shortfall in the sale proceeds in *Urbancorp* the result likely would have been different. But it is clear the pendulum has swung somewhat from the days of *Veltri* and *Atlas Block*. While unpaid contractors and their counsel used to reflexively stand back as soon as insolvency intervened, they can now rest assured that their claims can survive insolvency and that the trusts funds they are entitled to will be excluded from the property of the bankrupt.

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SCC Refuses to Hear Appeal in *HOOPP Realty v. GCNA* Case

On April 16, 2020, the Supreme Court of Canada dismissed an application for leave to appeal the Alberta Court of Appeal's decision in *HOOPP Realty Inc. v. Guarantee Company of North America*. That decision effectively brought an end to a dispute that lasted close to 20 years.

In 1999, Clark Builders and HOOPP Realty Inc. entered into a contract for the construction of a warehouse. Clark Builders delivered a performance bond issued by the Guarantee Company of North America ("GCNA"), using the CCDC standard form at the time, CCDC 221 1979.

HOOPP Realty was not satisfied with the flooring installed by Clark Builders. Clark Builders replaced the floor work and reserved its position that it was not obliged to do so under the contract. HOOPP Realty commenced an action seeking costs arising from the investigation, consultant, and engineering costs related to the floor replacement. The Alberta Court of Appeal[1] dismissed the action between Clark Builders and HOOPP Realty because the contract provided for a mandatory arbitration which had not been commenced within the limitation period. As a result, no finding was made on the merits of whether Clark Builders was obliged to replace the floor or whether it was liable for any costs incurred by HOOPP.

Meanwhile, HOOPP had commenced an action against GCNA under the performance bond, which it continued to pursue. The issue was whether GCNA had been relieved of any obligations under the performance bond given that HOOPP's claim under the contract against Clark Builders was barred by the expiry of the limitation period.

At the end of a summary trial, the trial judge held GCNA had not been relieved of its liability. This decision was based on the reasoning that the expiry of the limitation period did not "extinguish" the claim against Clark Builders, but only barred the remedy.

On appeal, three arguments were raised by GCNA:

1. GCNA had no remaining obligations since the underlying debt had been extinguished;
2. GCNA was entitled to raise any defence that the principal could raise, including any limitation defence; and
3. GCNA's obligation was not free-standing, but only collateral to the liability of the principal.

On the first argument, the Court of Appeal agreed with the trial judge that the expiration of a limitation period under Alberta law does not result in the complete extinguishment of the underlying obligation.

On the second and third arguments, which both relate to the nature of a surety's obligation, the Court held that the barring of a remedy against Clark Builders did not necessarily bar HOOPP's remedies against the surety under the performance bond.

The Court relied on wording of the performance bond, whereby Clark Builders and the surety bound themselves "jointly and severally", as support that the surety could have freestanding obligations to HOOPP under the bond. In addition, there was no provision requiring HOOPP to first exhaust its remedies against Clark Builders before its call on the performance bond.

Although GCNA argued that the usage of "joint and several" in a performance bond has a different meaning than its common usage, no authorities were provided for that proposition, and the Court rejected it. Instead, the Court of Appeal adopted the following interpretation offered in *Hudson's Building and Engineering Contracts*, 13th ed. (London: Sweet and Maxwell, 2015), at p. 1132:

> 10-037 It is submitted that where, as is usually the case in construction contracts, the obligation to be guaranteed arises under a separate contract between the principal debtor and creditor, the fact that the *liability to pay under the bond* may be expressed to be joint and several by the surety and debtor, although discharged by unilateral due performance on the part of the debtor, is not the same thing as *joint liability under the principal contract*, and so is in no way inconsistent with the surety's

1. *AG Clark Holdings Ltd v HOOPP Realty Inc*, 2014 ABCA 20, 31 CLR (4th) 173, affirming 2013 ABQB 402, 26 CLR (4th) 154.

> true status as a guarantor. If this view is correct, no practical significance should attach to the presence of the principal debtor as an additional party liable under the bond in cases where it is the rights and liabilities *inter se* of the bondsman and obligee creditor which are in issue. (Emphasis added)

On that basis, the Court summarized:

> [28] In summary, it can be accepted that in most respects the obligation of a surety is co-extensive with the obligations of the principal debtor. That means that the surety is not exposed to a wider liability than that of the principal debtor under the principal contract, and that any substantive defences open to the principal debtor will be open to the surety. It does not, however, mean that the surety can have no independent obligations under the performance bond. Whether there are such independent obligations depends on the wording of the bond. In this case, it is clear that HOOPP Realty had several claims against Clark Builders and The Guarantee Company, and it was entitled to pursue one or both of them. Having failed in its claim against Clark Builders, it nevertheless retains a potential claim against The Guarantee Company.

On the issue of the limitation defence, the Court held that as the principal is obliged to indemnify the surety for any funds paid under the performance bond, the principal does not have the protection of the *Limitations Act* until the limitation has run against **both** the principal and the surety. The same is true for the surety. The appeal was dismissed.

