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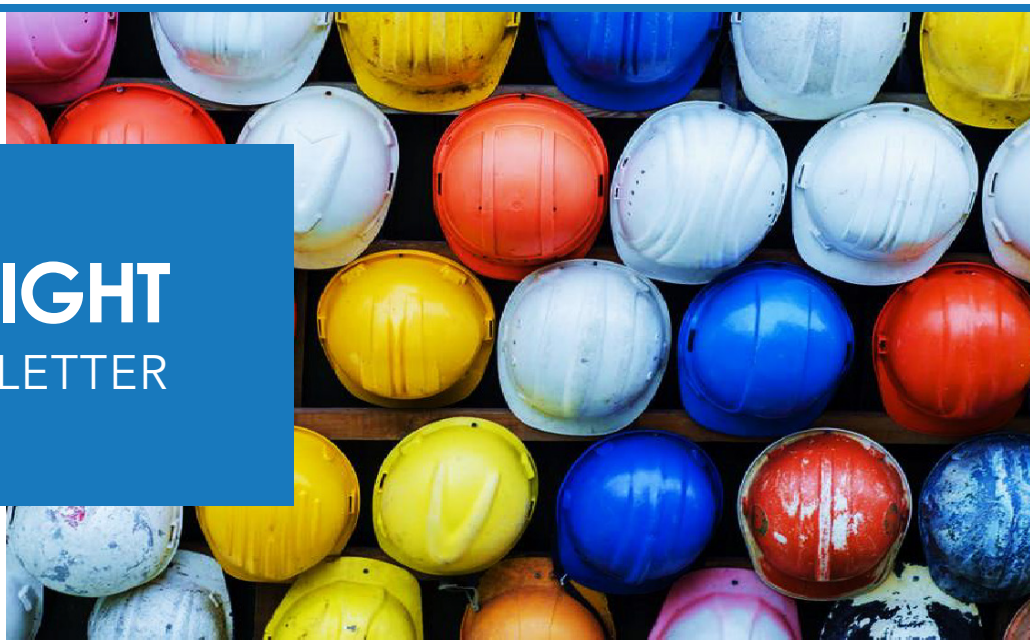

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Case Comment: *Gillham v. Lake of Bays (Township)*

In *Gillham v. Lake of Bays (Township)*, 2018 ONCA 667, the Ontario Court of Appeal addressed the discoverability of a claim for damages arising from construction deficiencies and confirmed it necessary that the plaintiff know that the loss is non-trivial, and that commencing a legal proceeding would be an appropriate means to remedy the loss.

Facts

In 1991 the plaintiffs, Jack and Heather Gillham, purchased a 1950's waterfront cottage in the Township of Lake of Bays. Shortly after purchasing the cottage, the Gillhams noticed that the cottage was tilting downwards at its northeast corner towards the lake. The Gillhams hired a contractor to undertake temporary remedial work to correct the level of the cottage. By 2004, however, the cottage had again started to tilt, and the Gillhams were advised that additional remedial work would be expensive and was not guaranteed to permanently fix the problem. In response, the Gillhams decided to replace their cottage with a new prefabricated cottage.

The Gillhams entered into a contract with the defendant, Royal Homes Limited, for Royal Homes to supply and install the new prefabricated cottage. In turn, Royal Homes retained the defendant, J.D. MacKay, to act as its subcontractor to excavate the foundation and the pier footings of the deck, and construct and backfill a stacked rock retaining wall. By July of 2006 both J.D. MacKay and Royal Homes had completed their work.

In the summer of 2009, however, the Gillhams noticed that one of the deck

piers in the northeast corner of the deck had shrunk 1 ¼ inches, pulling the deck away from the cottage. Royal Homes attended to the property, jacked up the deck post, and shimmed it. At this time, Royal Homes advised the Gillhams that the issue was not a construction issue, and that the Gillhams should retain the engineering firm Trow Associates Inc. to investigate and determine the cause of the pier settlement.

The Gillhams followed Royal Homes' advice and retained Trow to conduct a site inspection. Following the inspection, Trow released a report on September 15, 2009, concluding that the weight of the stacked rock retaining wall and backfill was causing the failure of a pre-existing lower retaining structure, which in turn was causing lateral movement of the deck towards the northeast. With respect to the cottage, however, the Trow report noted that while the deck pier movement did "not appear to have affected the dwelling yet, there is a hairline crack (less than 1 mm in width – typical of shrinkage cracks) in the basement floor that is located in the northeast corner of the basement." Following receipt of the report prepared by Trow, the Gillhams spoke with the principal of J.D. Mackay who indicated that the stacked stone wall might find its own level and that the Gillhams should monitor the situation and "wait and see".

