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GLAHOLT LLP
CONSTRUCTION LAWYERS

BUILDING INSIGHT

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IN THIS ISSUE

Court of Appeal Rejects Challenge to International Commercial Arbitral Award

On December 4, 2017 the Ontario Court of Appeal dismissed an appeal from the judgment of Justice Penny, 2016 ONSC 7171, upholding an international commercial arbitral award. The decision affirms the relatively narrow grounds for judicial intervention provided for in the UNCITRAL Model Law. This decision is of interest for the Court's thorough analysis of the grounds for judicial intervention under the Model Law, and in particular for its examination of the issue of compliance with contractual pre-arbitration dispute resolution steps. The latter issue is a common problem as many construction contracts provide for staged or escalated dispute resolution processes as a precursor to arbitration, often expressed in mandatory terms. The case also affirms the principle expressed by the Court of Appeal in *Popack v Lipszyc*, 2016 ONCA 135 that "the parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum".

The dispute concerned the construction of a 220 km slurry pipeline from an inland mine site to a coastal refinery in Madagascar. The prime contract provided for an escalating dispute resolution procedure culminating in arbitration under the ICC Rules and Ontario law. Strathy C.J.O., writing for a unanimous Court, described the tribunal conducting the arbitration as "blue chip…. with expertise in both commercial arbitration and mega-project construction disputes." After a three week hearing conducted in Toronto in mid-2014, the tribunal

issued its award on September 30, 2015. The contractor was awarded only 18 days extension against 294 days of incurred delay and, as a result of the application of liquidated damages for delay in favour of the owner, the net award substantially favoured the owner.

The contractor argued the following grounds in seeking to set aside the Award, both in the lower court and in the Court of Appeal:

> (a) alleged errors of jurisdiction in proceeding to hear the owner's environmental counterclaims without compliance with pre-arbitration dispute resolution conditions, and other grounds;
>
> (b) alleged denial of procedural fairness; and,
>
> (c) alleged breach of Ontario public policy.

The Court of Appeal began its analysis by noting that under the Model Law the tribunal is accorded a high degree of deference. Courts in Ontario will not substitute their judgment for the tribunal's.

With respect to the jurisdictional challenge, the court found that at various points leading up to the arbitration hearing the two sides had taken contrary positions on whether the counterclaims should proceed directly to arbitration without having gone through all of the contractual pre-arbitration dispute resolution steps. The contractor argued, on the other hand, that the tribunal's jurisdiction was purely consensual and that there absent actual consent, there could be no jurisdiction.

This challenge was dismissed on the basis that the environmental counterclaims had been fully pleaded and defended in the arbitration. Evidence was adduced by both parties and there was full argument on the merits of the counterclaims. The counterclaims arose out of the same project delay asserted by the contractor in support of its own claims. It would not have made any sense, and thus could not have been reasonably contemplated by the parties, to have conducted a second arbitration of the counterclaims which arose out of the same issues of project delay. Essentially the tribunal and both levels of court all characterized the process of arbitrating the counterclaims as thorough and fair.

The Court of Appeal also applied the "close connection" principle. Under Canadian common law, an arbitral tribunal's mandate includes everything "closely connected" to the matters subject to arbitration: *Desputeaux c. Éditions Chouette (1987) Inc.*, 2003 SCC 17.

Finally, and in line with the the U.S. Supreme Court decision in *BG Group plc v. Republic of Argentina* 134 S.Ct. 1198 (2014), the court held that the issue of pre-arbitral steps was one of timing of arbitration, not entitlement to arbitration and, as such, was a procedural matter properly decided by the tribunal and entitled to deference by courts.

Had the contractor's error of jurisdiction argument been accepted by the Court of Appeal, this decision would have raised the stakes considerably for parties hoping to embark on arbitration where imperfect compliance has been observed of contractually prescribed pre-arbitration steps. Indeed, parties are nevertheless well advised to be very cautious in dispensing with or declining to follow contractually mandated pre-arbitration steps given that an arbitrator's decision to accept jurisdiction is discretionary and each case will be reviewed on its own facts. Nevertheless, this decision is helpful in dealing with circumstances where the claims being asserted by one party are closely connected to the claims submitted to arbitration by the other party.