Although the facts giving rise to this decision may be unique, the "joint and several" language relied on by the Alberta Court of Appeal is found in various standard form performance bonds, including the current CCDC performance bond form 221-2002, Surety Association of Canada's renewable performance bond for a multi-year contract, and the Form 32 performance bond for Ontario's *Construction Act*. It will be interesting to see what impact this case has on the case law in this area, particularly outside the Province of Alberta.

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Contractor's Conflicted Warranty Language Shut Down on Appeal

***2099082 Ontario Limited v. Varcon Construction Corporation*, 2020 ONCA 202**

Not all warranty provisions are created equal when it comes to construction contracts. Individual warranty provisions may vary in length of time, scope, and the degree of fault required to trigger those obligations.

The case *2099082 Ontario Limited v. Varcon Construction Corporation* ("***Varcon***") serves as a warning that conflicting provisions in multilevel contract documents may prolong costly litigation and make the difference between a successful or failed warranty claim.

In addition, a party's refusal to produce relevant evidence prior to a hearing risks gutting its defence and undermining any resulting appeal.

Background: unpaid holdback, soil compaction and septic backup

In this case, the court was required to resolve a dispute related to non-payment of statutory holdback by the contractor, Varcon Construction Corporation ("**Varcon**"), to its subcontractor, 2099082 Ontario Limited, carrying on business as AWD Contractors ("**AWD**").

AWD's scope of work related to, among other things, excavation, piping, backfilling and soil compaction. AWD's claim was for the modest holdback amount of $39,064.87.

One year after AWD started a civil action to collect its holdback from Varcon, the septic system at the project failed. Native soil settled underneath the Project's sewage pipes, deflected the pipes and caused the sewage system to back up. The failure occurred within the 12-month warranty term in AWD's subcontract.

Varcon alleged that AWD had improperly compacted the native soil and sought to hold AWD responsible for its sewage remediation costs. AWD maintained that native soil was called for in the subcontract, its compactions had been tested by a third-party expert, Inspec-sol Inc., and the compaction test results had met the required standard. There was a conflict between the expansive warranty language contained in the prime contract versus the subcontract's narrower indemnity provision.

From the issuance of AWD's claim to Varcon's appeal, the litigation lasted nearly five years. Early in the process, AWD brought a successful motion for summary judgment for unpaid holdback. The holdback amount of $39,064.87 was ordered to be paid into court. On that same motion, Varcon was given leave to amend its pleadings to advance a counterclaim of $150,000 against AWD for remediation costs. The action proceeded through discoveries. AWD brought a second motion for summary judgment to dismiss Varcon's counterclaim in its entirety.

As will be explained below, AWD's summary judgment motion was only partially successful, resulting in an order that the action proceed to trial. Both Varcon and AWD appealed.

Motion granted: partial summary judgment, no decision on breach of warranty, resulting in an order to proceed to trial

The motions judge in *2099042 Ontario Limited v. Varcon Construction Corporation*, 2019 ONSC 2497, awarded only partial summary judgment to AWD, determining that:

> (a) AWD completed its work without deficiency in accordance with the subcontract's specifications;
>
> (b) AWD was not liable for failing to warn Varcon that compacted native soil was not a suitable material for the backfill;
>
> (c) AWD was not in breach of contract for refusing to complete the sewage remediation work; and
>
> (d) Whether AWD's was liable for breach of warranty was a triable issue and could not be decided on the facts and evidence available on the motion.

A critical factor in the motion judge's decision was reliance on AWD's evidence that it completed compaction tests and that the results met the standard required by the subcontract. AWD did not have the compaction test reports that it previously delivered to Varcon. During the litigation, AWD unsuccessfully attempted to have the reports disclosed by the Project owner, but the owner refused. Instead, AWD relied on the evidence of its employee who worked for Varcon over the course of the Project.

The former Varcon employee testified that the testing results were completed to specification by AWD.

Varcon refused to produce the compaction tests during the litigation or obtain them from the project owner. The motions judge found that Varcon had no reasonable explanation for its refusal and an adverse inference was drawn against the contractor as a result. Another consequence of the non-disclosure was that Varcon's expert witness did not have contemporaneous compaction reports to underpin his analysis. Without an adequate factual foundation, the expert's findings were held to be mere assumptions. The contractor was unable to refute AWD's assertion that the tests were completed to specification.

Partial summary judgment did not put an end to the matter. The motion judge's refusal to decide whether AWD had breached its warranty to Varcon left the issue to be determined at trial.

Neither party was satisfied with the direction to proceed to trial. Varcon appealed to set aside AWD's partial summary judgment. AWD took the opportunity to cross-appeal, maintaining that summary judgment was appropriate on all issues, including Varcon's counterclaim for breach of warranty.

Appeal: order to proceed to trial set aside, full summary judgment on all issues, and no breach of warranty

Varcon's appeal was in vain and dismissed. The court added salt to the wound by granting AWD's cross-appeal. The order to proceed to trial was set aside. The appeal ended the matter.

