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IN THIS ISSUE

Force majeure Provisions in the Context of Outbreaks and Protests

Force majeure provisions are often overlooked, but when drafted and invoked properly, they can be useful risk allocation tools. In the construction context, they can be used to allocate risk in case of a shortage of raw materials, extreme weather or a labour strike, among other events. *Force majeure* clauses excuse a party's performance under a contract in full or in part, to the extent that the failure to perform is due to certain circumstances outside of the party's control. Generally, reliance upon a *force majeure* clause requires that one or more of the following conditions be fulfilled:

1. the specified event is beyond the control of the claiming parties;

2. the event prevents or delays, in whole or in part, the performance of the contract;

3. the event makes performance of the contract imprudent, substantially more difficult or substantially more expensive;

4. the event was not due to the fault or negligence of the claiming party; and

5. the claiming party has exercised reasonable diligence to overcome or remove the specified *force majeure* event.

In the case of number 3, it is important to note that parties typically cannot avoid their contractual obligations solely because performance has become more costly or time-consuming than anticipated. There would likely need to be another factor working to prevent performance of the contract in order for a party to rely on a force majeure provision. There is a difference between a contract that can no longer be performed, where the doctrine of frustration is applicable, and a *force majeure* clause. If a contract becomes impossible to perform, it may be open for a party to argue that it has been frustrated and the obligations of the parties are at an end. However with a *force majeure* clause, the contract is not at an end. There are ongoing obligations, although the parties may be excused from penalties or damages due to delayed performance or reduced supply as examples.

When interpreting a *force majeure* provision, the court will look to the circumstances and the relevant contractual provision to determine whether the clause applies to excuse the party seeking to rely on it from performance of a contractual obligation. In the leading Canadian force majeure decision, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawich Pulp and Paper Company Limited*, [1976] 1 SCR 580 ("*Atlantic Paper*"), the Supreme Court of Canada applied a strict interpretation of the *force majeure* clause in the contract between the parties and determined that reliance on a *force majeure* clause requires that the event be beyond the control and reasonable foresight of the contracting parties, and that the event renders performance of the contractual obligations impossible.

In *Atlantic Paper*, St. Anne had contracted with Atlantic to purchase waste paper to be used for corrugating medium, subject only to, among other things, "the non-availability of markets for pulp or corrugating medium". St. Anne subsequently advised Atlantic that the paper was no longer needed and tried to rely on the "non-availability of markets" portion of the *force majeure* clause to argue that its inability to find a profitable market for its finished product constituted an event of *force majeure*. The Court rejected this argument because the markets for waste paper remained materially unchanged from the time the parties contracted. In addition, the parties were aware of the state of the markets at the time the contract was entered into and the primary cause of the failure of St. Anne's corrugating medium was lack of an effective marketing plan. Therefore, the event was foreseeable and St. Anne was not allowed to rely on a condition it had brought upon itself. Although performance would have caused St. Anne commercial hardship, performance would not have been impossible.

While *Atlantic Paper* introduced the impossibility standard, a 1996 decision out of the Alberta Court of Appeal, *Atcor Ltd. v. Continental Energy Marketing Ltd.* ("*Atcor*"), emphasizes the need to look at the specific circumstance of the party invoking *force majeure*. Atcor contracted with Continental to supply natural gas through a pipeline operated by a third party. The agreement had a f*orce majeure* clause which listed *force majeure* events as including breakages of pipelines. Due to breakdowns and repairs, the third party was unable to provide the usual quantities of gas to Atcor, who was in turn unable to perform its contract with Continental. Atcor selectively declared *force majeure* with its customers so that some received a full supply and others, like Continental, received none and had to purchase elsewhere at a higher rate. At trial ([1995] 1 WWR 137 ABQB), Atcor was allowed to rely on the *force majeure* clause in its contract with Continental.

On appeal (1996 ABCA 40 at para. 11), the Court of Appeal articulated the general principle that is sometimes referred to as the 'commercial reasonableness standard': "A supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible." Put differently, "… in the absence of clearer words to the contrary, a supplier is not excused from non-performance by a force majeure event if the sole consequence of that event is to drive him to buy from another supplier and make a smaller profit. He is excused, however, if the solution in all the circumstances is not reasonable" (1996 ABCA 40 at para. 35). The Court of Appeal set aside the lower court's decision and ordered a new trial on the basis that there was not enough evidence as to how onerous it would be for the supplier to meet its obligations. The parties settled before trial.

Despite the 'commercial reasonableness' standard articulated in *Atcor*, it appears that the impossibility standard prevails in Canada. There is no statutory concept of *force majeure* in Canadian common law. The common law doctrine of force majeure may have arisen in part to overcome the narrow scope of the doctrine of frustration. Although *force majeure* is a popular topic in academic literature, it is rarely dealt with by Canadian courts. This may explain why *force majeure* has not displaced the doctrine of frustration.

The "Outbreak" Example

'Standard' *force majeure* clauses may not adequately capture the risks present in the modern world. In "Is SARS an 'Event' that Triggers a *Force majeure* Clause?", Mario Nigro and Marianna Smith discuss how outbreaks like SARS are treated in the context of *force majeure* clauses. Such events may fall under the phrase "epidemic" or "emergency", but there is difficulty

in identifying the "unexpected" event that triggered the *force majeure*. The SARS outbreak was not instantaneous, but was evidenced over a period of several weeks. In order for a party to rely on a *force majeure* clause in the case of an outbreak like SARS or COVID-19, the clause will have to be properly drafted to include such outbreaks and the parties will have to demonstrate that they acted reasonably over the development of the outbreak to mitigate its effects on performance of the contract.

