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NEWSLETTER

IN THIS ISSUE

Case Comment: *R&V Construction Management Inc. v. Baradaran*

On May 21, 2020, the Ontario Divisional Court released its decision in *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111. This highly anticipated decision marks the culmination of a roller coaster of litigation with widespread implications concerning the powers of a referee under the *Construction Act*, procedural fairness, and lawyers' obligations when acting against self-represented litigants.

Background

In 2016, Manoucher Baradaran (the "Owner") hired R&V Construction Management Inc. (the "Contractor") to perform certain repair work and renovations following the flooding of his home. Disputes ultimately arose and the Contractor preserved a Claim for Lien and perfected its claim by commencing an action.

The Contractor moved under section 58 of the *Construction Lien Act* (as it then was, hereinafter referred to as the "Act") and obtained both a judgment referring the action to a master for trial, and an order for trial with a master, in accordance with the usual procedure for a lien action in Toronto.

The Owner moved under section 47 of the Act for an order "discharging [the Contractor's] lien and dismissing the

action or, in the alternative, an order reducing lien security." Importantly, it was this motion and only this motion that was before the master.

At the hearing, the master characterized the motion as a motion for summary judgment and found that she had jurisdiction to use the so-called Enhanced Powers granted to judges on such a motion under Rule 20.04(2.1) of the *Rules of Civil Procedure*. Under this Rule, the Enhanced Powers allow a judge to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence, in determining whether summary judgment ought to be granted or not, i.e. whether there is a genuine issue requiring a trial.

In support of her finding, the master referred to section 58(4) of the Act, which provides as follows:

> **Powers of master on reference** — A master or a case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleadings and the giving of directions to a receiver or trustee appointed by the court.

The Owner, who was self-represented at the hearing, took the position that his motion should be granted because the Contractor's principal had died prior to trial without his evidence being preserved. The Owner argued, accordingly, that his sworn evidence could not be challenged and thus judgment must be granted in his favour.

The Contractor took the position that there was a genuine issue requiring a trial and presented evidence in support of its Claim for Lien being proven.

At the end of the hearing, the master ruled as follows: "My disposition is based on finding that there are no genuine issues for trial. There is the best evidence. R&V has proven a lien claim…". Judgment was accordingly granted in favour of the Contractor.

Lower Court Decision

The Owner moved to oppose the master's report. The Superior Court held that the master exceeded her jurisdiction by employing the Enhanced Powers. The motions judge reasoned:

> 1. In *RSG Mechanical Inc. v. 1398796 Ontario Inc.*, 2015 ONSC 2070 ("*RSG Mechanical*"), the Divisional Court held that a master "does not, for the purposes of the reference, obtain the standing of or become a judge." The motions judge found that he was bound by this case.
>
> 2. Masters are divided on their jurisdiction to use the Enhanced Powers.
>
> 3. The Superior Court has held that "a master does not have the power to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence that is granted to a judge on a summary judgment motion, pursuant to Rule 20.04(2.1)." [1] The motions judge found that the Divisional Court and Superior Court were accordingly unanimously aligned in finding that masters may not use the Enhanced Powers.
>
> 4. There is nothing in the Act to suggest that masters may use the Enhanced Powers.

1. *Kieswetter Demolition (1992) Inc. v. Traugott Building Contractors Inc.*, 2014 ONSC 1397, at para. 4 (Sup. Ct. J.) ("*Kieswetter*").

The Contractor appealed this decision to the Divisional Court.

Divisional Court Decision

Although the appeal was dismissed, the Divisional Court disagreed with the motion judge's findings in respect of the powers available to a master on reference under the Act.

First, the Divisional Court noted that *RSG Mechanical* does not concern the procedural powers of a referee in a construction lien action. That case involved a master's decision to not follow superior court precedent. The master on reference had concluded that because it had "all the jurisdiction, powers and authority of the court…" the master had obtained the standing of a Superior Court judge and was accordingly not bound by Superior Court precedent. The Divisional Court, however, held that a master on reference's report is always reviewable by the Superior Court and as a matter of principle, "precedent binds if it comes from a court that has the power to review the decision of the court applying precedent." As such, while a reference may give a referee the jurisdiction, powers and authority of a judge, it does not give a referee the standing of a judge. *RSG Mechanical* accordingly did not apply to this case.

Second, the Divisional Court noted that while there are masters who have concluded that they do not have Enhanced Powers when hearing summary judgment motions,[2] these masters were not masters on reference. That is, they did not obtain the status of a referee under the Act. In fact, there had been no decision by a master on reference that concluded that referees may not use the Enhanced Powers.

2. See, for example, *90 St. George St. v. Reliance Construction*, 2012 ONSC 1171, at paras. 28 and 36 (Master McLeod, as he then was); *Campoli Electric v. Georgian Clairlea*, 2017 ONSC 2784 (Master Short).

The question remained open for the Divisional Court to decide.

Third, the Divisional Court noted that the issue of a referee's powers under the Act was not at issue in *Kieswetter*. Rather, Heeney R.S.J.'s *dicta* in *Kieswetter* addressed the powers of a master **not** on reference who may not use the Enhanced Powers on a summary judgment motion. As such, the Divisional Court and the Superior Court were not unanimous in finding that a master may not use the Enhanced Powers, as was found by the motions judge.

Finally, the Divisional Court addressed a master on reference's authority under the Act to use the Enhanced Powers. The motions judge reasoned that a plain reading of the Act suggested that a "summary trial", not summary judgment, is the legislative choice of remedy under the Act. The Divisional Court, however, found that this interpretation would fly in the face of forty years of practice under the Act and that motions under Rules 20 and 21 (dispositions without trial, including, summary judgment) "may be brought before a master, if leave is granted, in cases referred to the master for trial under the [Act]".

In sum, the Divisional Court noted that section 67 of the Act made clear that a construction lien referee's jurisdiction is not limited to "summary trials" but includes appropriate interlocutory proceedings. The Act requires a summary process, not a summary trial. While summary trials may be a "good solution" in some cases, in others, disposition without a trial, such as by summary judgment, may be the more "summary", and thus appropriate, solution. Indeed, section 67 of the Act accords a master the power to consent to a summary judgment motion being brought under Rule 20 where such disposition without trial "would expedite the resolution of the issues in dispute". If the master who gives such consent is a referee, the master on reference has the powers given to him or her under section 58 of the Act, which includes the Enhanced Powers. On the other hand, if the master who consents to hearing a motion for summary judgment is not a referee, then the master's powers are limited to those given to him or her under the *Rules of Civil Procedure*.

The motions judge accordingly erred in its holding that the master, as a master on reference, did not have jurisdiction to use the Enhanced Powers on a motion for summary judgment. Notwithstanding, the Divisional Court held that the master nevertheless denied the self-represented Owner procedural fairness in granting judgment to the Contractor.