The issues of procedural fairness and violation of public policy were analyzed using a similar deferential standard. To interfere with the award on either basis, the reviewing court must find conduct by the tribunal that offends "basic notions of morality and justice". The application judge rejected the contractor's arguments under these headings, including the argument that in depriving it of "tranche payments" for failing to meet contractual milestones and in awarding the owner liquidated damages for delay, the tribunal's award constituted double recovery for the owner. The tribunal found that the tranche payments and liquidated damages were distinct and served different purposes.

Nevertheless, in dismissing the application, Justice Penny commented that had there been double recovery he may have been inclined to find a violation of public policy. The Court of Appeal was more terse, finding that the Tribunal's award did not "come close to meeting the test" for violation of public policy which requires a finding of conduct by a tribunal "which offends our local principles of justice in a fundamental way". The Court of Appeal found that the application judge had applied the right test and reached the right result, and therefore declined to comment further on whether a finding of double recovery would have violated public policy.

The application judge had also considered whether he would have upheld the tribunal's decision anyway, even if public policy was violated by awarding damages on

the counterclaim that amounted to double recovery. He answered this question affirmatively. However, his finding on this "ultimate discretion" may be of limited precedential value; the Court of Appeal characterized this part of the judgment as *obiter dicta* and stated that it need not deal with the argument. The Court of Appeal confirmed, however, that its decision in *Popack v. Lipszyc* is the governing authority in Ontario in determining whether a reviewing court should exercise its discretion under section 34(2) of the Model Law by declining to set aside an international arbitral award even where grounds exist to do so.

CCG v. Ambatovy confirms that under the Model Law, an appellate court is to approach the tribunal's reasons with considerable deference. Nothing in this decision will provide future unsuccessful parties with much hope that an appeal in Ontario from an international arbitral tribunal constituted under the Model Law will be likely to succeed. However, the decision is recent enough that the time to seek leave to appeal to the Supreme Court of Canada is not yet expired. As of press time it is unknown whether an application for leave will be pursued.

AUTHOR:

Brendan Bowles
Partner

Transitioning into the new *Construction Act*

On December 12, 2017, the *Construction Lien Amendment Act, 2017* received Royal Assent. Many of the housekeeping and non-substantive amendments came into force that day. All substantive amendments have to await proclamation by the Lieutenant Governor, including the key provisions introducing prompt payment and adjudication. While as of today, the *Act* as we know it remains in force pretty much unchanged, that will change in the very near future.

Most of the procedural aspects of the new legislation will be prescribed by means of regulations. These regulations have reportedly been drafted and are currently being reviewed, but will not enter into force until early Spring at the earliest. The dates of entry into force of the remaining portions of the Act are currently unclear. Of the substantive amendments to come into force on proclamation, amendments to modernize the lien and holdback process will come into effect first. Prompt payment and adjudication provisions will take effect once the adjudicative body is established. The Government will provide notice to industry stakeholders prior to any changes taking effect.

Transition

Section 87.3(1) of the *Construction Act* governs the transition period, stating that the Act "as it read immediately before the day subsection 2(2) of the *Construction Lien Amendment Act, 2017* came into force" will continue to apply with respect to an improvement where:

> (a) a contract for the improvement was entered into before that day, regardless of when any subcontract under the contract was entered into;
>
> (b) a procurement process, if any, for the improvement was commenced before that day by the owner of the premises; or
>
> (c) the premises is subject to a leasehold interest, and the lease was first entered into before that day.

In other words, if a general contract is entered into before the new regime comes into effect, but a subcontract under that contract is entered into after the change, the entire improvement will be governed by the Act as it currently reads. "Procurement process" is not defined, but "the making of a request for qualifications", "a request for proposals" and "a call for tenders" are listed as examples.

Subsection *2(2) of the Construction Lien Amendment* Act, 2017 repeals

the definition of "construction trade newspaper". Why that particular amendment was chosen as trigger date for the transition provision is somewhat of a mystery.

Parts I.1, Prompt Payment, and II.1, Construction Dispute Interim Adjudication, will apply in respect of contracts and subcontracts entered into on or after the day subsection 1*1(1) of the Construction Lien Amendme*nt Act, 2017 comes into force.