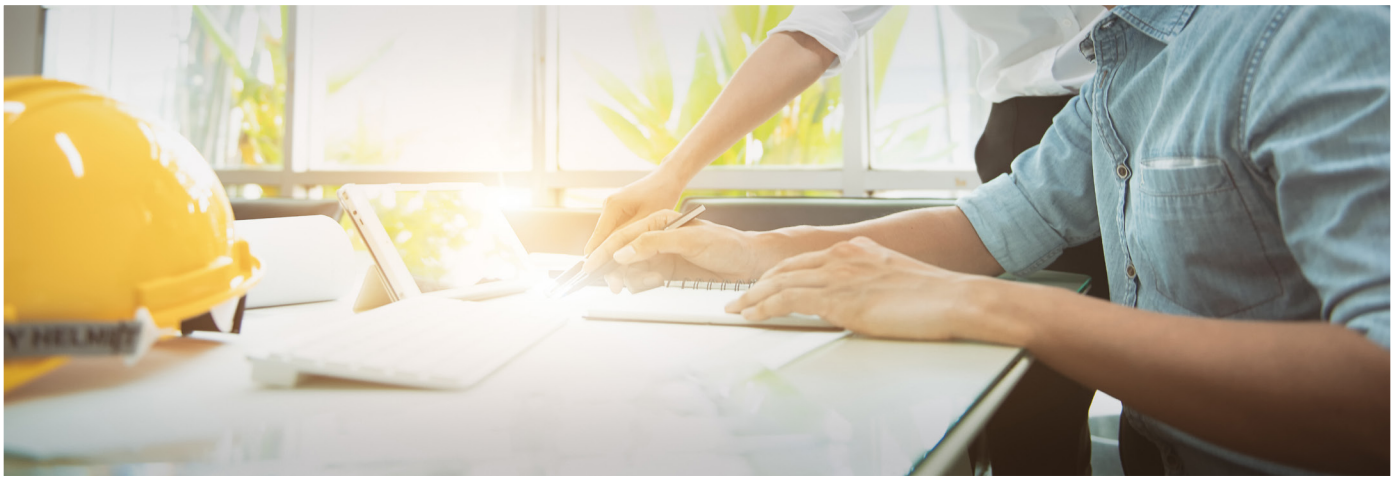
In "Ebola outbreak: is it a force majeure event? A regional pandemic", Paul Giles and Julian Berenholtz write that while an Ebola outbreak may be considered a *force majeure* event in some circumstances, such an outbreak may fall short of a *force majeure* event because it could be considered foreseeable due to the fact that in recent history and in certain parts of West Africa, there have been Ebola outbreaks, although occasional, confined and not necessarily in the same countries as where outbreaks have previously occurred. Companies should consider which types of risk events have already occurred in the geographic region that construction, supply and/or trade will be taking place. Such risks may be considered foreseeable and can be addressed with other risk allocation provisions in a contract, even if they do not qualify as *force majeure* events.

Recently, Chinese authorities have closed factories and ordered lock-downs in the wake of COVID-19. Companies that buy and sell goods in the Chinese market are considering the legal defence of *force majeure*, including China's biggest importer of liquefied natural gas. The China Council for the Promotion of International Trade ("CCPIT") has issued over 1,600 "*force majeure* certificates" to companies in over thirty sectors to shield them from legal damages arising from COVID-19. According to the CCPIT, the certificates are recognized by government, customs, trade associations and enterprises of more than 200 countries and regions. For companies who do not have the benefit of relying on a certificate, if a *force majeure* clause provides relief in the event of unforeseen "acts of government", this may allow a party to invoke *force majeure* in the case of government ordered factory closures. Unlike SARS or Ebola, COVID-19 is a "new" outbreak and thus, may be less likely to be deemed foreseeable, depending on when the contract containing the *force majeure* provision was executed. When it comes to health-related *force majeures*, contract drafters can consider words such as "outbreak", "epidemic", "plague", and "quarantine" to capture both an outbreak itself and the effects of the outbreak.

With any claim of *force majeure*, the court will look to whether the circumstances of the *force majeure* were known to the parties at the time the contract was entered into. With the outbreak example, this raises the question of the level a virus or disease had reached when the contract was entered into – had 10 people been infected? 100? How many infected people raise an illness to the level of an "outbreak" or an "epidemic"? This is akin to the issue of climate change – at what point will the events and material shortages caused by our changing climate cease to be considered *force majeures* and be considered "foreseeable"? How about major changes to the environmental laws or regulations which apply to a project?

Steel Tariffs and Material Shortages

On March 23, 2018, the U.S. government imposed new tariffs on steel and aluminum under Section 232 of the *Trade Expansion Act of 1962*. The tariffs became effective on March 23, 2018 and impose a 25% tax on steel and a 10% tax on aluminum imported into the United States from any country other than Canada and Mexico.



Numerous state and federal courts in the U.S. have refused to enforce or apply *force majeure* clauses where governmental action only affects the profitability of a contract, but does not actually prevent a party from performing. Accordingly, in the context of steel and aluminum tariffs, it seems likely that *force majeure* would not be applicable unless the tariffs create market conditions that drastically decreased the supply of steel and/or aluminum so as to make performance under the contract virtually impossible.

The steel industry has formulated risk allocation clauses to specifically address steel shortages, so as to avoid reliance on a *force majeure* clause. For example, a provision written on behalf of the American Institute of Steel Construction provides as follows:

> The subcontract price is based upon the agreed prices and surcharges for the steel types and shapes necessary for the project and posted and made publicly available by [steel mill] on [date]. Notwithstanding anything herein to the contrary, any increases or decreases in the price of the steel ordered by subcontractor for the project, or any additional surcharges imposed on the steel ordered by subcontractor for the project, after [date] shall result in a corresponding dollar-for-dollar increase (or decrease) in the subcontract price.