The Divisional Court found that the master incorrectly described the motion as a motion for summary judgment. A motion under section 47 of the Act is not a motion for summary judgment. It is always a defensive motion and "does not provide a means for the plaintiff to move for judgment." As such, the Contractor's response to the Owner's motion did not put the Owner on notice that judgment could be granted against him, thus denying him procedural fairness when judgment was, in fact, granted against him. Indeed, the Contractor was clear in stating its position that it was only seeking a trial, not judgment. In sum, the Divisional Court affirmed on the matter of general interest that a master on reference may use the Enhanced Powers in disposing of a summary judgment motion. However, in terms of the merits of specific interest to the parties, the Divisional Court dismissed the Contractor's appeal on the basis that summary judgment had been granted without a motion by the Contractor and with the Owner having been deprived of procedural fairness on the unique facts of this case.

The Court accordingly remanded the case back to another construction lien master to proceed on its merits.

Implications

The main proposition to come from this case is that a construction lien referee may use the Enhanced Powers when deciding a motion for summary judgment. This decision, however, was decided under the *Construction Lien Act* (i.e. the *Construction Act* as it read prior to July 1, 2018), where the list of possible referees under section 58 of the Act only included masters, case management masters and persons agreed on by the parties. Since July 1, 2018, this list has expanded to include deputy judges of the Small Claims Court or the Small Claims Court Administrative Judge, where jurisdiction allows.

So, does this mean that decision makers in the Small Claims Court may invoke the Enhanced Powers?

While the Divisional Court was careful in crafting its language to ensure that this decision applies to the powers of any construction lien referee, not just a master on reference, *it would seem* that a referee in the Small Claims Court would still not be able use the Enhanced Powers because such powers are established under Rule 20 of the *Rules of Civil Procedure* and matters in the Small Claims Court are decided under the *Rules of the Small Claims Court*, not the *Rules of Civil Procedure*. Indeed, the *Rules of the Small Claims Court* do not even contemplate motions for summary judgment. As the Ontario Court of Appeal noted in *Riddell v. Apple Canada Inc.*:[3]

> In [*Van de Vrande v. Butkowski*, 2010 ONCA 230], this court held that motions for summary judgment based on principles emanating from r. 20 of the *Rules of Civil Procedure* are not available under the [*Rules of the Small Claims Court*]. This holding was based on the court's conclusion… that the failure to provide for summary judgment motions under the *Rules of the Small Claims Court* was not a gap in those Rules but, rather, a deliberate omission.

Nevertheless, as my colleague Kaleigh Du Vernet and I discussed previously in an episode of *Building Insight*,[4] there is some uncertainty regarding the jurisdiction, powers and authority of Deputy Judges or the Small Claims Court Administrative Judge on reference and because this is still a novel issue, only time (and some case law) will be able to provide clarity.

It should also be noted that while summary judgment motions, and thus a referee's ability to use the Enhanced Powers, are not available under the *Rules of the Small Claims Court*, decision makers in the Small Claims Court, whether on reference or not, are already accorded a set of broad and flexible powers in order to "hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience."[5]

In addition, this case highlights the cautious approach members of the Law Society must take when managing a file with self-represented litigants. Some applicable rules under the Rules of Professional Conduct include Rules 7.2-1 and 7.2-9 and Subrule 5.1-2(i). Indeed, it is always prudent for counsel to "urge the unrepresented person to obtain independent legal representation."[6]

Finally, this decision may pour some cold water on the concept of "boomerang" summary judgment. Boomerang summary judgment is granted when the moving party (as the name suggests) moves for summary judgment, the non-moving party (as the name suggests) merely responds to the motion and does not bring a cross-motion for judgment itself, yet summary judgment is granted in favour of the non-moving party.

While this case did not in fact deal with summary judgment *per se* (it dealt with a section 47 motion), its reasoning bears somewhat of a similarity to the Court of Appeal's recent decision in *Drummond v. Cadillac Fairview Corporation Limited* ("*Drummond*"), where the Court held that the lower court's granting of "boomerang" summary judgment in favour of the non-moving party denied the moving party procedural fairness.[7] Indeed, like the position taken by the Contractor in this case, the non-moving party in *Drummond* did not seek judgment, but rather, a trial.[8] The Court of Appeal held that the moving party in *Drummond* was denied procedural fairness because *inter alia* "the motion judge failed to put [the moving party] on notice that he might grant judgment

3. 2017 ONCA 590, at para. 5.

4. "Episode 17: An Evening with the Bench" can be heard here.

5. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25.

6. An online LSO resource regarding managing files with self-represented litigants can be found here.

7. 2019 ONCA 447, at paras. 12-13.

8. Note that while the non-moving party in *Drummond* did not move for summary judgment, it did include judgment as an alternative form of relief in its factum.

against it and then afford [the moving party] an opportunity to address that litigation risk.[9]

Neither this case, nor *Drummond*, should be read as a flat-out rejection of the concept of "boomerang" summary judgment. Both of these cases may be cautiously read as placing an important limitation on the practice, that being procedural fairness.

As such, where a non-moving party is faced with a motion for summary judgment and wishes to seek summary judgment as well, the prudent course of action is for the party to formally move for summary judgment in a cross-motion and not wait for the boomerang to be thrown its way.

Conclusion

In *R&V Construction Management Inc. v. Baradaran*, the Divisional Court has provided some much needed clarity on the powers of a construction lien referee. However, as discussed above, the coming of the new *Construction Act* has led to a number of novel issues that are yet to be resolved. As such, this decision is likely only among the first of what will likely be a number of important decisions that will be released by courts in the coming years that will shape construction law and interpret the new Act.

9. 2019 ONCA 447, at paras. 12-13.

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Building Without an Architect – *AIBC v. Langford (City)*

Investment in residential construction for Canada is on a steep rise, according to Statistics Canada.[1] BuildForce Canada reports that overall, total residential construction employment is expected to increase by over 17,000 workers over the next decade.[2] Even during the COVID-19 pandemic, the residential construction industry and the professional renovations industry have shown that they are major contributors to economic activity, note the Canadian and Ontario Home Builders' Associations and the Building Industry and Land Development Association.[3]

Against this backdrop, between 2015 and 2018, Statistics Canada shows that architects have been increasing the percentage of their services when it comes to multi-family residential projects, yet decreasing services related to single family dwellings.[4]

In Canada, most statutes governing the practice of architecture have a requirement that for any residential building over a certain area and/or number of storeys, an architect must be engaged. However, if a project is of a lesser size or otherwise exempt from the relevant legislation, then a person who is not a licenced member of the profession may be permitted to take on such a project.

This leads to the question: Who decides when an architect is required for a project? If a developer chooses to proceed without one, contrary to relevant legislation pertaining to architects, should that developer be granted a building permit by a municipality?