1. Varcon's appeal was dismissed

The appeal court upheld the motions judge's dismissal of Varcon's counterclaim on the issues of breach of contract, failure to warn, and deficiencies. The court of appeal made it clear that it was Varcon's obligation to obtain the compaction reports from the project owner.

Without those reports, the appeal court held that it was open to the motions judge to find that Varcon's expert's evidence was "unreliable and not credible."

The court found that there was "no indication there would be better evidence or legal arguments on the issues at trial." This result underscores the difficulty of overturning decisions on appeal in the absence of a palpable and overriding error.

2. AWD's cross-appeal was granted: no leave to appeal required and no breach of warranty

Varcon first attempted to shut down AWD's cross-appeal with a procedural argument. Varcon correctly pointed out that the motions judge's direction to proceed to trial was interlocutory. AWD had not sought leave for its appeal of that interlocutory order contrary to Rule 61.03.1 of the *Rules of Civil Procedure*.

The appeal court, however, found that seeking leave for the cross-appeal was not required.

The main appeal was from a final order and did not require leave. Relying on prior case law, the court held that both appeals were so interrelated that leave to hear the cross-appeal would have been granted inevitably after the first issue was before the court. The cross appeal was permitted to continue in the absence of an application for leave.

The result of the cross-appeal was in AWD's favour. The appeal court set aside the motion judge's decision that summary judgment was inappropriate for the warranty claim. The contract documents were found to be sufficient to resolve the warranty dispute.

The subcontract limited AWD's obligation to correct defective work to:

> (a) damages or fault in the work as the result of imperfect or defective work done or material furnished **by the subcontractor**; or
>
> (b) loss or damages "arising" from material or workmanship furnished **by the subcontractor**.

Varcon relied on warranty language in the prime contract that required AWD to re-do defective work "whether or not" it caused the defect. The prime contract's warranty language conflicted with the subcontract's more narrowly worded indemnity.

The court took objection to Varcon's contractual interpretation, namely, that the prime contract's warranty language held AWD liable for problematic soil even though its work was not deficient. In effect, the court stated this would have made AWD a "guarantor of any and all defects on the project," an interpretation that did not accord with "sound commercial principles and good business sense."

The fact that AWD used native soil that ultimately settled and caused the pipes to deflect was not its fault: the contract's specifications called for the use of native soil. The court held that AWD could not be faulted for following the contract's specifications.

Insights from *Varcon*'s five-year saga

For every action, there is an equal and opposite reaction. In Varcon, the contractor's appeal of the first instance provoked a devastating cross-appeal.

Ambiguity between the project agreement's warranty provisions and the subcontract was not resolved in the contractor's favour. Commercial principles and sound business sense won over a strict reading of the project documentation. Had the subcontract been written in parallel to the project agreement's broad indemnity language, the outcome may not have been the same. Equally, had the contractor in this case made all reasonable efforts to obtain the testing results for consideration by the court, the case may have been resolved much earlier.

The court's decision in Varcon highlighted the courts' favour to decisions that are final, reasonable, and practical without slavish deference to technical contractual language or procedure. Varcon supports that parties ought to pursue full disclosure and avoid the adverse inference of missing evidence whenever possible.

This action's lengthy procedural history, which involved multiple sets of pleadings, two motions for summary judgment, and an appeal over five years, also illustrates the utility of interim adjudication under the Construction Act. Adjudication was not available in Varcon, but if it had been, AWD's holdback may have been paid back five years earlier at far less cost.

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Bidder Beware: Reprisal Clauses in Construction

Reprisal clauses allow municipalities to exclude a contractor from bidding on projects when a contractor has been involved in litigation against the municipality, or engaged in conduct prohibited by the municipality. Reprisal clauses can be found in tender documents or a municipality's by-laws and policies. In Toronto, a reprisal clause is found in the Toronto Municipal Code, which allows City Council to suspend a contractor from bidding for one to five years based upon evidence that there has been a contravention of the Supplier Code of Conduct.[1]

Reprisal clauses give municipalities significant power, above and beyond the power they already hold as owners. The power to exclude contractors who have engaged in recent litigation or prohibited conduct from bidding is irrespective of the results of any litigation.

Reprisal clauses encourage contractors to weigh the cost and benefit of litigating a dispute against a municipality, against the risk of being unable to bid on that municipality's projects for a certain period of time and the associated cost.

J. Cote & Son Excavating Ltd. v. Burnaby

In *J. Cote & Son Excavating Ltd. v. Burnaby*,[2] the British Columbia Court of Appeal recently weighed in on reprisal clauses, and the Supreme Court of Canada refused to grant leave for an appeal.

J. Cote & Son Excavating Ltd. ("J. Cote") brought a claim against the City of Burnaby to recover payment in December 2013.

1. Toronto Municipal Code, Chapter 195, Purchasing, §195-13.13.(a).

2. 2019 BCCA 168, leave to appeal denied 2019 CarswellBC 3699 (S.C.C.).

In February 2014, Burnaby included a reprisal clause (the "Clause") in its tender documents which excluded bids from contractors involved in litigation against Burnaby within the two years before the tender closing date, effectively excluding J. Cote.