In the Supreme Court of Nova Scotia decision *M.A. Hanna Company v. Sydney Steel Corporation*, 388 APR 241, Sydney Steel Corporation ("Sysco") was a buyer of iron ore pellets under a long-term supply contract with M.A. Hanna Company ("Hanna"). Hanna claimed damages for Sysco's refusal to accept the quantities of iron ore pellets specified in their contract. Sysco argued, among other things, that the crash in the steel market and Sysco's plan in response to the crash, which was to change its steelmaking technology so as to reduce its demand for pellets, was a *force majeure* event, and also argued frustration. The Court rejected the frustration argument on the basis that although performance of the contract by Sysco had become commercially unprofitable, the changed market did not render performance physically or legally impossible. However, the Court interpreted the *force majeure* clause, which was drafted generally and broadly, as applying to the changed circumstances of the steel industry.

The Singapore Court of Appeal decision *Holcim (Singapore) Pte Ltd. v. Precise Development Pte. Ltd.*, [2011] SBCA 1 articulates a 'commercial practicability' approach to interpretation of *force majeure* clauses in commercial contracts. The case involved a supply contract for ready-mixed concrete ("RMC"). A shortage of the raw materials needed to manufacture RMC was caused by a government-imposed ban on the export of sand from Indonesia to Singapore. The court found that an event of *force majeure* was made out in the circumstances because the sand ban constituted a disruption to the availability of sand that placed the manufacturer in a commercially impracticable situation. The events were also found to have been beyond the control of the manufacturer as it had taken reasonable steps to mitigate the effect of the sand ban on its production of RMC. Notably, the clause interpreted as a *force majeure* clause did not include the words "*force majeure*". In relation to a commercial contract, Andrew Phang Boon Leong JA determined [at para. 11, emphasis added]:

> **[W]here a commercial transaction is involved, the process of ascertaining whether or not a particular set of circumstances constitutes a 'disruption' or 'hindrance' within the meaning of the force majeure clause concerned ought to be informed by considerations of commercial practicability** (bearing in mind, of course, the particular context in which the contract had been entered into (including any relevant commercial practice in the trade and/or resultant dislocation in the trade)). Hence, if, for example, events occurred which, whilst not preventing literal performance of the contract as such, were such as would render continued performance commercially impractical, there would, in our view, generally be a 'disruption' or 'hindrance' within the meaning of the force majeure clause in question.

In International Chamber of Commerce Case No. 8790/2002, the Tribunal concluded that a seller's temporary suspension of deliveries was justified based on *force majeure*. The seller had procured a certificate from the local Chamber of Commerce stating that a drought had led to a decrease in raw material yield and that those circumstances were "beyond human control" and prevented the seller from performing its contractual obligations. The *force majeure* provision at issue did not specify drought as a *force majeure* event, but it was determined that drought fell under the categories of "natural catastrophes" and "other circumstances outside control" in the *force majeure* provision.

In *Fishery Products International Ltd. v. Midland Transport Ltd.*, [1992] 1990 Sr. J. No. 4509 ("*Midland*"), Midland was transporting fish to Ontario and Quebec and became stranded on a highway because of a trucker protest. The fish became unfit for consumption.

Midland attempted to rely on the "strike" portion of the *force majeure* clause to be excused from performance. However, the argument was rejected because "strike" has a precise legal meaning and the trucker protest did not fit within it.

What happens if a supplier is able to supply some of the contracted-for raw material to its purchasers, but not enough to supply it to everyone it has contracted with? In *Androscoggin Energy LC v. Producers Marketing Ltd.*, [2003] A.J. No. 1701, a large number of Producers' gas wells were shut-in by an Alberta regulatory board and *force majeure* was declared by Producers. The Alberta Court of Queen's Bench found a duty to mitigate the effects of the force majeure event, writing at para. 14, "If the seller is unable to supply gas due to an event of *force majeure*, any reduction in supply is to be apportioned among the various purchasers who share similar contracts as the buyer on a pro rata basis."

There are current supply chain issues in Canada, both a result of COVID-19 and due to another potential *force majeure* event which is occurring. At the time of writing, protests are being held in solidarity with a blockade of the Coastal GasLink pipeline in northern British Columbia by members of the Wet'suwet'en Nation. The protests have blocked roads and port terminals, caused major rail shutdowns and impacted the trucking industry. In some cases, trucks are being used to ship goods and materials instead of rail. However, shipping by truck tends to cost more. The effects of the protests are being felt by the construction industry as shipments, and in turn projects, are delayed. Shortages of materials and other supply chain issues can make it difficult for parties to construction and supply contracts to negotiate a favourable price. However, this does not necessarily mean that a party can avoid its contractual obligations by invoking *force majeure*. Protests have frequently been recognized as *force majeure* events but, as *Midland* demonstrates, the wording of the *force majeure* provision is critical.

Duty to Mitigate

Even if an event is considered unexpected, courts will impose a duty to mitigate the event and its effects. The extent of that duty is unclear. Some contracts specify that a party must exercise "due diligence". In *Atcor*, the duty to mitigate was limited to an implied standard of "commercial reasonableness". Such standards are difficult to clearly define and can result in litigation. Parties should specify in their contracts the extent to which a party declaring *force majeure* is required to mitigate and can also specify what they are not responsible for mitigating in terms of the effects of a *force majeure* event, for example the settlement of strikes. Parties can also determine whether the party declaring *force majeure* has a duty to mitigate only the *force majeure* event itself or both the event its effects. If parties wish to contract out of the duty to mitigate, clear and unequivocal language should be used.