It is important to note, however, s. 87.3 itself is not yet in force, so at the time of writing, it is very much business as usual and the current Act applies.

Deadline to Preserve and Perfect Liens

Sections 31 an*d 36* of the Act will be amended to extend the time to preserve and perfect liens. The time to preserve will be extended from 45 to 60 days, the time to perfect from 45 to 90 days, for a total period of 150 days rather than the former 90 days.

Holdback

Section 26 of the Act, which currently provides that a payer "may, without jeopardy, make payment of the holdback…", will be changed to be made mandatory. Once the lien period has expired and no liens are left on title, the holdback "shall" be released. However, that provision is made "subject to" a new s. 27.1, which allows an owner to claim set-off, as long as this is done by way of a "Notice of Non-Payment due to Set-Off", listing claims and amounts of claimed set-off.

New sections 26.1 and 26.2 will allow phased, annual or segmented release of holdback: the former on large, multi-year projects, the latter on projects with clearly separable improvements (e.g. AFP/P3 projects).

The Act specifically permits the contractual designation of a design phase for the purposes of phased release of holdback.

Deferral agreements may be entered into to exclude portions of work from the calculation of substantial performance so as to allow for early holdback release.

Disputes concerning timely release of holdback will be sent to adjudication, as discussed below.

Prompt Payment

The Act will provide for a prompt payment regime, applying to all public and private sector construction contracts and requiring payment within 28 days between the owner and general contractor upon submission of a "proper invoice", i.e. a "properly documented invoice". "Proper invoice" is defined as:

a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor's name and address.

2. The date of the proper invoice and the period during which the services or materials were supplied.

3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.

4. A description, including quantity where appropriate, of the services or materials that were supplied.

5. 5.The amount payable for the services or materials that were supplied, and the payment terms.

6. 6.The name, title, telephone number and mailing address of the person to whom payment is to be sent.

7. 7.Any other information that may be prescribed.

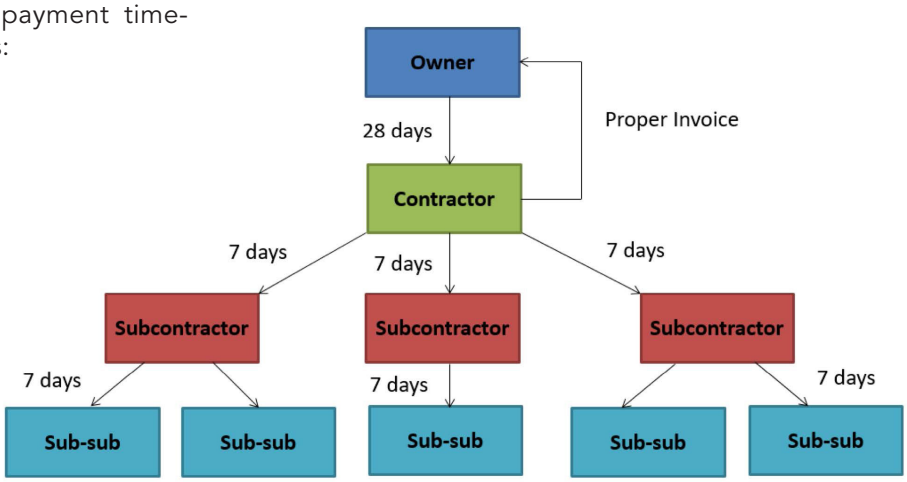
Proper invoices must be given to an owner on a monthly basis, unless the contract provides otherwise.

Upon receiving full payment from the owner, the general contractor has seven days to pay those subcontractor(s) that were included in the invoice submitted to the owner for the services included in that invoice.

Upon receiving partial payment from the owner, the general contractor must pay its subcontractor(s) that were involved in the submitted invoice from that payment on a rateable basis. Where the money withheld by the owner relates to the work of a specific subcontractor, the money paid will be distributed among the other subcontractors rateably.

However, the owner, the general contractor or other payer will be allowed to set off against invoices by submitting a "Notice of Intention to Withhold Payment" within 7 days of receipt of a "proper invoice", specifying the amount that is not being paid and detailing the reasons for the non-payment.