In December 2014, J. Cote brought a second action against the City to challenge the constitutional and common law validity of the Clause. J. Cote argued that the Clause infringed the rule of law, infringed access to the courts contrary to the Charter and section 96 of the *Constitution Act, 1867* and was contrary to public policy. Section 96 of the *Constitution Act* guarantees the core jurisdiction of provincial superior courts.

Interestingly, in January 2017, Burnaby removed the Clause from its tender documents and began to use a pre-qualified list of contractors.

At the summary trial, the judge dismissed the application. She found that while there is a constitutional right of access to the courts, it is subject to permissible limits, and that the Clause fell within those limits.

On appeal, the British Columbia Court of Appeal was tasked with determining whether the Clause infringed a constitutionally protected right of access to the courts.

The Court engaged in a thorough analysis, and ultimately found that the Clause did not infringe constitutionally protected access to the courts. The Clause only appeared in Burnaby's tender materials, which affected a small number of corporations, and was not imposed by a law of general application. The Court noted that not every limit on access to the courts is automatically unconstitutional, as was the case here.

The Court found that the jurisprudence does not contain a broad constitutional right of unrestricted access to civil superior courts. The Court highlighted the following constitutional findings:

1. Section 96 of the *Constitution Act, 1867* is the only path to a constitutionally protected right to civil superior courts, but it only applies when *legislation* denies access to civil superior courts, and thus infringes the core jurisdiction of the courts.

2. The *Charter* does not prescribe a general right to access to civil superior courts

3. The rule of law does not independently protect a right of access to civil superior courts. Instead, the right is protected by section 96 of the *Constitution Act, 1867* and is bolstered by the rule of law.

In this case, the Court of Appeal agreed with the trial judge that the Clause was neither legislation nor a policy that amounted to a law. Therefore, J. Cote had failed to establish a denial of the limited protection of access to the superior courts provided by s. 96 of the *Constitution Act, 1867*.

Other Case Law

There are several other cases across Canada on the topic of reprisal clauses. In *Hancon Holdings Ltd. v. Nanaimo (City)*,[3] a petitioner applied to the court to seek an order setting aside a City Counsel decision to include a reprisal clause in the City's purchasing policy and tender documents. The court decided not to interfere with the conduct of the elected officials, and found no evidence of bad faith.

In *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)*,[4] a municipality passed a policy which banned contractors from bidding who had engaged in litigation against the municipality. The contractor sought judicial review of the policy. The municipality cited a number of reasons for enacting the policy, including that it would be prudent to avoid doing business with litigious parties, the municipality would be guarded and cautious in dealings with party adverse in interest, and there was a risk of breaching confidentiality when dealing with parties against whom the municipality is in litigation.

The Alberta Court of Queen's Bench held that the policy did discriminate, but the discrimination was authorized. The municipality made a business decision for business reasons. Courts must respect the power exercised by an elected government, and a court's role is limited to reviewing whether a municipality exceeded its powers.

In *Interpaving Limited v. City of Greater Sudbury*,[5] a contractor issued a statement of claim against the City, and the City barred the contractor from bidding for four years. The contractor allegedly had a history of violating health and safety legislation and engaging in abusive conduct against City employees. The contractor was given a chance to meet with the City, in an attempt to have the debarment

3. *Hancon Holdings Ltd. v. Nanaimo (City)*, 2001 BCSC 1606.

4. *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)*, 1997 CarswellAlta 1164.

5. *Interpaving Limited v. City of Greater Sudbury*, 2018 ONSC 3005.

rescinded, and the City later provided reasons supporting the debarment. The contractor applied for judicial review of the decision, and sought an order that the by-law which contained the reprisal clause was without effect.

The Divisional Court noted that the City had the right to determine who to do business with, and found that the by-law containing the reprisal clause was valid.

The Court found that the City should have given the contractor formal notice of its intention to debar, a summary of the grounds and reason for the decision, and opportunity to respond. The City failed to provide notice, and the Court found that this was a breach of procedural fairness. The City's reconsideration cured the procedural defects in the earlier decision, and the Court found the City did not act in bad faith.

One dissenting judge, Justice Ellies, noted that the duty of procedural fairness required the City to state the evidence it relied on in making its decision, which was not done. Justice Ellies also took the position that the procedural unfairness that occurred could not be corrected by the reconsideration that occurred later. Justice Ellies would therefore have allowed the application.

The Effect on the Construction Industry

Reprisal clauses are an important issue for general contractors. Municipalities represent a large portion of project owners, which are a significant source of revenue for many general contractors.

The Ontario General Contractors Association ("OGCA") has taken a stand against reprisal clauses and calls for legislative intervention. The OGCA states that reprisal clauses are punitive and do not address the power imbalance between municipalities and contactors. The OGCA argues that reprisal clauses restrict the bidding process and increase the cost of the project because they "force contractors, who may have a dispute with the city, to choose between pursuing their legal rights and bidding on future city contracts."[6] The OGCA proposes that municipalities use a fair prequalification system, a contractor and consultant performance program, and a fair scoring system that is not based simply on the lowest bid.