The Gillhams took no further steps. However, between 2009 and 2012 the settlement issues continued. In 2012, the Gillhams retained another contractor, Fowler Construction Company Ltd., who recommended a soil study. The Gillhams retained a different engineering firm, Terraprobe Inc., to undertake the soil study and, in July 2012, Terraprobe released a report concluding that the stacked stone retaining wall built by J.D. MacKay had been built on loose sand and fill without adequate support, that the retaining wall was failing, and that it would need to be removed and reconstructed. The Terraprobe report also indicated that both the cottage foundation and the retaining wall should be supported by native undisturbed soil or bedrock. In the summer of 2013 Fowler commenced remedial work on the property and discovered that the entire cottage foundation had been improperly constructed on loose soil.

On October 21, 2013, the Gillhams commenced an action against J.D. MacKay and Royal Homes for the cost of reconstructing the retaining wall and stabilizing/underpinning the foundation of the cottage. (The Gillhams also commenced an action against the Corporation of the Township of Lake of Bays. However, for the purposes of this case comment and its discoverability analysis, the facts and allegations concerning the Township have been omitted.)

Lower Court Decision

Royal Homes moved for summary judgment for dismissal of the Gillhams' action on the basis that the Gillhams failed to commence their action before expiry of the applicable two-year limitation period. J.D. MacKay was not a party to the motion, as the Gillhams had settled with J.D. MacKay by way of Pierringer Agreement sometime prior.

The motion judge considered sections 4 and 5 of the *Limitations Act, 2002*, S.O. 2002, C. 24, Schedule B and, relying on the decision of *Kowal v. Shyiak*, 2012 ONCA 512, considered whether the Gillhams knew the essential facts to provide them with a *prima facie* ground to infer that the acts or omissions were caused by the parties identified. The motion judge found that the Gillhams were aware that they had a claim against one or more of the defendants on September 15, 2009, when Trow delivered their report. The motions judge made, amongst others, three key findings of fact:

> 1. The Trow report dated September 15, 2009, stated that the "weight that was added by the construction of the retaining wall and backfill … appears to be causing a failure of the lower retaining structure" [emphasis in original];
>
> 2. The Gillhams knew the identity of Royal Homes and J.D. MacKay – the Gillhams were intimately aware that these were the parties involved in the construction of their new cottage; and
>
> 3. The Gillhams were aware that their cottage property had challenging site conditions, but were also assured by Royal Homes that their new cottage would be built on a stable foundation and the site conditions would not continue to be an issue.

The motion judge concluded that these facts, taken in the aggregate, should have alerted the Gillhams to the fact that their problems were construction related and that they had a cause of action against Royal Homes and J.D. MacKay. Simply put – the Gillhams contracted for a new cottage without foundational issues, and discovered in 2009 that they had foundational issues. On this basis, the motion judge granted summary judgment and dismissed the Gillhams' action.

In *obiter*, the motion judge identified that, if it were not statute barred, the Gillhams would have a strong *prima facie* case in negligence against the defendants.

Appeal Court Analysis

The Ontario Court of Appeal framed its analysis on the overarching question set out in *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 – whether the claimant knew or reasonably could have known, exercising reasonable diligence, the material facts set out in section 5(1)(a) of the *Limitations Act, 2002* that give rise to a claim. The Court went on break this down into three distinct elements of knowledge:

> 4. The identity of a potential defendant (*Longo v. MacLaren Art Centre*, 2014 ONCA 526);
>
> 5. That non-trivial loss has occurred (*Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Limited*, 2008 ONCA 384); and
>
> 6. That the loss being non-trivial, a proceeding would be an appropriate means to seek remedy (*Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218).

The Court then went on to review the Trow report dated September 15, 2009, in light of the above principles to determine whether the report provided the Gillhams with the requisite knowledge to constitute discovery of a claim against the defendants.