Drafting Suggestions

Force majeure provisions can be an important part of a risk allocation plan. When drafting, use specific and concise language and sufficient detail to ensure risk is being allocated as intended. There is a fine line between a provision that includes everything the parties intended and one that is too broad to be useful, as articulated by the Alberta Court of Appeal in *Atcor* at para. 14:

> …a broad list of *force majeure* events offers the risk of turning the bargain on its head if it can be used as an escape clause. When the list is broad, one reasonably expects to see in the contract that the event is tied to meaningful consequences. A good contract would expressly deal with several possible results, and different levels of obligation to mitigate, as did some samples from the trade put before the trial judge. This unfortunately did not. We are told only that, as a prerequisite to invocation, the invoking party must show a causal tie and also show it did not "fail to remedy the condition". Those terms, unfortunately, are not very specific. It was a choice of words that assured litigation.

Parties who feel that they may need some flexibility down the road will often seek to expand the ambit of *force majeure* clauses, while those

who want to hold others to the strict terms of the contract will try to limit the clause to extraordinary circumstances.

Each construction project carries its own set of risks, depending on the type of project and its location. Boilerplate *force majeure* provisions are not sufficient to capture the risks present on every project or in every supply chain. Rather than taking a "cut and paste" approach to *force majeure* provisions, parties to construction contracts should seek legal advice and draft with their specific region and project in mind each time a new contract is entered into. Be sure to include and clearly describe trigger events, duration, notice requirements and what the effect of the events described in the clause are to have on contractual obligations. Parties should also consider how the *force majeure* provision interacts with other risk allocation provisions in their contracts. In terms of a project's supply chain, think about where materials and supplies are coming from and plan accordingly. Avoid reliance on single sources where possible. Consider proactive procurement or built-in float for materials susceptible to interruption by *force majeure* events. While *force majeure* clauses can be used to mitigate the effects of extraordinary circumstances, they do not take the place of a resilient supply chain. Properly drafted *force majeure* clauses can help manage parties unexpected events, while maintaining their contractual relationship.

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Second Round Knock Out: Security for Costs and the New *Construction Act*

The Gatti Group Corp. v. Zuccarini, 2019 ONSC 3393 and 2019 ONSC 7050

Ontario's reformed *Construction Act* has been fully in force since October 1, 2019. The changes to the *Act* and its regulations are still settling across the province, at times in surprising ways. In the Ontario Superior Court's recent decision, *The Gatti Group Corp v. Zuccarini*, 2019 ONSC 7050 ("*Zuccarini*"), the *Act* amplified the defendants' successful second security for costs motion, resulting in an order that the plaintiff post $95,000 into court in 30 days.

The case profiles the court's flexibility and discretion when awarding security for costs. More importantly, the *Act*'s security for costs formula under section 44 may be used as a guideline for future security for costs awards in construction matters.

Security for costs

In Ontario, unsuccessful litigants risk paying the other side's legal costs following any hearing, loss, dismissal, or judgment. Construction cases are no different. Without security, successful litigants may have no recourse to collect those costs. Lien claimant plaintiffs may have security by virtue of the *Act*'s requirement that 25% of the claim for lien amount be posted to vacate that lien from title. Defendants and counterclaimants, however, are generally unsecured.

Defendants who have a good reason to believe that a plaintiff will be unable to pay their costs after the action is dismissed can bring a motion for security for costs under Rule 57 of the *Rules of Civil Procedure* (the "*Rules*"). A successful motion for security for costs requires a plaintiff to post security into court before continuing with its action, in many cases bringing it to an end. In *Zuccarini*, the defendants did just that.

Round 1: defendants fail to meet their initial onus

During examinations for discovery, the Zuccarinis learned that the construction company plaintiff had terminated all its employees except for one, moved its business to its owner's home office, and appeared to only have one project on the go.

The Zuccarinis brought an initial motion for security for costs but were unsuccessful. In the Honourable Master Wiebe's reasons, he found that the defendants failed to meet their onus to prove there was a "good reason to believe" that the plaintiff had insufficient assets to satisfy a costs award. Master Wiebe applied Justice

Lang's test from *City Commercial Realty (Canada) Ltd. v. Batich*, 2005 CarswellOnt 10512 (C.A.), that the plaintiff must have a demonstrated belief of asset insufficiency beyond "mere conjecture, hunch, or speculation." Unspecified social media evidence, operating out of a home office, and admissions about letting go employees were not enough. Master Wiebe dismissed the motion without prejudice to it being brought again on better evidence.

Round 2: plaintiff fails to prove impecuniosity

After the first motion's dismissal, the defendants turned the tables by obtaining an order for further disclosure from the plaintiff. Specifically, the plaintiff was ordered to produce its project-related financial statements dated 2014 to 2019. The plaintiff failed to produce its 2018 and 2019 financial statements without explanation. The other statements showed minimal assets and repeated deficits.

The Zuccarinis capitalized on the new information and brought a second security for costs motion. Using the financial statements, they proved there was a good reason to believe, and more than "mere conjecture, hunch or speculation," that the plaintiff had insufficient assets to satisfy a costs award.

After the defendants met their initial onus, the evidentiary burden turned to the plaintiff construction contractor to demonstrate why security for costs should not be ordered.

In Ontario, the two primary defences to a security for costs motion are:

1. the plaintiff must prove that it has sufficient assets to satisfy the defendants' costs; or

2. prove that it is "impecunious," an order for security for costs would be unjust, and that the order would deprive the plaintiff the opportunity to prove its case.

In *Zuccarini*, the plaintiff did not attempt to prove that it could satisfy the defendants' costs, nor did it lead evidence on impecuniosity. The failure to disclose recent financial statements led to a total knock-out.

Security for costs calculation

Ultimately, the defendants claimed $128,753.45 in security for costs: $72,987.95 for amounts spent prior to the motion and $55,765.50 for amounts expected to be spent to prepare for and attend trial. When evaluating these amounts, the Honourable Master Wiebe applied a partial indemnity scale of 60% against the full amount of costs claimed by the defendants.