The Canadian Institute of Steel Construction ("CISC") also opposes the use of reprisal clauses, and President and CEO Ed Whalen notes that "it is essentially extortion and will lead to higher construction prices for the taxpayer with fewer contractors willing and able to bid Government projects."[7] Like the OGCA, the CISC classifies reprisal clauses as punitive.

The Canadian Construction Association ("CCA") also expressed their discontent with reprisal clauses, and states that they allow contractors to be financially punished for enforcing their legal rights.[8] This deters contractors from seeking a remedy in court, in fear of being banned from future bidding.

The Owner's Perspective

Municipalities have relied on reprisal clauses for many years now. From the owner's point of view, a reprisal is a safeguard against litigious contractors or prohibited conduct.

While contractors argue that reprisal clauses drive up the price of

6. The Ontario General Contractors Association (OGCA) published an article in its December 17, 2019 edition of OGCA News in relation to *J. Cote & Son Excavating Ltd. v. Burnaby* and reprisal clauses.

7. The CISC released a statement on March 12, 2020 titled "CISC strongly opposes use of Government reprisal clauses for construction".

8. The CCA released a statement on December 16, 2019 titled "CCA displeased by Supreme Court of Canada decision to dismiss appeal on use of reprisal clauses in British Columbia".

construction by limiting the amount of bidders and causing contractors to forego litigation, an owner might argue that costs are controlled by lowering the chance of litigation on a particular project, the cost of which is ultimately borne by the taxpayer. Indeed, a municipality can spend hundreds of thousands of dollars per year on the legal and administrative costs of litigation. A reprisal clause provides a municipality with control, in an effort to assist with cost and schedule control on the project.

Privilege Clauses

The effect of a reprisal clause could conceivably be achieved with a well-drafted privilege clause. The Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* held that privilege clauses do not overrule the obligation to only accept compliant bids, but they do allow owners to not simply accept the lowest bidder.[9] Owners are allowed to take a more nuanced view of "cost", so long as contracts are awarded based on disclosed criteria.

If a privilege clause is to have the same effect as a reprisal clause, then the tender documents should inform bidders that past experience and performance on projects is being assessed. To be even more explicit, the privilege clause could state that past litigation is a criterion in the municipality's award of the contract.

9. *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

Adjudication

With the recent introduction of adjudication, municipalities may modify their reprisal clauses in an attempt to exclude contractors who engage in adjudications. We expect that the courts will eventually be asked to address a situation where a contractor's participation in an adjudication is not voluntary, such as in the face of a notice of non-payment from the owner, and the owner triggers a reprisal clause. For example, it remains a live question whether a reprisal clause can be relied upon to prevent a contractor from bidding, if the contractor is forced to adjudicate by operation of Form 1.2 under the *Construction Act*.

The reprisal clause in *J. Cote & Son Excavating Ltd. v. Burnaby* barred contractors from bidding if they had "engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner". This would presumably exclude adjudications, which are not initiated in a court. This reprisal clause, and many others, would require modification if a municipality intends to exclude bidders who engage in adjudications against them.

Adjudication may become less attractive to general contractors if municipalities will trigger reprisal clauses after an adjudication has commenced. If adjudications gain the popularity that is anticipated, and if municipalities include adjudications in reprisal clauses, then some municipalities may have a very small pool of bidders in the future. This would conceivably drive up the price of construction.

Conclusion

For the foreseeable future, reprisal clauses are not going anywhere unless the industry groups mentioned earlier succeed in lobbying for legislative change. Contractors should be aware of the use of reprisal clauses, and when considering litigating against a municipality, should consider the triggering of a reprisal clause to be an additional risk. Contractors should also be aware of their right to procedural fairness when a municipality relies on a reprisal clause. Municipalities must consider not only their goals in instituting a reprisal clause, but also the ripple effects, especially since the advent of adjudication brings some uncertainty to the future of reprisal clauses.

AUTHOR:

Construction Lien Motions During COVID-19 Suspensions

In response to the COVID-19 pandemic, regular Court operations have been suspended as of March 16, 2020. Exceptions are made for select pre-trial conferences, urgent motions which can proceed by way of teleconference, motions in writing that are proceeding on consent of all parties, motions without notice and certain short motions on notice.

Consent and ex-parte motions in writing

In the event that a motion can proceed in writing on consent of all parties or without notice, motion materials must be delivered electronically to the court office at the courthouse where the file is located. Any consent motions which were filed with the court prior to March 17, 2020 should be re-submitted in electronic format. If a party is re-filing the materials electronically, it must be indicated in the draft Order that the "motion material previously filed is being withdrawn".

All consent/without notice motion materials must be submitted electronically to the generic email addresses set out in the Notice to Profession published on April 2, 2020 (https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update/).

Upon resumption of normal court operations, parties must undertake to file all materials and pay any applicable fees.

In order to ensure that a motion is reviewed and processed by a judge/construction lien master, the subject line should include the following information:

1. Level of Court (Superior Court of Justice);
2. Type of Matter (Construction Lien);
3. Court File Number; and
4. Type of Document.