In the recent British Columbia decision, *The Architectural Institute of British Columbia v. Langford*, 2020 BCSC 801, the City of Langford was of the view that it could permit a project which clearly required an architect to be constructed without one, as its role was not to enforce the *Architects Act*. The Architectural Institute of British Columbia (the "AIBC") disagreed and

1. https://www150.statcan.gc.ca/n1/daily-quotidien/200721/g-b001-eng.htm.

2. https://www.constructionforecasts.ca/en/media/press-releases.

3. https://www.globenewswire.com/news-release/2020/06/08/2044756/0/en/The-Residential-and-Non-Residential-Construction-Industry-Will-Lead-the-Post-COVID-19-Economic-Recovery.html.

4. https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2110019801.

brought the matter before the Supreme Court. The court sided with the AIBC, holding that Langford's decision to issue the permit without considering the *Architects Act* was unreasonable, and that the court's intervention was required to safeguard legality and rationality.

Background

The British Columbia *Architects Act* provides that only a person or architectural firm registered with the AIBC may practice architecture. Under the Act, a person is deemed to practise architecture if the person is engaged in the planning or supervision of the erection or alteration of buildings for the use or occupancy of persons other than himself or herself. There are exceptions for buildings with a gross area of less than 470 m^2.

In 2016, the City's Chief Building Inspector issued a building permit for the construction of a residential/commercial strata complex. The project was comprised of a five-unit townhouse complex with commercial space. It was clear from the application that the project did not involve an architect. The project was designed, and drawings were completed, by a designer. The building's gross area exceeded 470 m^2, in which case the *Architects Act* required the involvement of an architect.

After the construction of the building had been completed, and after occupancy permits were issued, an individual living in the complex contacted the AIBC, expressing concern that the complex had not been designed by, and constructed under, the supervision of an architect. The AIBC investigated and met with the designer, who acknowledged that he was in violation of the Act because he provided design services. The AIBC wrote to the City, expressing its view that the decision to issue a building permit without having determined that the drawings for the building complied with the Act was unreasonable. The AIBC requested a written commitment from the City that it would confirm compliance with the Act in its permitting process in the future.

The City acknowledged that the Act was arguably an "enactment respecting health or safety", and that the building bylaw permitted it to refuse to issue a building permit where the proposed work did not comply with an enactment respecting health or safety. The City argued, however, that this power was discretionary, and that building officials were not required under the bylaw to take the Act into account when considering building permit applications. According to the City, all it had to do was to review applications for compliance with the British Columbia *Building Code*.

AIBC also pointed to s. 2.3.6.1 of the by-law, which provided that "where in the opinion of the Chief Building Inspector the site conditions, the size or complexity of the building, part of a building or building component warrant, the Chief Building Inspector may require design and field review by a registered professional", and refuse to issue a permit without such prior review.

There was evidence before the court that the approach of municipalities throughout British Columbia was not uniform on this issue. Cities like Vancouver and Surrey decline to issue permits where architects are required but have not been involved, while other cities, like Langford and Kamloops, have issued permits in the same circumstances.

The Regulatory Power of Municipalities

As the Supreme Court of Canada has set out in cases like *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 and *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, while municipalities have a statutory power to regulate construction by by-law, whether they do or not is a policy decision. However, once municipalities make a policy decision in favour of regulating construction by by-law, they acquire an operational duty to enforce the provisions of the by-law. Once a municipality makes the policy decision to inspect building construction, it places itself in such proximity to persons who ought reasonably to rely on such inspections that it owes them a duty of care not only to perform such inspections, but to perform them with a reasonable degree of competence.

On the standard of review of administrative decisions, the court distilled the following principles from the recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

> Where a decision maker has made a decision without providing reasons and based on a disputed interpretation of their empowering legislation, a reviewing court should follow these principles:
>
> a) Examine the decision as a whole and the outcome that was reached;
>
> b) Consider whether a decision maker's interpretation of a statutory provision is consistent with the text, context and purpose of the provision at issue;
>
> c) Consider whether the interplay of text, context and purpose leaves room for more than one reasonable interpretation of the statutory provision, or aspect of the statutory provision, that

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is at issue;

d) Examine the decision in light of the relevant constraints on the decision maker, focussing the analysis on the outcome rather than on the decision maker's reasoning process; and

e) Consider whether the outcome of the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Based on those principles, the court was tasked with answering the following questions:

1. Did the Chief Building Inspector act unreasonably in issuing the building permit given his discretionary authority to refuse the permit pursuant to s. 2.3.9?

2. Did the Chief Building Inspector act unreasonably in issuing the building permit given his discretionary authority to require "design and field review by a registered professional" pursuant s. 2.3.6.1?

Both questions were answered in the affirmative.

The *Architects Act* as an "Enactment Respecting Health and Safety"

Since s. 2.3.9 of the by-law provided the Chief Building Inspector with authority to refuse to issue any permit where the proposed work does not comply with any enactment respecting health or safety, the first issue before the court was whether the *Architects Act* was such an enactment. The City argued that it was not:

> The *Architects Act* is not "an enactment respecting health and safety" as that term is used in the Building Bylaw. While it may be true that the object of the Legislature in enacting the *Architects Act* was to safeguard the public, the *Architects Act* does this through a professional regulatory scheme. The *Architects Act* regulates people. It does not establish standards for health and safety. It does not regulate design or construction, per se.
>
> The references in the Building Bylaw to "enactments respecting health and safety" are to be interpreted as being references to enactments that regulate health and safety matters (e.g., enactments that regulate design or construction, per se). An example of such an enactment is the sewerage system regulation under the *Public Health Act*.

The court disagreed. It cited to precedent in British Columbia that the courts in that province have always considered the *Architects Act* to be an enactment concerning health and safety: *Architectural Institute (British Columbia) v. Lee's Design & Engineering Ltd.*, 1979 CarswellBC 837 (S.C.); *Architectural Institute (British Columbia) v. Francour*, 1962 CarswellBC 191 (S.C.); aff'd 1963 CarswellBC 87 (C.A.); aff'd 1964 CarswellBC 29 (S.C.C.). As early as 1939, the British Columbia Supreme Court, in *Rex. v. Dominion Construction Company Limited* (1939), 1 W.W.R. 653, held as follows (emphasis added):

> "In my view **the paramount object of the Legislature was to safeguard the public** who resort to public buildings, such as theatres, churches, hotels, etc. If the erections are to be used exclusively by the corporation in question or where the structures do not cost more than $10,000 or where they are for storage of produce of agricultural associations then corporations are excepted, thus protecting the public against the exploitation of contractors and builders by the erection of unsafe structures - an additional security to those already

> existing by way of government or municipal inspection. The good old maxim 'salus populi est suprema lex' still survives."