The basic prompt payment timeline looks as follows:



Enforcement of Prompt Payment Provisions

The Act will also provide for adjudication to enforce the prompt payment regime. The contractor or subcontractor can legally suspend work until paid. Mandatory interest rules apply, and reasonable costs incurred during the delayed payment must be reimbursed. The adjudicator's determination, with reasons, is filed with the court and is subject to the same enforcement as any court order. Parties who disregard the adjudicator's determination will be subject to garnishment, seizure of property, invasive examinations in aid of execution, etc.

Interim Adjudication

Parties to Ontario construction contracts will have a right to refer certain disputes to interim adjudication. The parties are free to create contractual adjudication regimes, subject to the contractual *regime* being consistent with the Act. If the agreement fa*lls* below *the* requirements of the Act, the Act governs.

The following types of disputes may be referred to adjudication:

8. The valuation of services or materials provided under the contract.

9. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.

10. Disputes that are the subject of a notice of non-payment under Part I.1.

11. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).

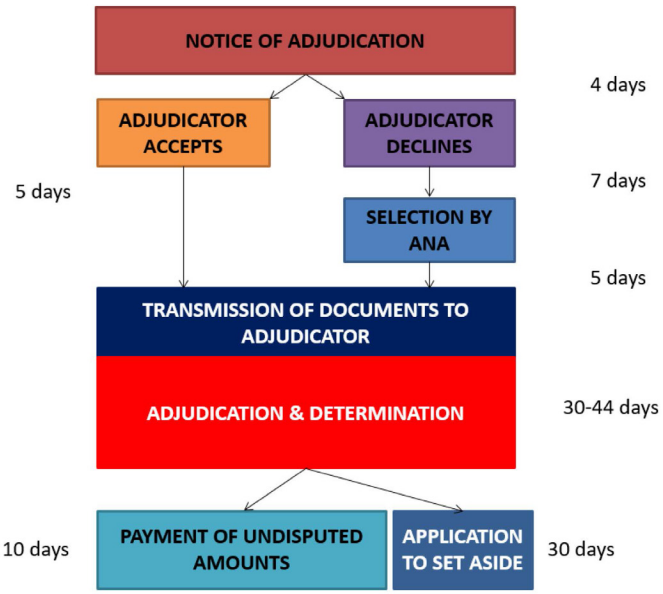
12. Payment of a holdback under section 26.1 or 26.2.

13. Non-payment of holdback under section 27.1.

14. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

Authorized nominating authorities will be established to create and maintain a roster of qualified adjudicators. Lien rights will be maintained during the adjudication.

Adjudication will follow a streamlined process:



Section 13.12 provides the adjudicator with broad powers, some of which are decidedly more inquisitorial than those of a typical common law judge:

15. Issuing directions respecting the conduct of the adjudication.

16. Taking the initiative in ascertaining the relevant facts and law.

17. Drawing inferences based on the conduct of the parties to adjudication.

18. Conducting an on-site inspection of the improvement that is the subject of the contract or subcontract, subject to the prior consent of the owner, if he or she is not a party to the adjudication; and any other person who has the legal authority to exclude others from the premises.

19. Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, to enable him or her to determine better any matter of fact in question. The adjudicator may fix a fee for any such assistance and direct payment thereof by the parties.

20. Making a determination in the adjudication.

21. Any other power that may be prescribed.

The adjudicator's determination will be binding on an interim basis and, as such, be enforceable as if it were an order of the court. In other words, there is no need to go to court to obtain judgment on a determination; you already have a judgment, albeit an interim one. While an application to set aside a determination will only rarely succeed based on the very strict test stipulated by s. 13.18, nothing in the Act prevents a party from commencing proceedings in court or before an arbitrator to finally determine the matter. All the Act does is to keep the money flowing while that process takes place.

As mentioned above, neither prompt payment nor adjudication are happening yet; both regimes will apply only in respect of contracts and subcontracts entered into on or after the day subsection 11(1) of the *Construction Lien* Amendment Act, 2017 comes into force, which, given that we don't even have a nominating authority at this point, is unlikely to happen before some time in 2019.