The body of the email should include the following information:

1. Short title of proceeding;
2. List of documents attached;
3. Order requested; and
4. Contact information of person submitting the request (email and phone number).

The electronic materials must include:

1. The motion materials (notice of motion, affidavit and draft order);
2. Consent of all parties;
3. Authorization to execute the consent if one was provided by opposing counsel; and
4. Draft order in Word format.

Judges and masters do not have access to court files. As a result, parties should include as part of the motion record all court documents which are relevant to the motion. It is important to note that electronic motion materials should not exceed 10MB in size. All materials being submitted must be in searchable PDF format.

Motions that are being brought on consent and in writing in the Northeast Region cannon exceed 10 pages in length. Any attachments must be made available via hyperlink.

Once materials are submitted electronically, they will be re-directed to the construction lien master or a judge. The construction lien master/judge will review the motion materials and will determine whether or not the relief sought is to be granted. If the relief is granted, the order will be signed and returned to the moving party via email. The moving party is responsible for providing a copy of the signed order to all responding parties within 7 days of its receipt.

In the event that there are issues or concerns with the materials or the

proposed order, the parties will receive an endorsement by email setting out the deficiencies or reasons for denial of the order.

If parties are seeking an order for payment of security out of court, the original issued and entered Order will be required so that it can be submitted to the Office of the Accountant of the Superior Court of Justice. Typically, the original signed orders are delivered to the civil intake unit. Parties will have to make arrangements with the process server to attend at the civil intake unit during their special business hours and have the original order entered.

To identify the proper location of the original order, parties will have to make enquiries with the trial-coordinator or the judicial secretary who provided them with a copy of the signed order.

Motions to Vacate Construction Liens

The vacating process is slightly different. During remote operations, the ordinary procedures for vacating motions do not apply. In addition to the above-mentioned documents, the moving party will have to submit a revised form of order that is currently being used under the remote protocol (https://www.ontariocourts.ca/scj/files/notices/vacating-order-form.pdf), a draft fiat for payment into court (https://www.ontariocourts.ca/scj/files/notices/fiat.pdf) as well as a copy of the security being posted (lien bond/letter or credit/certified cheque). If the lien is being vacated by a lien bond, counsel must ensure that the seal is visible on the scanned copy of the lien bond. The seal may not be visible, even on a high-resolution scan. Under such circumstances counsel must attest, in the body of the e-mail, that the seal is present on the lien bond.

If the lien is being vacated in an intended lien action with no court file number, the court will assign a court file number to the case. Once materials are reviewed and approved, parties will receive a copy of the signed order, an endorsement, a signed fiat, and an approved copy of the lien bond.

The order does not need to be entered unless it has to be registered on title. Should a party require to register the order on title, specific instructions will be provided by the registrar with respect to the internal entry of the order.

In order to post security, parties must print in colour all the materials received from the Master's Office, being the issued order, the endorsement, the signed fiat and the approved security. The said documents are to be combined with the original form of security and delivered to the accountant's office. Parties are reminded that they will be required to enter the Order if it is to be registered on title.

Once payment into court is made, counsel for the lien claimant must be served with copy of the order and copy of the receipt from the accountant's office to evidence compliance with the order. If the lien attaches to the premises, the issued and entered order must be registered on title.

Urgent Motions

Prior to bringing an urgent motion, counsel must assert that there is a valid reason for urgency and be prepared to provide documents evidencing the urgency along with the motion materials. Upcoming expiry of limitations, financing or any other transaction that could be disrupted, would usually be classified urgent.

Parties are strongly encouraged to bring urgent motions in a jurisdiction where the action was commenced. Although there is an option to bring *ex parte* motions in Toronto, counsel must be reminded that in the event that the order is to be registered on title (such as vacating order), it must be entered in the jurisdiction where the action was commenced. If the motion is heard in the same jurisdiction, arrangement may be made internally to have the order entered and returned to counsel via email for registration.

Once motion materials are submitted to the designated e-mail address for urgent motions (https://www.ontariocourts.ca/scj/files/Courthouse-contact-information%2025-Mar-2020.pdf), the trial coordinator will schedule a teleconference with the judge/master. Counsel should be prepared to appear via teleconference on the same or the following day.

Once the motion is heard, the judge/master will sign the order. The signed order will be emailed to counsel.

Counsel are expected to make enquiries with the trial coordinator concerning the entry of the order at the civil intake office of the said jurisdiction.

Short Motions on Notice in Toronto

As per the newly published Notice to Profession, effective May 19, 2020, parties will be able to schedule opposed short motions to a judge or a master. Such motions will be subject to review in writing before being scheduled. Parties wishing to

bring a short motion or an application to a judge or a master may submit a short motion request form (https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/#C_Civil_Matters) to Toronto.SCJ.CIVILINTAKE@ontario.ca.

The judge or master reviewing the short motion request form may issue directions for the disposition of the motion or convene a case conference for that purpose.

Parties should refer to the regional practice directions for instructions concerning short motions on notice in other regions on the Superior Court of Justice website at: https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/.