The court in *Langford* held that considering the textual, contextual and purposive constraints on any interpretation of the Building Bylaw, the only reasonable interpretation is that the Act is an "enactment respecting health or safety". Given that conclusion, the court held the City's conduct was unreasonable:

> It is not a rational or acceptable outcome that a municipal building permit could be issued for a building which has clearly been designed in contravention of a relevant provincial statute respecting health and safety, that is, the Act.
>
> The Chief Building Inspector had the discretionary authority under Building Bylaw, s. 2.3.9 to refuse the building permit for non-compliance with the Act. His or his staff's decision to issue the building permit without considering an enactment respecting health or safety is inconsistent with the legal constraints imposed on him by the governing statutory scheme and other statutory law. For these reasons, I conclude that the Chief Building Inspector's decision to issue the building permit was unreasonable.

Municipality's Authority to Require the Involvement of an Architect

Section 2.3.6.1 of the by-law provided that the Chief Building Inspector could require design and field review by an architect, where in the opinion of the Chief Building Inspector the site conditions, the size or complexity of the building, part of a building or building component warranted it.

The City again argued that while that section gave the City the authority to require design by a registered professional, including an architect, in circumstances where the *Building Code* did not otherwise require it, it did not mean that the City could not issue a building permit in this case. Again, the court disagreed, finding that ignoring the *Architects Act* could not be reasonable:

> It is fundamental to the concept of reasonableness that relevant factors be taken into account in the exercise of the discretion. If relevant factors are not taken into account, a discretionary decision can be said to be unreasonable.

The City's final argument was that when issuing building permits, it proceeded in accordance with the requirements of the by-law and, in turn, the *Building Code*. In this case, the *Building Code* did not require an architect. The court's simple answer was that the *Building Code* is a regulation under the *Building Act*, and the *Architects Act* is a statute. As such, the *Building Code* could not take precedence over the *Architects Act*.

In the end, intervention by the court was required to safeguard legality and rationality. The court declared that the decision of the Chief Building Inspector of the City of Langford to issue a building permit for the property in these circumstances was unreasonable.

The AIBC issued a statement noting that the BC Supreme Court's decision was a positive outcome which clarified the interplay of the *Architects Act* and the municipal building permitting process in British Columbia. The AIBC highlighted that the Act is clearly a law relating to the health and safety of the public and that architects' involvement in projects minimizes public risk through their training, professional regulation, insurance coverage and required continuing education.

This decision will likely serve as a precedent in other jurisdictions, particularly as the residential industry continues to expand at a rapid pace and issues such as affordable housing, the "missing middle" and densification of urban areas have the attention of municipal governments across Canada.

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Specifying Project Team Members in a Tender Submission: *Aquatech Canadian Water Services Inc. v. Alberta (Minister of Environment and Parks)*

Overview & Facts

In *Aquatech Canadian Water Services Inc v. Alberta (Minister of Environment and Parks)*, 2020 ABCA 153, Aquatech was an unsuccessful bidder that participated in an Alberta Minister of Environment and Parks request for proposal process. The RFP process was undertaken by Alberta to award a contract for the "operation, monitoring and servicing of water and wastewater facilities in the Kananaskis region of Alberta." Aquatech brought an application for judicial review of Alberta's decision to award the contract to H2O Innovations Inc. Aquatech claimed that H2O's RFP response failed to comply with a mandatory requirement of the RFP that, in accordance with the principles of Canadian tendering law, could not be waived by Alberta. The specific mandatory requirement of the RFP at issue was the requirement that bidders "have at least five in-house certified operators with Level 1 to perform the services under the contract." H2O did not expressly provide the names of its certified operators that would be assigned to complete the contract works in its RFP response. However, the Court of Appeal of Alberta upheld the lower Court's decision that H2O's RFP response was both: (i) compliant with the mandatory provision of the RFP, and (ii) substantially compliant with the RFP provisions such that the Owner could waive the minor irregularity pursuant to an included discretion clause.

Application for Judicial Review, Award of Public Water Management Contract

Aquatech chose to apply for judicial review because the tender documents included a liability limitation clause that may have limited Aquatech's ability to bring an action for breach of contract. Generally, judicial review is "only available where there is an exercise of state authority and where that exercise is of a sufficiently public character": *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, para 14. Where a public body makes a decision that is largely private in nature, it still may be brought within the purview of public law if it is "coloured with a [sufficient] public element, flavour or character": *Air Canada v. Toronto Port Authority*, 2011 FCA 347, para. 60. Notably, the Alberta Court of Queen's Bench held that Alberta's procurement of the water management contract satisfied the *Wall* criteria and was subject to judicial review. After determining that "the decision-makers in this case were government employees acting for the AEP who was acting as an agent for the Crown", the court held that "the procurement of [the operation of water treatment plant] services takes on a public dimension that may not be present in other forms of contract between the government and other private concerns": *Aquatech v. Alberta (Minister of Environment and Parks)*, 2019 ABQB 62, paras 19, 25. The Alberta Court of Appeal did not comment on the availability of judicial review as the issue was not cross-appealed by Alberta (*Aquatech Canadian Water Services Inc v. Alberta (Minister of Environment and Parks*), 2020 ABCA 153 at paras. 13–14).

Contract A, Mandatory Compliance – *Double N Earthmovers* Exception

Contract A requires, *inter alia*, that the owner must not accept a bid that is not compliant with the terms of the tender documents: *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 SCR 619. However, the Supreme Court of Canada in the 2007 decision of *Double N Earthmovers Ltd v. Edmonton (City)*, 2007 SCC 3, created an exception to the strict compliance requirement. The *Double N Earthmovers* exception effectively stipulates that, unless otherwise expressly stated in the tender documents, a bid will be deemed compliant with a mandatory provision of the tender documents where it "commits to comply with [that] mandatory condition in the tender documents."

This exception is based on the proposition that "the nature of the bidding process… represents a commitment to comply with what is bid" (*Double N*, para. 42). Therefore, depending on the language of the tender documents, a bidder may comply with a tender requirement at the time of tender by including in its bid a representation that it will comply with the requirement at the requisite time.

In *Aquatech*, H2O did not expressly name which licenced operators would be dedicated to the contract work in its RFP response. However, H2O provided "an organization chart and information about how it deals with staffing and recruiting" and "a list of nine names and their qualifications which exceeded the requirements in the request for proposal." The court held that in providing this information and representing that "it would have the requisite staffing in place to perform the contract", H2O had committed to comply with the mandatory condition of the RFP documents. Thus, H2O's bid was compliant with the RFP documents under the strict compliance exception from *Double N*.