AUTHORS:

Markus Rotterdam
Director of Research

Emma Cosgrave
Articling Student

How Not to Calculate the Lien Amount

The case of *HMI Construction Inc. v. Index Energy Mills Road Corp.*, 2017 ONSC 4075 (Div. Ct.), serves as a good example of why lien claimants need to carefully determine the amount of their lien before registering their claim for lien. Index Energy bought an energy production facility that was originally built in 1941 with a plan to retrofit and replace the existing plant with a biomass fired cogeneration facility that would supply steam to industrial clients and generate electricity for sale into the power grid. In December 2012, Index Energy entered into a fixed price engineer, procure and construct contract with HMI. Work commenced shortly after execution of the EPC contract, however, disputes arose between HMI and Index Energy. On May 1, 2015, Index Energy issued notices of default to HMI and on May 19, 2015, Index Energy informed HMI of its decision to take over plant operations despite the work under the EPC contract not being completed. On July 28, 2015, HMI was advised of the decision by Index Energy to terminate the EPC contract as a result of HMI's default.

HMI registered two construction liens totalling $32,807,468.11. The defendant Index Energy brought a motion to discharge the two liens and alternatively to post a reduced amount of security for the liens. The motions judge held that HMI had no reasonable prospect of proving a lien claim in excess of a maximum lienable claim amount of $13,872,154.86 plus HST, and therefore, rather than discharge the liens, reduced the amount of the security to be posted to vacate the registration of the claims for lien from title to the maximum amount. HMI appealed the result to the Divisional Court, which dismissed the appeal of HMI.

In order to fully appreciate the result in this case, it is important to understand the underlying facts regarding the calculation of HMI's lien amount so that statements made by the motions judge and endorsed by the Divisional Court are not taken out of context.

The evidence on the motion was an affidavit of HMI's administration manager, on which she was cross examined. First HMI totalled all of its costs on the project for material, equipment, and labour including amounts claimed by its subcontractors. Then HMI added 10% profit, which ignored the fact that profit was already in the fixed price contract amount. HMI then deducted the amounts paid from Index and the balance owing under this cost plus approach became the amount claimed in the HMI liens. HMI's administration manager also refused to answer questions that essentially asked whether HMI's lien was calculated based on a cost plus approach and the court drew an adverse inference from her refusal to answer these proper questions.

In determining that HMI was not entitled to calculate its lien on this basis with respect to a contract that was a fixed price and that included terms for changes in the work and claims, the court stated:

> With a fixed price contract, in the absence of approved change orders, a contractor cannot include in a claim for lien extra charges for the work included in the fixed price contract simply because costs were more than usual or anticipated when the fixed price contract was signed. When a party signs a fixed price contract, the party assumes risks of cost changes.

The above statement, if taken out of context, could lead to a misunderstanding of the *HMI* case. The court did not disallow all liens because unapproved or disputed extras are included in the lien calculation, which is clear from the Divisional Court decision. The statement above only refers to charges by a contractor for work that is in the original scope. Simply stated, there is a base price and a base scope of work associated with that price, and that should be the starting point of the lien calculation.

The court set out seven reasons whey the cost plus approach was inappropriate in this case for calculating the lien. The court articulated the third reason as follows:

> Thirdly, HMI could have liened for disputed amounts owing pursuant to the original contract and for disputed work that was not included in the original contract (extras). Index and HMI had agreed to an approach for valuing payment of extras that was different than for work that was included in the original scope of the fixed price contract. However, HMI's "cost plus" approach did not differentiate between the original contract work and extras. All work was valued using the same "cost plus" basis, whether that work was part of the scope of the original fixed price contract or whether the work was an extra.

Therein lies the problem with the calculation of the value of the HMI liens; HMI did not differentiate between the costs incurred to complete the original scope of work and its claims. Typically, when the value of a lien is calculated, the amounts are put in buckets, such as approved and unpaid extras, unapproved or disputed extras or amounts for additional compensation arising from delays, as a few examples. The lower court found that the cost plus approach by HMI significantly exaggerated the amount of its liens.