The court considered several factors to determine the amount of security ordered. Among other things: the experience and hourly rates of the defendants' lawyers, the conduct of the defendants' prior lawyer, the amounts spent up to that point in the action, the number of days of trial, and the defendants' bill of costs for trial.

The plaintiff unsuccessfully attempted to argue that it should not have to pay security for costs when it also bore the burden of defending a counterclaim. However, the plaintiff led no evidence to demonstrate that both the claim and counterclaim were related to the same issues and was unsuccessful on this point.

In the alternative, the plaintiff argued that the amount of security ought to be set by virtue of the old *Construction Lien Act*'s requirement that a maximum of $50,000.00 be posted to vacate a lien of $200,000.00 or more. The plaintiff's submission was innovative. The *Act*'s security for costs formula is ordinarily just applied to parties vacating liens. This submission backfired on the plaintiff. The Honourable Master Wiebe not only rejected that costs cap as out of date, citing the new *Act*'s higher limit of $250,000.00, but applied the *Act* against the plaintiff. The court calculated 25% of the plaintiff's claim and the defendant's counterclaim as potential figures for security for costs awards in the circumstances—$85,857.50 and $103,342.00 respectively.

Applying the "rough justice" approach employed in *Yong Tai Construction v. Unimac Group Ltd.*, 2015 ONSC 4866 (SCJ), the Honourable Master Wiebe split the difference between the two costs amounts and ordered the plaintiff to post $95,000.00 as security for costs in 30 days.

Lessons learned from Zuccarini's "rough justice"

This case has several takeaways for construction and civil litigants in Ontario.

Defendants bringing security for costs motions must meet their initial onus by proving there is "good reason to believe" that the plaintiff has insufficient assets to satisfy a costs award beyond "mere conjecture, hunch, or speculation." The defendants in this case were fortunate to have a second chance after their motion was dismissed.

Plaintiffs responding to security for costs motions may be required to be financially transparent. They must have evidence to prove they have sufficient assets to satisfy a costs award, or be prepared to prove impecuniosity. In this case, despite the plaintiff's arguments on the merits of the case, the refusal to disclose recent financial statements contrary to a court order was fatal.

The *Act* will continue to have wide-ranging impacts on the practice of construction law in Ontario.

The new section 44 formula in the *Act* appears to not only increase amounts required as security for liens, but to serve as a benchmark for defendants/plaintiffs by counterclaim seeking "just" security for costs awards against plaintiffs.

AUTHOR:

Case Comment: *9585800 Canada Inc. v. JP Gravel Construction*

A recent Divisional Court decision, *9585800 Canada Inc. v. JP Gravel Construction* 2019 ONSC 7022 has eliminated confusion in one area of Ontario lien law. Unfortunately, respectfully, in doing so it may have created confusion elsewhere.

In the Summer 2019 issue of this newsletter, we commented on the Superior Court decision in *9585800 Canada Inc. v. JP Gravel Construction* 2019 ONSC 3396, which we respectfully submitted was wrongly decided. The case arose from a common but misguided practice: an attempt by a lien claimant to "self-correct" an error in a registered claim for lien by registering a discharge of the erroneous lien and then registering a second, corrected form of lien. In *JP Gravel*, the lien claimant registered a lien in the amount of $662,100.48, discovered the time period claimed for the supply of services and materials was incorrect and then proceeded to discharge that lien and registered a second lien for the same amount and using substantially the same information as contained in the earlier lien, but correcting the time period claimed for the supply of services and materials. We argued that those facts brought the case squarely within the binding precedent of *Southridge Construction Group Inc. v. 667293 Ontario* (1992), 2 C.L.R. (2d) 177, aff'd (1993), 2 C.L.R. (2d) 184 (Div. Ct.) and the numerous cases that followed it, which held that once a lien is discharged, a claimant cannot lien again for services performed prior to the date of the perfection of the first, discharged lien. In our view, the form of self-correction used in *JP Gravel* was in fact fatal to the lien.

However, the lower court distinguished *Southridge* on the basis that the error in *Southridge* concerned the amount of the lien, while the error in *JP Gravel* concerned the date for the supply. The fact that the claimant in *JP Gravel* had used the wrong timeframe was held to have turned the lien into a "nullity". We were critical of this conclusion as it disregarded section 6 of the *Construction Act* and the case law interpreting this section. Far from being a nullity, in our respectful opinion, the error in time frame was an error of form, not substance, that in the absence of prejudice did not invalidate the claim for lien.

A simple thought experiment would demonstrate the inadvertent danger in concluding that such errors rendered a claim for lien a nullity: what if the error in *JP Gravel* was not discovered within the strict time periods to preserve and perfect the claim for lien? This would mean that the claim for lien would never have been preserved at all since a nullity cannot satisfy a legal requirement. Even in the absence of prejudice the Court's hands would be tied in ruling that the lien was not invalidated by virtue of section 6, since a nullity is by definition invalid. In short, we were concerned that in trying to "do right" by the lien claimant in *JP Gravel*, the Court may have inadvertently created jeopardy for other lien claimants whose liens contain similar errors of form but may have been invalidated as "nullities", instead of liens that could be saved by section 6.

The Divisional Court has now overturned the lower court decision in *JP Gravel*, finding that the wording of section 48 of the *Construction Act* is clear that once a lien is discharged, that discharge is irrevocable, and the discharged lien cannot be revived by the registration of another lien. This affirms well-understood law and removes any doubt; lawyers should not use a discharge of lien as a means to correct a registration error. The correct course is to register a second claim for lien with the correct information and to consent to an order *vacating* the first registered claim for lien. The distinction between *vacating* a claim for lien (which merely removes the instrument from title while preserving the remedy) and *discharging* a claim for lien, which extinguishes the lien remedy, remains alive and well. Moreover, the potential for liens containing errors of substance not form being considered nullities instead of liens capable of being saved under section 6 in the absence of prejudice, has been avoided.