AUTHOR:

Virtual Commissioning During Uncertain Times: COVID-19

Commissioning is governed by the *Commissioners for Taking Affidavits Act* and is not regulated by the Law Society of Ontario. Although the law is evolving in this area, the best practice for commissioning documents remains for the person who is acting as a commissioner to be in the physical presence of the deponent to commission the document(s).

However, as a result of COVID-19, and until further notice, the Law Society of Ontario will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public" as not requiring the lawyer or paralegal to be in the physical presence of the client. If lawyers and paralegals choose to use virtual commissioning, they are should attempt to manage some of the risks associated with this practice.

Virtual commissioning is an authentication and signature process for taking affidavits and statutory declarations that uses audio-visual technology. It is therefore not conducted in the physical presence of the commissioner. An example of virtual commissioning is a lawyer who meets with a client via Skype or FaceTime and directs the client to sign the relevant legal document that is visible to the lawyer through video. The client then returns the original executed document to the lawyer who, upon receipt, signs the document as a witness to the client's signature. Another example is a client and a lawyer logging into the same platform to view and electronically sign the same document simultaneously, despite being in different physical locations.

Some of the risks associated with Virtual Commissioning include:

- Fraud;
- Identity theft;
- Undue influence;
- Duress;
- Capacity;
- The client is left without copies of the documents executed remotely;

- The client feels that they did not have an adequate opportunity to ask questions or request clarifying information about the documents they are executing.

In order to manage some of these risks, one should consider the following:

1. Are there any red flags of fraud? Be alert that persons may attempt to use this uncertain time to commit fraud or other illegal acts. Lawyers should be alert in order to ensure that they are not assisting, or being reckless in respect of any illegal activity.

2. Assess whether there is a risk that the client may be subject to undue influence or duress.

3. Determine how to provide the client with copies of the document executed remotely.

4. Confirm the client's understanding of the documents they are executing and provide the opportunity to ask questions during the video conference.

There is no prescribed process in commissioning documents virtually. However, the Law Society of Ontario has provided guidelines to ensure a consistent process is used and documented in order to mitigate risks associated with not being in the physical presence of deponents. One can find sample materials that have been prepared by the Law Society to assist with this process as set out below. They should be used in order to guide commissioners through the virtual commissioning process.

Best Practices for Virtual Commissioning during COVID-19

https://lawsocietyontario.azureedge.net/media/lso/media/lawyers/practice-supports-resources/best-practices-for-virtual-commissioning-during-covid-19-en.pdf

Virtual Commissioning Checklist

https://lawsocietyontario.azureedge.net/media/lso/media/lawyers/practice-supports-resources/virtual-commissioning-checklist-en.pdf

On May 12, 2020, the Ontario legislature passed an omnibus bill, *COVID-19 Response and Reforms to Modernize Ontario Act 2020*, which codified the process for remotely commissioning or notarizing a document.

AUTHOR:

New Phase of the E-filing Pilot and Perfection of Claims for Lien

In order to perfect a claim for lien, a lien claimant must issue a statement of claim and certificate of action, following which the certificate of action must be registered on title.

Prior to March 23, 2020, parties were required to attend the courthouses in person to issue a statement of claim and certificate of action. In the event that the property was located in another jurisdiction, counsel for lien claimants were required to plan ahead in order to allow timely delivery of the documents and court fees to the appropriate jurisdiction, issuance of the statement of claim and certificate of action and prompt receipt of the issued documents in order to register the certificate of action on title.

On March 23, 2020, the Ministry of the Attorney General launched a new phase of the e-filing pilot, which now allows parties and litigants to issue Certificates of Action, among other Court documents, electronically, a feature which was not available before.

Parties are strongly encouraged to use Civil Claims Online to issue statements of claim and certificates of action and to receive electronically issued documents in Superior Court of Justice civil actions as follows:

1. Access Civil Claims Online at: https://www.ontario.ca/page/file-civil-claim-online.

2. Start the process by issuing a Statement of Claim.

3. The last step in the issuance process will allow parties to upload both the statement of claim and certificate of action.

4. Upon payment of the court fees (parties will be charged one fee of $359.00 for both the statement of claim and certificate of action) parties will receive an email from Civil Claims Online enclosing both the issued statement of claim and certificate of action. Both issued documents will have an electronically populated court file number and electronic court seal. No court attendance is required.

5. Once the statement of claim and certificate of action have been issued, parties may proceed to register the electronically issued certificate of action on title.

It is important to note that in the event that the construction lien has been vacated prior to the issuance of the statement of claim, no certificate of action is required to be issued and registered on title.