The matter was appealed to the Divisional Court, which as noted above, dismissed the appeal. The Divisional Court articulated the proper manner for itemizing a claim:

a) Contract accounting

b) Plus extras with amounts claimed for each extra, including the basis on which those claims were calculated

c) Less credits for work not done

d) Less acknowledged deficiencies (if any)

e) Plus any other claims (such as delay costs).

This formulaic approach by the Divisional Court, although perhaps not complete in its description, does however serve as a good guide to calculating the value of a lien.

Justice Corbett , writing for a unanimous Divisional Court, *stated that "I would have expected properly completed Scott Schedules to account for HMI's lien claim in the manner I have d*escribed above." A party, therefore, when preparing the calculation of its lien value should prepare a Scott Schedule setting out the items in the claim for lien and the value for each item. Maintaining such a written record will no doubt assist a party in the event that the party is cross-examined on its lien.

AUTHOR:

John Margie
Partner

Notable Case Law

LIEN DECISIONS

Ravenda Homes Ltd. v. 1372708, 2017 ONCA 834

The correct test for damages under s. 35 of the CLA requires a consideration of whether a lien claim was "grossly in excess" of what was ultimately proven to be owed under the lien, not merely "excessive". In allowing an appeal from the motion judge on this basis, the Court of Appeal also held that the motion judge erred in making any determination under s. 35 of the CLA at all, given that the amount of the claimant's lien had not been determined, but was one of the issues that the motion judge referred to trial.

The decision also contains a lengthy discussion of the elements required to establish ownership under the Act.

Environmental Building Solutions Corporation v. 2420124 Ontario Ltd., 2017 ONSC 6202 (S.C.J.)

The court vacated a lien where the amount of the lien exceeded the value of the improvement by close to 25%. The discrepancy was not a failure to comply strictly with the Act, so that the claim for lien could not be cured by application of s. 6 of the Act.

International Brotherhood of Electrical Workers, Local 424 v. Imperial Oil Ventures Resources Limited, 2017 ABQB 434

On an energy project, where a lien "in connection with" the construction of a building rather than recovery of a mineral is registered only against the surface interest, it is a lien under s. 6(1) of the *Builders' Lien Act* and ought to be registered with the Registrar of Land Titles rather than the Minister of Energy. The work done results in a lien on the entire project, even when the work is limited to one small portion of it.

Cos Shore Inc. v. Unimac-United Mgmt. Corp., 2017 ONSC 4813 (Master)

An attendance by a subcontractor at the site without authority from the contractor and without a confirming record, all to allegedly inspect its work for compliance with plans and specifications has been found not to extend the lien period.

National Bank of Canada v. KNC Holdings Ltd., 2017 SKCA 57

The assets of an oil and gas company were placed into receivership. The appeal concerned the priority of liens filed against those assets relative to a security interest held by National Bank of Canada. Relying on the Saskatchewan Court of Appeal decision in *Canada Trust Co. v. Cenex Ltd.*, the Chambers judge held that s. 22 gave the lienholders priority over National Bank in relation to a variety of assets. National Bank argued that *Cenex* was wrongly decided and that, as a result, the Chambers judge's reading of s. 22 of The *Builders' Lien Act* was incorrect. National Bank argued that its security interests had priority over those of the lienholders.

The Court of Appeal agreed and held that *Cenex* could not be reconciled with the current wording of s. 22(2) of the Act. The court held that section 22(2) clarified the nature of the assets to which a builder's lien attached, but did not establish priorities between liens and other kinds of security.

Homes by Element Construction Ltd. (Re), 2017 ABQB 442 (Reg.)

An owner may be estopped from relying on the failure to register a CPL where it applied to the court to set a lien fund and paid the fund into court without putting the validity of the lien in issue.

New Beginnings Contracting Ltd. v. Wedgewoods Condominium Corp., 2017 ABQB 501

An application to stay lien proceedings in favour of arbitration was dismissed where sending the claim to arbitration would bifurcate the dispute, possibly lead to many complexities in its resolution, and would likely not lead to less expensive proceedings. In addition, the application to move the proceedings to arbitration has been brought too late.