Contract A, Mandatory Compliance – Discretion Clauses & Substantial Compliance

Notwithstanding the overarching mandatory tender compliance imposed by Contract A, many owners will include in their tender documents a discretion clause. Discretion clauses generally stipulate that the owner will have the right to waive minor errors, omissions or irregularities in a bid. Discretion clauses are generally upheld as valid where the allegedly non-compliant bid is *substantially* compliant: *Steelmac Ltd v Nova Scotia (Attorney General)*, 2007 NSSC 156. A non-compliant bid will be substantially compliant if, *objectively*, it does not deviate from the mandatory requirements of the tender documents in a *material* way: *Graham Industrial Services Ltd v Greater Vancouver Water District*, 2004 BCCA 5. As an example, some considerations that ought to be evaluated when determining whether a non-compliance is *objectively material* are: (i) whether the non-compliance gives the non-compliant bidder an unfair advantage over other bidders, (ii) whether the non-compliance truly matters, (iii) the language of the relevant provisions of the tender, and (iv) the degree to which the bid is non-compliant.

In *Aquatech*, Alberta's tender documents included a discretion clause which stated that Alberta could "waive an irregularity or noncompliance with the requirements of this [RFP] where the irregularity or noncompliance is minor or inconsequential." The court held that H2O's bid was substantially compliant and that Alberta was justified in waiving the minor non-compliance. In so doing, the court rightfully considered "the conditions of tender, matters affecting fairness to other bidders, impact on price and work in relation to the overall bid price and nature of work". H2O's bid was substantially compliant because its RFP response committed to staffing the project in accordance with the RFP documents and the failure to allocate specific licenced operators to the contract was not unfair to other bidders and did not affect the bid price or nature of the work.

Conclusion

Although the Court of Appeal for Alberta ultimately held that H2O's failure to specify which of its listed licenced pump operators would be assigned to the project was not a material and substantial non-compliance, this is not a rule that can be applied universally. In completing an objective analysis for material bid non-compliance, reference must always be made to the underlying facts and tender provisions. For example, where tender documents include a privilege clause, an owner is permitted to take a more nuanced view of project cost than just the bottom-line price. In such a case, a failure to provide specific names and qualifications of key project personnel may be found to be a substantial and material non-compliance. In *Aquatech*, the project team members at issue were Level I Certified Water and Waste Wastewater Operators as prescribed by the regulations of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12. The court effectively held that employing one licenced operator on the project over another would not have an impact on work in relation to the nature of the work. On many projects, however, the specific individuals that populate the project management team are of critical importance to the project. Certainly not all project managers, superintendents, engineers, architects or other project leaders are identical. To avoid any undesired scrutiny over the compliance of one's bid, bidders would do well to name specific intended project team members on their tender submissions where requested. Should an intended project team member become unavailable at some point after contract award, depending on the language of the contract, it is likely that a replacement could be installed with the consent of the owner.

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Rectification of Contracts - *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273

Rectification is an equitable remedy available to correct a contract document that fails to accurately record the parties' true agreement. As stated in *Heintzman and Goldsmith on Canadian Building Contracts*, rectification at first glance seems like a useful remedy to correct building contracts, since there are any number of aspects regarding the scope, dimension and details in a building contract about which the parties could be mistaken, and particularly given the fact that due to the pyramidal structure of the construction industry, the possibility of mistake increases the further one goes down the pyramid.

The recent Ontario Court of Appeal decision in *2484234 Ontario Inc. v. Hanley Park Developments Inc.* is noteworthy because it demonstrates that even though strict conditions must be met before rectification can be granted, the court will not tolerate unconscionable behavior by a contracting party.

The court applied the well-known test in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56. The error in the document sought to be rectified can result from a common mistake or a unilateral mistake. In case of a common mistake, rectification of an agreement is available upon the court being satisfied that:

1. The parties had reached a prior agreement whose terms are definite and ascertainable;

2. The agreement was still effective when the instrument was executed;

3. The instrument fails to record accurately that prior agreement; and

4. If rectified as proposed, the instrument would carry out the agreement.

In the case of a unilateral mistake, in addition to the four requirements set out above, the court must also be satisfied that:

5. The party resisting rectification knew or ought to have known about the mistake; and

6. Permitting that party to take advantage of the mistake would amount to 'fraud or the equivalent of fraud'.

The case before the Court of Appeal concerned a claim for rectification of a transfer agreement granting an easement over four parts of a property. The purpose of the easement was to construct an access road to a subdivision to be developed by the appellant. When the developer discovered that a fifth part of the property was also required for the access road, it sought rectification of the agreement to include a fifth part.

The application judge dismissed the application for rectification on the basis that the developer had failed to meet steps 3 and 6 of the *Fairmont* test. With respect to step 3, she held that the Transfer Agreement accurately recorded the prior agreement because "Part 5 was never discussed nor made the subject matter of a prior agreement". With respect to step 6, she held that permitting the respondent to take advantage of the appellant's mistake did not amount to fraud or its equivalent in this case because there was no clause requiring the respondent to convey "all lands necessary for the development of the access road", the respondent did not intentionally deceive the appellant, and the appellant should have verified the boundaries pursuant to the due diligence condition.

The appellant developer argued that the parties' correspondence made it clear that the developer was seeking a transfer of and easement over the parts of the adjacent property that would allow development of the access road and that the respondent communicated that it was agreeable to doing so, even while it was specifying one less part of its property than it knew would be sufficient.

The respondent did not dispute that it knew that Parts 1 to 4 were insufficient for the construction of the access road but argued that it simply never agreed to transfer Part 5 and that rectification was therefore unavailable. The appellant should have verified what it needed and could not now complain if it signed an agreement that did not achieve its goals.

The prior agreement with definite and ascertainable terms

The respondent's lawyer had sent a letter to the developer referring to "parcel of land outlined as Parts 1, 2, 3 and 4" and stating that "Engineer for the project has advised my client that these 4 parts will be sufficient for the road which is to be built to access the subdivision". This letter set out terms

and called for their acceptance. The Court of Appeal held that this was sufficiently definite and ascertainable prior agreement to satisfy the *Fairmont* test.

Therefore, the respondent had promised to convey Parts 1 to 4 on the basis that they were sufficient for access, and the respondent acknowledged that the purpose of the agreement was to facilitate the development of the proposed subdivision.

That language was enough to distinguish the case from that in *Fairmont*:

> 58 Two important consequences flow from a consideration of this language.
>
> 59 First, these terms of the antecedent agreement make this case quite different from Fairmont. That the lands conveyed would be sufficient to build the Access Road and would facilitate development was not simply an "aspiration", an "unspecified plan", an "intended effect", or an "inchoate or otherwise undeveloped "intent"", as was tax neutrality in Fairmont. That the lands would be sufficient for the Access Road and thus facilitate development is addressed in the terms of the antecedent agreement itself.
>
> 60 Second, the application judge's statement that there was no representation or warranty by the respondent as to what was required for the Access Road was made without adverting to these terms, let alone giving them meaning.
>
> […]
>
> 65 The March 7 letter was in response to a direct request of the appellant for parts of the Adjacent Property that would allow it to meet the condition in the Draft Plan of Subdivision requiring the Janlyn Crescent connection. That was the genesis and aim of the transaction. These objective facts underscore the importance of the lands being described in the antecedent agreement as "sufficient" and an easement over them as facilitating development. In light of the factual matrix, these words cannot be viewed as surplus. An interpretation that allows the contract to function in furtherance of its commercial purpose is preferred over one that does not.