AUTHOR:

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Senior Law Clerk

Notable Case Law

***JVD Installations Inc. v. Skookum Creek Power Partnership*, 2020 BCSC 374**

A British Columbia Supreme Court case which contains a useful summary of lienability of work done off-site:

> 46 The Act does not require a lien claimant to perform or provide work "on" the lands described in a lien; it requires the lien claimant to perform or provide work "in relation to an improvement" that is located on lienable lands. If a claimant can establish that it performed work "in relation to" an improvement, it is entitled to lien against any land that the improvement touches, regardless of where the claimant performed the work. This is true even if most of the improvement is located outside the liened lands: *Sandhill Development Ltd. v. Green Valley Developments Ltd.*, 2008 BCSC 1646 at para. 33; *Kettle Valley*.
>
> 47 Work is done "in relation to" an improvement, where it is forms an "integral and necessary part of the actual physical construction" of the improvement: *Northern Thunderbird Air Ltd. v. Royal Oak & Kemess Mines Inc.*, 2002 BCCA 58 at para. 48. It is not enough that the work contributes to the improvement in some way; it must be directly necessary to it.
>
> 48 There are two ways in which a lien claimant may satisfy the "integral and necessary" test without actually performing any work on the lands it seeks to lien. First, the work a claimant performs off-site may be incorporated into and form an essential physical part of the finished improvement. Second, a claimant may perform work on one part of a single integrated improvement that is located on more than one parcel of land. Even if the claimant performs no physical work on the lienable lands themselves, it is entitled to a lien over the entire improvement, including any lienable lands the improvement touches.

***4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303**

The Court of Appeal ordered an appeal to be heard in writing over the objection of one of the parties, holding that it was well within its jurisdiction to make that order where the due administration of justice required it. The court held that during the pandemic, judicial resources are strained; the ability to hear appeals remotely is not unlimited; and that where appropriate, some appeals must be heard in writing in order to ensure that appeals continue to be heard in a timely and an orderly fashion.

***Association of Professional Engineers v. Rew*, 2020 ONSC 2589 (Div. Ct.)**

Discussion of electronic hearings as a key aspect of the courts' response to the COVID-19 crisis. The case contains detailed directions about the actual conduct of such hearings. Despite the objection of one of the parties, the court directed that an application for judicial review would proceed before a panel of three judges of the Divisional Court by way of video conference using ZOOM technology.

The court held that neither scheduling nor conduct of court proceedings by video conference was subject to the consent of the parties. Nor was this professional discipline matter somehow unsuited to hearing by video conference. The hearing was to be conducted on the basis of a written record; no oral testimony was to be heard. The parties would all be represented by experienced and competent counsel, who should have no difficulty making their arguments understood to the court by means of video conference. The relative importance of the case had nothing to do with whether the case could be heard fairly and efficiently by video conference. The argument that the dynamics of a live hearing would be lost in a video conference was also rejected. Even if something might be lost in such proceedings, which was not conceded, the court held that something would definitely be lost if court business did not continue, as best as can be managed, during the COVID-19 crisis.

***Northern Dynasty Ventures Inc v. Japan Canada Oil Sands Limited*, 2020 ABQB 275**

Under s. 6(4) of the Alberta *Builders' Lien Act*, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work. "Immediate vicinity" may, depending on the facts of the case, include sites almost 100 km away. In this case, crushing equipment rented to a contractor at a gravel pit site was held to have been in the immediate vicinity of an oil sands project 89 km away. In a very Canadian decision, Justice Kendell held that:

> Take, for example, Tim Hortons. If someone was located in the centre of the City of Edmonton and argued that a Tim Hortons restaurant 30 kilometers away, as the crow flies, or a driving distance of 89 kilometers was in their immediate vicinity, I would dispute that claim, because there are numerous Tim Hortons locations that are much closer than the distance described. The same cannot be said for a gravel pit. Immediate vicinity must be considered on the specific and unique facts of a particular case.

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Building Insight Podcasts

Episode 15: A Lawyer's Duty to the Court: Lessons from *Blake v. Blake*
November 2019

Katherine Thornton, associate, and Jackie van Leeuwen, articling student, discuss a lawyer's duty to the court and the lessons learned from the Superior Court of Justice case *Blake v. Blake*.

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Episode 16: Ethical Dilemmas in Construction Law
December 2019

Brendan Bowles, partner, and Ivan Merrow, associate, discuss ethical dilemmas in construction law.

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Episode 17: An Evening with the Bench
January 2020

Kaleigh Du Vernet, associate, and Myles Rosenthal, articling student, provide commentary and discuss important takeaways from An Evening with the Bench, an OBA event held on November 6, 2019.

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Episode 18: Force Majeures
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Madalina Sontrop, associate, and Jackie van Leeuwen, articling student, discuss force majeure events and clauses in the context of the global COVID-19 pandemic.

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Episode 19: COVID-19, Ontario's Essential Workplaces and the Suspension of Limitation Periods and Procedural Time Periods
April 2020

John Paul Ventrella, associate, and Jacob McClelland, associate, discuss the effect of Ontario's regulations under the Emergency Management and Civil Protection Act, the list of essential workplaces and the suspension of limitation and procedural time periods on the construction industry.

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Episode 20: Updates to Ontario's Essential Construction Workplaces and Court Notices to the Profession
May 2020

Pavle Levkovic and Derrick Dodgson, associates, discuss construction-related updates to the Government of Ontario's List of Essential Workplaces and the Ontario Superior Court of Justice's Notices to the Profession.

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