King Road Paving and Landscaping Inc. v. Plati, 2017 ONSC 6319

The purpose of the holdback under the *Construction Lien Act* is to create a fund to which the lien claimants may look if they are unable to recover from the person with whom they have a direct contract. The holdback is a trust fund for the subcontractors. Provided the owner retains the proper holdback over the course of the construction and otherwise complies with its statutory obligations, the owner's liability to a subcontractor lien claimant, with whom the owner has no direct contract, is limited to the amount of the holdback.

OTHER CONSTRUCTION DECISIONS

Grascan Construction Ltd. v. Metrolinx, 2017 ONSC 6424 (Div. Ct.)

The Divisional Court dismissed Grascan's application for judicial review of a decision by IO and Metrolinx decision to disqualify it from an RFP process for failure to abide by the RFQ rules. The RFQ required each construction Prime Team Member of an applicant team to obtain an accounting firm letter from a national accounting and advisory firm with expertise in forensic reviews by the submission deadline. Grascan admitted that they did not include the letter in their submission since they did not have sufficient time to obtain one. Grascan argued that the requirement was new, that it had not been insisted upon in prior projects by the IO and Metrolinx and that by refusing to exercise the discretion IO and Metrolinx retained in the RFQ to waive the requirement for the letter, the Sponsors effectively permitted only the largest construction companies to compete for the Project, and excluded smaller construction companies, like theirs, from the

competition. Instead, the applicants included a letter from Deloitte advising that a letter was currently in progress and would be forthcoming.

The applicants alleged that IO and Metrolinx breached the duty of fairness they owed to them by failing to: (a) conduct a public procurement process that was open, fair and in a transparent manner; (b) provide equal treatment to vendors, to evaluate and consistently enforce the criteria set out in the RFQ; (c) provide reasonable notice and opportunity for the applicant to compete; and (d) provide the applicant with sufficient time to submit its response.

The court held that IO and Metrolinx did not breach any duty of fairness and that their decision was reasonable. The applicants were really seeking special treatment and asking the court to excuse their failure to include the letter in their Prequalification Submission. Had IO and Metrolinx accepted the submission without the letter, the other bidders would have had good reason to complain. Fairness required that the the applicants be treated the same as all other bidders, and the application was dismissed in its entirety.

Cardinal Contracting Ltd. v. Seko Construction (Vancouver) Ltd., 2017 YKSC 51

A clause stipulating that "Payments shall be made monthly on progress estimates as approved by the Contractor covering 90% of the value of the Work completed by the Subcontractor to the end of the previous month; such payments to be made 7 days after the Contractor receives payment for such Work from the Owner" was held to be a timing clause rather than a pay-when-paid clause. There was no clear wording that the payment on the subcontract was conditional on the owner paying the contractor. Therefore, the court followed *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.* (1995), 19 C.L.R. (2d) 1 (N.S. C.A.) rather than *Timbro Developments Ltd. v. Grimsby Diesel Motors Inc.* (1988), 32 C.L.R. 32 (Ont. C.A.).

Thom v. Laird Custom Homes Ltd., 2017 BCSC 1577

The following limitation clause was held to be a complete bar against an attempt to join the architect as a defendant six years after the expiration of the agreed upon date:

"In further consideration of the services provided by HEARTH architectural Inc., the Client expressly agrees that HEARTH architectural Inc.'s liability shall be absolutely limited to a Claim brought within a period of two (2) years from the date of the suspension or abandonment of the Project, the Certificate of Completion or substantial Performance for the Project or the termination or suspension of HEARTH architectural Inc.'s services, whichever first occurs (the "Limitation Period"). The Client further agrees that, following the expiration of the Limitation Period, HEARTH architectural Inc.'s lability for a Claim brought by the Client shall absolutely cease to exist and the Client shall bring no proceedings against HEARTH architectural Inc."

Billing v. Precisioneering DKG Corp., 2017 BCSC 1777

The plaintiff designed a honeycomb structure for manhole covers, which was a complex design that took him about 5 years to complete. The defendants refused to pay certain royalties. The plaintiff had a strong science background, but was not a professional engineer or geoscientist. The court held that the work done in designing and developing manhole covers fell within the definition of the practice of professional engineering, and that s. 24(1) of the *Engineers and Geoscientists Act* barred the plaintiff from recovering any remuneration for the work he did in relation to the design and development of manhole covers.