While the application judge found that Part 5 had never been expressly discussed, the Court of Appeal held that even if that were so, that did not determine the matter.

Since the respondent promised to convey Parts 1 to 4 on the basis that they were sufficient, it was obligated to do what was necessary to make them sufficient and which was in its power to do, and that was to include Part 5. With Part 5, the agreement made business sense; without it, did not. It was clear to the court that had the parties been asked by an officious bystander about whether Part 5 would be included if the Parts specified as sufficient were not in fact sufficient, they would have answered: "obviously". The inclusion of Part 5 was therefore an implied term of the parties' true agreement.

It followed that the transfer agreement did not accurately record the parties' prior agreement because it did not fully record it.

Unconscionability

With respect to step 6 of the *Fairmont* test (permitting that party to take advantage of the mistake would amount to 'fraud or the equivalent of fraud), the application's judge finding that the respondent did not intentionally deceive the appellant was held not to have averted to the proper test. The Court of Appeal held that deceit or fraud in the strict legal sense was unnecessary; and that any conduct that would make it unconscientious for a person to avail himself of the advantage obtained, including all kinds of unfair dealing and unconscionable conduct", were sufficient. In this case, the respondent's principal testified that he was aware that parts 1 to 4 were insufficient if part 5 was not included but was also aware that the formal agreement only referred to parts 1 to 4. This conduct was designed to lead, or knowingly allow, the appellant to think it was getting what it needed and therefore satisfied step 6 of the rectification test.

In those circumstances, the Court of Appeal rectified the transfer agreement to include Part 5 and ordered specific performance of the rectified agreement.

The case serves as both a demonstration of the power of this remedy and a timely reminder that very strict conditions must be met before the remedy becomes available. On the facts of that case, rectification was granted because the parties' true agreement was readily definable and ascertainable and one party had acted unconscionably to take advantage of the other's mistake. The mistake was one of detail, the Court preferred an interpretation that gave effect to the commercial purpose of the transaction over one that did not. Nevertheless, the decision affirms the limits of this equitable remedy. Rectification can correct a document to accord with both parties' true agreement, it cannot change an agreement to make it achieve one party's desired result.

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Triton Hardware Limited v. Torngat Regional Housing Association, 2020 NLSC 72

Overview & Facts

In *Triton Hardware Limited v. Torngat Regional Housing Association*, 2020 NLSC 72, Triton Hardware Limited ("Triton") was an unsuccessful bidder that participated in a Torngat Regional Housing Corporation ("TRHC") tender process for the construction of eight houses. The tender documents included a privilege clause that stated that "The Lowest of Any Quotes Will Not necessarily Be Accepted [*sic*]". The instructions to bidders stated that bids were to include "the total price for the material adjacent to each item" and that this included "all costs to deliver the material, taxes and wharf charges". Notwithstanding that Triton was the lowest bidder, TRHC awarded the contract to another bidder with whom they had contracted with in the past, White's Construction Limited ("WCL"). In awarding the contract to WCL, TRHC stated that it relied on the privilege clause included in the tender documents, that the cost difference between Triton and WCL was negligible (less than $1,000 per house), and that Triton's bid was non-compliant. Triton applied to the Newfoundland and Labrador Supreme Court ("NLSC") for summary trial claiming that by awarding the construction contract to WCL, TRHC breached the terms of tender Contract A. In awarding damages to Triton, the NLSC determined that: (i) the matter was appropriate to be determined by way of summary trial and judgment, (ii) Triton was the lowest compliant bidder, and (iii) that TRHC was not entitled to rely on the privilege clause to award the contract to WCL.

(i) Application for Summary Trial and Judgment

The NLSC allowed Triton's application for summary trial under Rule 17A of the *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Schedule D (similar, but not identical, to Rule 20 of Ontario's *Rules of Civil Procedure*). At the NLSC, summary trial proceedings may be used to decide factual and legal issues where the facts are not in dispute or are easily ascertained by the Court: *LHE v.*

DAE, 2019 NLCA 66. Where there is a genuine issue for trial, the Court may still proceed by way of summary trial where it is satisfied that the evidentiary record is "sufficient for adjudication": *Pomerleau Inc v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2014 NLTD(G) 19. Triton and TRHC were in agreement that the fundamental principles of Canadian tendering law applied. The only disagreement was whether Triton's bid was factually compliant since it included HST in the bid prices. However, the NLSC concluded that this issue could be decided based on the evidentiary record put before it.

(ii) Contract A, Mandatory Compliance – Substantial Compliance

Upon submission of its bid, Triton entered into Contract A with TRHC. Contract A requires that the owner must not accept a bid that is not compliant with the terms of the tender documents: *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 SCR 619. No evidence was given regarding whether the tender documents included a discretion clause (e.g. "the owner will have the right to waive minor errors, omissions or irregularities"). However, the NLSC held that the prevailing test for tender bid compliance is substantial compliance and not strict compliance: *Coady Construction & Excavating Limited v .Conception Bay South (Town)*, 2018 NLSC 115; *Cougar Engineering and Construction v. Newfoundland and Labrador*, 2015 NLCA 45. The TRHC claimed that Triton's bid was non-compliant with the tender call because it included HST in the bid prices. However, this argument was rejected because the instructions to bidders expressly required the submission of "total prices" which included "all costs to deliver the material, taxes and wharf charges". Accordingly, the NLSC held that Triton's bid was compliant with all material conditions of the tender call. In so doing, the NLSC noted that "TRHC's reliance on the privilege clause… is evidence from which there is a compelling inference that Triton was a compliant bidder."

(iii) Contract A, Mandatory Compliance – Privilege Clauses

Privilege clauses generally stipulate that an owner need not accept the lowest or any tender. A well-drafted tender document package will tell the bidder which criteria the owner will consider in determining which bidder it will enter into Contract B with. An owner must take care to ensure that any privilege clause included is clear, concise and congruent with the tender documents. This is important because privilege clauses do not permit the owner to select a successful bidder on the basis of undisclosed criteria: *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 SCR 619. Privilege clauses do not operate independent of the tender documents: *Martel Building Limited v. R*, 2000 SCC 60, para 82.