The loss of the lien remedy altogether where the discharge is inadvertent may seem harsh, but the reason for the distinction is of fundamental importance. A claim for lien is an a legal action *in rem* which can affect the rights and remedies of third parties in respect of land or money. A discharge is meant to be an unambiguous signal to the world at large that the lien has been irrevocably extinguished, thereby allowing other parties to govern themselves accordingly without having to conduct further inquiries to determine whether the discharge is in fact final.

While the Divisional Court's conclusion on the discharge issue in *JP Gravel* is no doubt correct, we respectfully submit that the Divisional Court may have erred in hearing the appeal in the first place. It is well-settled law that an unsuccessful motion to discharge a lien is interlocutory in nature. Since this case was governed by the former *Construction Lien Act*, there was no appeal from interlocutory orders.

The Divisional Court relied on a number of decisions for its finding that the order below was final:

> The formal order states in paragraph 1 that the motion is dismissed. However, paragraph 2 of the order states that the second lien is valid and shall remain in place. Paragraph 2 is a final order, as it settles the validity of the lien that was registered on June 4, 2018 and deprives Gravel of a substantive defence at trial (see *HMI Construction Inc. v. Index Energy Mills Road Corporation*, 2017 ONSC 4075 (CanLII) (Div. Ct.) at para. 12; *Stubbe's Precast Commercial Ltd. v. King & Columbia Inc.*, 2018 ONSC 3062 (CanLII) (Div. Ct.) at para. 12; *570 South Service Road Inc. v. Lawrence-Paine & Associates Ltd.*, 2011 ONSC 3410 (Div. Ct.) at para. 13).

It is apparent that the wording of the formal order under appeal was important to the Divisional Court's disposition of this issue and correctly so, since, as affirmed in *570 South Service*, it is the court's formal order which is subject to an appeal, not the court's reasons for decision. Arguably the lower court's formal order that "the second lien is valid and shall remain in place" is a final disposition of that issue that cannot be re-examined at trial and as such is final and subject to appeal.

However, with respect, the case law relied on by the Divisional Court in reaching this conclusion does not support this conclusion. *HMI Construction* stands for the proposition that an order reducing security posted in court to vacate a lien is a final order. Justice Corbett held that "an order under s.44(2) reducing the amount of security to be posted for a lien is a final order in that it determines, on a final basis, the maximum amount of the lien claim." That decision does not stand for the proposition that an unsuccessful motion to discharge a lien is final.

The next case relied on by the Divisional Court, *Stubbe's Precast*, does stand for that proposition, but it was reversed

by a panel of the Divisional Court on appeal on this very point. At paragraph 14 of the appeal decision at 2018 ONSC 6539, the court clearly states that "[i]n our view, the motions judge erred in concluding that the order of Flynn J. was a final order". Presumably, the Divisional Court hearing *JP Gravel* was not made aware that a decision it was relying on had been reversed.

The last case cited by the Divisional Court, *570 South Service Road*, also seems to stand for the exact opposite proposition it was cited for by the Divisional Court:

> The order as issued and entered by the court simply says "the motion by 570 South Service Road is dismissed". It is that order which is before us on this appeal, and it is not a final order that settles for all time the validity of the Claim for Lien.

It is therefore somewhat surprising that the Divisional Court in *9585800 Canada Inc. v. JP Gravel Construction* relied on this case law to arrive at the conclusion that the order appealed from was final. It would have been preferable had the Divisional Court explicitly distinguished the cases it cited from the terms of the formal order made by the lower court in *JP Gravel*, and we respectfully submit that for future cases considering the distinction between a final and interlocutory order that *JP Gravel* should be considered as turning on its key fact: the lower court judge's finding on the validity of the lien in *JP Gravel* was expressly and finally made in the formal court order and not just stated in the reasons for decision as a reason to dismiss the motion. Put another way, the best reading of *JP Gravel* may be that an order dismissing a motion to discharge a lien is interlocutory, but if the Court goes one step further and orders the claim for lien to be valid, it is this latter part of the order that is final and therefore subject to full appeal rights under either the *Construction Lien Act* or the *Construction Act*.

Given that we agree with the Divisional Court's disposition as to the effect of a discharge, one could question why we are choosing to criticize the court's handling of this jurisdictional point. After all, given the *Construction Act* has relaxed the rule prohibiting appeals from interlocutory orders for matters arising from contracts procured or entered into on or after July 1, 2018, does the interlocutory or final distinction still matter? Can this aspect of the Divisional Court's decision in *JP Gravel* essentially be regarded as potentially flawed, but of no significance beyond the immediate parties? We are of the contrary view: appeals from interlocutory orders are permitted by the *Construction Act* with leave. As such, the distinction between final and interlocutory orders still matters and this aspect of *JP Gravel* will therefore bear close scrutiny by future courts.

The transition provisions of the *Construction Act* are gradual. For the next few years there will still be many lien matters before the Court arising from contracts procured or entered into before July 1, 2018 and therefore subject to the *Construction Lien Act*'s prohibition on interlocutory appeals. The point is far from moot in those cases.

For cases that fall under the new *Construction Act* regime where appeals from interlocutory orders are allowed with leave, it is arguably more important, not less, if the Court is to properly fulfill its gatekeeper function, that the distinction between interlocutory and final orders be well understood and maintained. No doubt, if the Divisional Court decision in *JP Gravel* stands, it will be used by unsuccessful parties moving for a discharge order to seek an appeal as of right and skip the step of seeking leave. With the greatest of respect, it appears that in affirming *Southridge* and the irrevocable nature of a discharge, the Divisional Court may have introduced uncertainty into whether an unsuccessful motion to discharge a claim for lien is final or interlocutory. We can anticipate that it will be for a future court to re-examine this issue given that the distinction between interlocutory and final orders remains fundamental to an appeal in an action under the *Construction Act*.