In *Triton*, the tender documents expressly stated that "[t]he awarding of the contract will be based on the lowest average price" and that "The Lowest of Any Quotes Will Not necessarily Be Accepted [*sic*]". There was no indication in the tender documents of any bid evaluation criteria other than price. The NLSC stated that "[a]t most, the wording [of the privilege clause] supports that the intention of TRHC was to award the contract to the lowest compliant bidder or not award the contract at all." Illustrating the importance of clear drafting, the NLSC helpfully stated that "[i]f TRHC wanted to have the flexibility to choose a contractor whom TRHC had previously hired, TRHC needed to make this clear in the Instructions to Bidders". In addressing the claim made by TRHC that the cost difference between the Triton and WCL bids was negligible, the NLSC reiterated that if TRHC wanted the ability to choose from a pool of comparable bids, it should have made that clear in the tender documents. Consequently, it was held that TRHC could not rely on the privilege clause to award to the contract to WCL, and in doing so, TRHC breached its Contract A obligations to Triton.

Calculation of Damages

In assessing damages, the NLSC upheld the long-standing principle that the normal measure of damages for an owner's breach of Contract A is the bidder's lost profit: *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 SCR 619, paras 59–60; *Naylor Group Inc v. Ellis-Don Construction Ltd*, 2001 SCC 58, para 73. Triton, however, also claimed damages for the cost of preparing its bid. In striking down this portion of Triton's claim, the NLSC held that awarding damages for the cost of bid preparation is "not money that would put Triton in the same position it would have been in if the contract had been honoured".

Conclusion

Summarily, *Triton* underlines the importance of drafting clear and concise tender documents. In order for a privilege clause to permit an owner to select a bidder based on criteria other than price, those other evaluation criteria must be made clear in the tender documents. Otherwise, a standard privilege

clause will only permit the owner to: (i) award Contract B to the lowest compliant bidder, or (ii) not award Contract B at all. In the absence of clear and concise tender documents, an owner faces the risk of incurring re-tendering costs if it does not wish to enter into Contract B with the lowest compliant bidder. When determining bid compliance issues that arise solely from the interpretation of the tender documents, the Court may proceed by way of summary trial where the relevant tender documents and bids have been entered into evidence.

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The Adjudication Process in a Nutshell

The adjudication process commences when the Claimant delivers a written Notice of Adjudication to the Respondent as well as the Ontario Dispute Adjudication for Construction Contracts (ODACC). The Respondent may then provide the Claimant and ODACC with a Response to Notice of Adjudication.

After the Respondent receives the Notice of Adjudication, the Claimant and the Respondent have four (4) days to select an Adjudicator and obtain the Adjudicator's consent to act as per s. 13.9(6) of the *Construction Act*.

If the Parties cannot agree on an Adjudicator, either Party can ask the ODACC to appoint an Adjudicator. The ODACC will then appoint an Adjudicator within seven (7) days of receiving the appointment request.

The Adjudicator will conduct the adjudication in the manner he or she determines appropriate in the circumstances, in accordance with s. 13.12(4) of the *Construction Act*. Some adjudications may include a hearing by videoconference, some may have an in-person hearing, some may require a site visit, and some may proceed only with documents.

After an Adjudicator consents to adjudicate a dispute, the Adjudicator will contact the Parties to negotiate the Adjudication Fee. The Adjudication Fee may consist of a flat fee, or an hourly rate (plus disbursements). If the Adjudicator and the Parties cannot agree on an Adjudication Fee, the Adjudicator may ask the ODACC to set the fee. The ODACC will set the fee in accordance with the Schedule of Fees approved by the Attorney General for Ontario.

The parties to an adjudication are responsible for an equal share of the adjudication fees unless the Adjudicator orders otherwise (s. 13.10(3) of the *Construction Act*). Each Party to an adjudication will be responsible for their own costs, regardless of the outcome (s. 13.16 of the *Construction Act*). Pursuant to s. 13.17 of the *Construction Act*, an Adjudicator has the discretion to order a party to pay all or a portion of the other Party's costs where the Party acted in a manner that was "frivolous, vexatious, an abuse of process or other than in good faith".

When the Adjudicator communicates the adjudication process to the Parties, the Adjudicator will specify the supporting documents (and number of pages) that each Party may submit to the Adjudicator for consideration. The Claimant's supporting documents are due within five (5) days of the appointment of the Adjudicator. The Adjudicator will notify the Respondent as to when it must submit its supporting documents.

The Adjudicator will make a Determination within thirty (30) days from the day the Claimant submits its documents (the "Due Date"). The Due Date may be extended with the consent of all the Parties and the Adjudicator.

The ODACC will certify the Determination within seven (7) days of the Determination being sent to the Parties, which is available on the ODACC website.

Once the Parties have received the certified copy of the Determination and wish to move forward with enforcement, the following procedural steps are required:

1. The Certified Copy, along with two additional copies, is filed at the Civil Intake Office of the Superior Court of Justice (*Please note the hours of operations at the Civil Intake Office may vary due to COVID-19*);

2. The court will return a stamped and certified copy of the Determination;

3. A court-stamped copy must be delivered to the opposing party within ten (10) days of receipt; and

4. A party may proceed with enforcement proceedings if the opposing party refuses to pay by way of writ of execution or garnishment.

For more information and the *Glaholt Bowles Guide to the Conduct and Enforcement of Adjudication in Ontario*, please visit the Publications page on our website at https://www.glaholt.com/resources/publications.

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Roofmart Ontario Ordered to Disclose Customer Information to Tax Authorities

On May 11, 2020, the Federal Court of Appeal upheld a sweeping order for Canada's tax authorities to obtain customer information from Roofmart Ontario Inc. ("**Roofmart**") to investigate the group's tax compliance.

In the court's decision *Roofmart Ontario Inc. v. Canada (National Revenue)*, 2020 FCA 85 (CanLII), Roofmart was ordered to disclose business information and customer purchase history of unidentified businesses to the Canada Revenue Agency ("**CRA**"). As a result, Roofmart is required to deliver information to the CRA about its customers who spent over $20,000.00 annually with the supplier during the period from January 1, 2015 to December 31, 2017.

The information ordered to be disclosed to the CRA includes Roofmart's customers' name, contact information, business number, itemized transaction details, and all bank account information from credit applications or other records maintained by Roofmart.

Importantly, Roofmart was **not** under audit by the CRA during this period, and the disclosure order is not limited to any individual customers under audit by the CRA. The order operates as a dragnet, capturing Roofmart's customer information who are not otherwise targets of the CRA.

The Minister of Revenue applied for the order under section 231.2(3) of the *Income Tax Act* ("**ITA**"), and its companion provision under section 289(3) of the *Excise Tax Act* ("**ETA**").

The provisions allow the Minister of Revenue to acquire information from individuals about one or more "ascertainable" unnamed persons in order to verify those persons' compliance with the ITA and ETA.