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The Role of Experts in Construction Litigation: *White Constructions Pty Ltd v PBS Holdings Pty Ltd*

Players familiar with the nature of construction disputes are cognizant of the important role an expert plays in the determination of many common construction claims. It is crucial to remember that the primary duty of the expert witness is to the Court and not to the client. Rule 4.1 of the *Rules of Civil Procedure* provides as follows:

> 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The specific knowledge and skilled analysis of fact provided by an expert is to assist the court in the determination of issues that require a particular skill and expertise to properly evaluate, where there may be a range of reasonable conclusions to reach. Usually, at the end of the case and the presentation of all evidence, a decision-maker will render a final decision and will adopt all or part of an expert's evaluations into their reasoning.

However, recently, the Supreme Court of New South Wales published its decision in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166, where the court rejected both parties' delay expert analyses entirely and brought in a court-appointed expert to evaluate delay.

The parties' experts in this case adopted methods derived from the *United Kingdom Society of Construction Law Delay and Disruption Protocol*, which contains six established methods of delay analysis used to assist expert witnesses in formulating methodologies for determining delay in any particular case.

Both experts used a different methodology of the six prescribed in the Protocol. Both disagreed on the appropriate delay analysis method to be adopted, and how the other had applied their methodology. The plaintiff's expert used the "as planned versus as-built window analysis", and the defendant's expert used a "collapsed as-built analysis", each derived from the Protocol. The Court in this case acknowledged that both experts were "adept in their art" and had "reached profoundly differing conclusions".

When comparing delay analysis reports in construction cases, this is often the case. It is common for parties in dispute over delays, liability and damages to have vastly different views as to who or what is to blame. Expert opinion exists to assist the court in reconciling these differences through an independent analysis of the facts, an applied method to evaluate the facts, and conclusions drawn as to what the delay is and what it is attributable to.

In this case, this did not happen. The reports were complex and were described as "impenetrable", so that the Judge would require significant assistance to critically evaluate them. The Court held that it was not inevitable that either one of the methods provided by the party experts was the appropriate one for use in this case. Therefore, the Court dismissed both parties' expert evidence, and appointed its own expert to analyze the delay under rule 31.54(1) of the New South Wales *Uniform Civil Procedure Rules*, which provides that "in any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion".

The Court also held that the six methods in the Protocol are not absolute. The mere fact that the experts chose to apply methodologies from the protocol in their analysis did not give them standing, and methods which are otherwise logical or rational that are outside of the Protocol are not prevented from being given standing.

The Protocol is a guideline that can be used by experts in selecting a methodology for delay analysis, but ultimately it is for the expert to adopt a method appropriate to each case. As stated in the Protocol itself, it "aims to be consistent with good practice" however, "to make its recommendations more achievable by project participants, the protocol does not strive to be consistent with best practice".

Not all cases fall within the scope of these methodologies, and experts should be prepared to adapt to each case and apply a "common law, common sense" approach by paying close attention to the actual facts, rather than opinions about what the evidence establishes. Users of the Protocol should apply its recommendations with common sense, and adapt the Protocol to each case, so as to not detract from the benefits of applying best practices.

It is not unheard of for the court to appoint an expert in construction cases where there are complex issues dependent on expert evidence, or where the court may feel as though it does not have the appropriate knowledge to comment on a specific issue without the assistance of an expert, as was recently done by the Superior Court of Ontario in *Willem Vander Meer Holdings Inc. v. Thomas Terry Richardson*, 2019 ONSC 4025. Both the *Rules of Civil Procedure* (r. 52.03(1)) and the Regulations under the *Construction Act* (O. Reg. 302/18, s. 14) expressly allow the court to obtain such assistance.

However, it is unusual for the court to reject expert evidence put forward by both parties and appoint its own expert for the same purpose.

Although it is commonplace for experts to draw different conclusions based on the evidence and to apply different methods in reaching those conclusions, this case goes to show that it may be beneficial for experts to cooperate with each other where possible. This could include coming to an agreement on the use of similar methodologies in conducting an analysis. Of course experts will reach their conclusions independently and by their own means, however it may be potentially useful to the court to apply similar methodologies to reach independent conclusions.

Ultimately, an expert's role is to be an aid to the court in the determination of a case. In *White Constructions*, the court-appointed expert concluded that the complexity of the party experts' reports introduced was a distraction to the merits of the case and ultimately did not assist the court in determining the issues at all, causing a misuse of time and cost. Courts will be able to conduct a more practical analysis of the expert evidence when making a final determination if the experts are guided by common sense and present their findings in a clear and accessible manner.

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Liening Municipal Lands in Ontario

Up until October 1, 2019, the only lands to which a lien could not attach were federally and provincially owned lands. Municipal lands, other than public streets or highways owned by a municipality, were subject to lien registrations just like any other privately-owned land.

Effective October 1, 2019 liens no longer attach to any municipal lands, which means that registering a lien against a municipally owned land is not an option. Instead, a lien must be preserved by giving a claim for lien (Form 12) to the municipality without registering a lien on title of the property. In order to perfect the claim for lien, the lien claimant will have to issue a Statement of Claim within the prescribed deadlines without registering a certificate of action.