In support of the application, the Minister of Revenue relied on a study by Statistics Canada that estimated 28% of the construction industry was "unreported or underreported". As the largest supplier of roofing companies in Ontario, Roofmart was targeted for the application.

Roofmart attempted to appeal the order from the lower court on several grounds, including that the tax authorities ought to be held to a higher standard of proof. Roofmart argued that a higher standard was appropriate to protect unnamed persons from undue invasions of privacy. The argument was not accepted by the appeal court. The court relied on its earlier decision in *eBay Canada Limited v. Canada (National Revenue)*, 2008 FCA 348 (CanLII), citing the Supreme Court of Canada case *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, where it held that taxpayers in a self-reporting system have a very low expectation of privacy when it comes to business records.

Roofmart further alleged that the Minister had not satisfied the ITA and ETA provisions' requirements that the group of persons was "ascertainable" or that the application was to "verify compliance" with their duties under those acts. The appeal failed on both counts. The court upheld the Minister's ability to compel information related to an unspecified or large group, as long as it was defined by a variable such as the $20,000 expenditure threshold. Even though the CRA official whose evidence underpinned the application could not explain on cross examination precisely how the information would be used to verify compliance, the court remained satisfied that his general explanation was sufficient. Given that the CRA official was not an auditor, and an auditor's evidence could have easily been filed in support of the Minister's application, this sets a low bar for future applications by the Minister.

Another argument advanced by Roofmart was that the application was *ultra vires*, meaning there was no jurisdiction to bring the application. Simply put, the CRA official who swore the affidavit in support of the application had not advanced evidence he was authorized to do so by the Minister of Revenue. The appeal court did not accept this argument, in part because the notice of application was authorized and brought in the name of the Minister of Revenue. Despite the fact that there was no evidence to suggest that the CRA official had the Minister's explicit authority to bring the application, and it was the Minister's burden to prove there was authority granted, there was also no evidence that the Minister's lawyers had proceeded without appropriate authority. This ground of appeal was unsuccessful.

The CRA's dragnet approach to investigating Ontario's roofing industry using information obtained through a large supplier may be considered by the industry to be a troubling development. Even in a self-reported tax system, businesses do have an expectation of privacy when they submit banking information to suppliers with account numbers, bank branch addresses, and other sensitive information. Statistics Canada is also a federal government entity. Although the CRA and Statistics Canada are different branches, the government in effect relied on evidence that it created to support an application to obtain private information about unnamed individuals not currently under tax compliance investigation.

More troubling is that the appeal court did not place any limits on how the obtained information may be used, despite that the ITA and ETA only authorize names to be collected for "verification" purposes. The CRA may now be in possession of sensitive personal banking information that it may then use not only for tax compliance investigations, but also for eventual collection and enforcement purposes, all without notice to the affected individuals.

Construction companies and stakeholders are well advised to revisit their recordkeeping and tax compliance practices in advance of any attention from the CRA. In particular, customers of Roofmart ought to be aware what information the company may have been required to disclose to the CRA in the wake of this decision.

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Notable Case Law

***White v. The Corporation of the Town of Bracebridge*, 2020 ONSC 3060**

When conducting building inspections, municipalities will not be held to a standard where they are required to act as insurers or guarantor for the renovation work. The municipality is not required to discover every latent defect or every deviation from the Code in renovations at the owner-builder's home where inspections are carried out according to an inspection scheme based on good faith policy decisions. That would be to hold the municipality to an impossible standard. It is required to conduct a reasonable inspection in light of all the circumstances of the case.

A municipality's obligation to ensure the premises is built in a manner that ensures the safety of future occupants does not cast upon the municipality any obligation to ensure that the building is completed exactly in accordance with the specifications set out for the development by the owner.

A municipality's duty is limited to detecting and ordering remedied those defects that are apparent on visual inspection during the staged inspections during construction. Inspectors do not have to continuously monitor the construction.

***Sustainable Developments Commercial Services Inc v. Budget Landscaping & Contracting Ltd.*, 2020 ABQB 391 (Master)**

Where a county leased land from a third party to stockpile aggregate for road building purposes, the contractor who hauled the aggregate to the site had no lien against that land, since the stockpiling did not constitute an improvement to the land, and the third party was not an "owner" for the purposes of the *Builders' Lien Act*.

***Mao v. Grove*, 2020 YKSC 23**

Where an owner has contracted to have construction work performed, a subcontractor who later claims its contract has been breached cannot bring an unjust enrichment claim against the non-contracting owner, even if the owner has benefitted from the work done under the breached contract. The remedy for that subcontractor against the non-contracting party is to place a builders' lien on the property within the allotted time. Having failed to do so, it cannot resort to a claim for unjust enrichment.

***Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 488**

On appeal from an order under s. 78 of the *Construction Act* to determine competing priorities between registered lien claimants and a registered mortgage in the context of a receivership, the parties sought directions from a single judge of the court on jurisdiction. Section 71(1) of the *Construction Act* provides for an appeal to the Divisional Court, while s. 193 of the *Bankruptcy and Insolvency Act* provides that an appeal lies to the Court of Appeal.

Justice Jamal adjourned the motion to be heard by a panel. The question whether an appeal lies within the jurisdiction of the Court of Appeal must be decided by a three-judge panel of the court. A single judge has no power to decide whether an appeal is within the jurisdiction of the court.

***Ken Wilson Architect Ltd. v. 101154620 Saskatchewan Ltd.*, 2020 SKQB 195**

One of the first Saskatchewan cases to discuss personal liability for a company's breach of trust in any detail. In the absence of Saskatchewan law, drawing guidance from Ontario law on point, the court held that the personal defendants were not liable for breach of trust. While being directors of the corporation, the personal defendants did not have day-to-day involvement in the operations. They were passive directors who had a peripheral role in the corporation at best. The fact that they were aware of an invoice rendered by the architect and that they signed resolutions authorizing the sale of the property leading to the vendor's trust fund was not sufficient to elevate their involvement and knowledge to the level necessary to satisfy the second prong of the test for personal liability. The personal defendants did not assent to, or acquiesce in, conduct that they knew or reasonably ought to have known amounted to breach of trust by the corporation.

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Building Insight Podcasts

Episode 17: An Evening with the Bench
January 2020

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

glaholt.com/linktopodcast17

Episode 18: Force Majeures
March 2020

Madalina Sontrop and Jackie van Leeuwen, associates, 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 and Jacob McClelland, associates, 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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Episode 21: Technology in the Practice of Law
July 2020

Keith Bannon, managing partner, and Myles Rosenthal, associate, discuss the use of technology in the practice of law and specific practice tips for navigating working from home.

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Episode 22: Our First Adjudication under the New *Construction Act*
August 2020

Patricia Joseph, associate, and Matthew DiBerardino, summer student, discuss Glaholt Bowles' first adjudication experience.

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