Pursuant to Ontario Regulation 304/18, a municipality may provide a method or methods for the giving of a copy of a claim for lien by publishing a statement on its website. These methods include:

1. Sending a copy of the claim for lien by email to a specified email address.

2. Completing and submitting the claim for lien through a specified web portal.

As of February 24, 2020, the following municipal entities created portals or provided instructions for electronic filing of claims for lien (Form 12):

1) City of Toronto - https://www.toronto.ca/business-economy/doing-business-with-the-city/claim-for-lien/claim-for-lien-submission/

2) Sudbury - https://www.greatersudbury.ca/do-business/claim-for-lien/

3) Durham - https://www.durham.ca/en/doing-business/construction-liens.aspx

4) Pickering - https://www.pickering.ca/en/city-hall/claim-for-lien.aspx

5) Oxford County - https://www.oxfordcounty.ca/Contact-Us/Construction-Act

6) City of Hamilton - https://www.hamilton.ca/government-information/accountability/construction-liens

7) Region of Waterloo - https://www.regionofwaterloo.ca/en/regional-government/submit-a-claim.aspx

By clicking on the above-mentioned links, you will be able to find detailed instructions as to how claims for lien (Form 12) are to be submitted or e-mailed to these municipalities.

In the event that a municipality has not published a method for the giving of a claim for lien on its website, then claim for lien must be given to the clerk of the municipality.

While this practice is very new and various municipalities are still updating their websites, it is recommended that lien claimants submit their liens both electronically (if permitted) and by giving a hard copy to the clerk as well in order comply with the *Act*.

Since the new amendment came into effect very recently, parties are strongly encouraged to check the municipal websites for such instructions prior to giving a lien to a municipality in any other method.

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Notable Case Law

***Paramount Mechanical Service Ltd. v. Kabob Palace Inc.*, 2019 MBQB 163**

Where a contract required a contractor to "supply labour and setting material only for installation for flooring including leveling of floor", the court interpreted that to mean *improving* the level as opposed to rendering the floor completely level. The contractor successfully argued that the floor was as level as reasonably could be expected given the condition of the pre-existing concrete base and, as such, was level in the sense intended by the contract. For the floor throughout the premises to have been truly level, a new base would have had to be poured, which was not contemplated by the parties nor reflected in the contract price.

***Wolf Construction v. Kinniburgh*, 2019 ABQB 660**

The court held that the contract was a cost plus contract, despite the fact that a fixed price contract was executed between the parties. The contractor had submitted an estimate stating that "we would like to complete the project on a cost plus basis… We charge cost plus 15% for all material, labour and subtrades... This estimate is a ballpark figure only, although we have tried to capture accurate pricing of everything." To deceive the insurance company so that monies from the insurance company would flow, the owner asked the contractor for a fixed price contract, "for something in writing just for insurance purposes to get the ball rolling on their side for financing", requesting "a rough number in the ball park for insurance purposes". The court concluded that there was no intention to create any sort of legal relationship in executing the fixed price agreement. The parties intended for the construction to proceed on a cost plus basis.

***Algee v. The Architects' Association of New Brunswick*, 2019 NBCA 74**

The appellant architect and his firm were found guilty by a Committee of Inquiry appointed by the Council of the Architects' Association of New Brunswick of three counts of failing to pay subconsultants promptly and using the funds that should have been paid to subconsultants for its own purposes, all in violation of the Association's By-law 14.6.15. The Council imposed a $1,000 fine, a reprimand and a four-month suspension, despite the Committee's recommendation of lesser penalty. The New Brunswick Court of Appeal set aside the suspension, holding that it was not within the range of reasonable outcomes. While a suspension was not necessarily beyond the range of reasonable outcomes for a violation of By-law 14.6.15, it was in this case, since the decision of the Council neither explained its rationale on penalties nor demonstrated justification, transparency or intelligibility in its decision-making process.

***Bastarache v. Farrell*, 2019 NLSC 153**

A contractor was retained to do concrete and foundation work on an oceanside property on which the owner intended to build two houses. When the contractor presented the owner with a final bill for $10,000, to be paid in cash, the owner requested a day to compare the invoice against his own records. The contractor testified that at that point, Caesar had crossed the Rubicon. The court described the contractor's reaction to the crossing, which may have been somewhat of an overreaction:

> The first defendant took the excavator off the float and told the plaintiff to give him the money. The plaintiff yelled at him to stop, saying that he had the money and a draft agreement to address the uneven wall holdback, but the first defendant proceeded towards the property. The plaintiff said that he stood in front of the second defendant's excavator yelling, "kill me" and the first defendant placed the excavator bucket over his head. The first defendant continued to approach the foundation and the plaintiff was forced to move. In the course of the next 15 minutes, he knocked down fifty percent of the foundation's walls.

This all delayed the project for four months. The court awarded the plaintiff all costs related to the necessary repairs and the rental expenses for that time while he waited for the house to be completed, but denied damages for mental distress. The latter, the court held, resulted mostly from standing in front of the excavator, not from the demolition and, having already called the police, the plaintiff should not have done that.

***Clark Builders and Stantec Consulting Ltd. v. GO Community Centre*, 2019 ABQB 706**

The Alberta Court of Queen's Bench conducts an exhaustive look at the various categories of recoverable pure economic loss. In this case, none of the categories established by the courts applied to the facts before the court, nor was this a case in which a new category should be created, and the claim in negligence was dismissed.

The case also contains a detailed discussion of discoverability for the purposes of the *Limitations Act*.

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Building Insight Podcasts

Episode 12: Practice Directions
August 2019

Pavle Levkovic, associate, and Darina Mishiyev, senior law clerk, discuss important practice directions for construction lawyers in Toronto.

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Episode 13: Diversity in Construction Law: A Focus on Female Leadership
September 2019

Lena Wang, partner, and Kaleigh DuVernet, associate, discuss female leadership in construction law with Sandra Astolfo, partner at WeirFoulds LLP, and Lea Nebel, partner at Blaney McMurtry LLP.

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Episode 14: Adjudication
October 2019

Duncan Glaholt, partner, and Jacob McClelland, associate, discuss the arrival of statutory adjudication under the *Construction Act*.

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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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