Contrary to the motions judge, the Court of Appeal found that the Trow report did not identify construction issues with the stacked stone retaining wall constructed by J.D. MacKay, but issues with the pre-existing retaining structure which were exacerbated by the weight of the stacked stone retaining wall. Further, the Court of Appeal found that while the Trow report identified a localized slope failure and/or consolidation of underlying soils at the northeast corner of the cottage deck, it did not attribute these to construction error. In overturning the motion judge's finding of fact on these two points, the Court of Appeal found that the Trow report only identified potentially naturally occurring issues that did not point to any negligence on the part of Royal Homes or J.D. MacKay.

The Court of Appeal found that it wasn't until the Terraprobe report of July 2012 that the Gillhams were aware that the cause of the problems was the negligent construction of the stone retaining wall on loose soil, which could have been prevented. Further, it wasn't until the Terraprobe report identified that the cottage foundation must be situated on native, undisturbed soil or bedrock, that the Gillhams were aware that construction on loose sandy soil would constitute a serious construction issue.

Lastly, the Court of Appeal found that, in J.D. MacKay and Royal Homes dismissing the Gillhams' initial concerns and the assuring them that the issues were due to natural settling, combined with the trivial nature of the identified deficiencies (the 1 ¼ inch settlement of the northeast deck pier and hairline basement crack), the Gillhams did not know that their loss was non-trivial, and that it was appropriate to pursue their claim in a court proceeding. The Court of Appeal, citing *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709, found that the motions judge made an error in law in failing to consider whether, having regard to the nature of the Gillhams' loss, they knew that the legal proceeding would be the appropriate means to remedy it.

Conclusion

The Ontario Court of Appeal made clear that the "appropriate means" element – that the claimant know that a legal claim would be an appropriate means to remedy their loss – has the objective of deterring needless litigation.

In this case, it had the practical effect of allowing the owners the opportunity to wait and see whether a minor observed deficiency worsens, without fear of running afoul the two-year limitation period. Counsel should be aware that, in light of *Gillham v. Lake of Bays (Township)*, the Court will only find a claim as discoverable – particularly where the claimant has a *prima facie* reasonable claim as in this case – where it is clear the owner was aware of a serious construction deficiency caused by an identifiable party.

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The New *Construction Act* – When is a Procurement Commenced?

On July 1, 2018, the *Construction Lien Act* became the *Construction Act* (the "Act"). The transition rules of section 87.3 have been discussed in earlier issues of this newsletter.

This article will focus solely on the issue of when a procurement process, as referred to in the transition rules, should be considered to have been commenced for the purposes of s. 87.3(1)(b).

Section 87.3 provides as follows:

Transition, Construction Lien Amendment Act, 2017

87.3 (1) This Act, as it read immediately before the day subsection 2 (2) of the Construction Lien Amendment Act, 2017 came into force, continues to apply with respect to an improvement if,

(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.

Examples, procurement process

(2) For the purposes of clause (1) (b), examples of the commencement of a procurement process include the making of a request for qualifications, a request for proposals or a call for tenders.

While the Act gives three examples of a procurement process, requests for qualifications, requests for proposals and calls for tender, it stops short of defining the term. Other Acts do define the term.

The *Fairness in Procurement Act, 2018*, S.O. 2018, c. 4, s. 1, for example, provides as follows:

> "procurement process" means a process in which a purchaser selects a supplier with which to enter into a procurement contract, other than a process initiated by a Government entity or broader public sector entity for the procurement of goods and services intended for commercial sale or resale.

"Procurement contract", in turn, is defined in that Act as:

> a contractual or commercial arrangement for the acquisition by a purchaser of goods or services from a supplier, through purchase, rental, lease or conditional sale, or by otherwise conferring value or a benefit on the supplier.

However, the law is clear that since the meaning ascribed to a particular term in a statute is always coloured by the legislative context in which that definition appears, it is inappropriate to simply use a definition from another statute: see *Ontario (Ministry of Community Safety & Correctional Services) v. Ontario (Information & Privacy Commissioner)*, 2009 CarswellOnt 8321 (Div. Ct.); *Apache Canada Ltd. v. Johnson*, 2005 ABCA 71.

When a word is not defined by the governing statute, the plain and ordinary meaning of the term should be applied: *Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33.

It has been said that:

> In the construction industry, "procurement" can be broadly defined as the acquisition of project resources for the realization of a constructed facility or project… In other words, procurement involves the selection of bidders for each portion of the work of a construction project who are qualified, competitive, interested in performing the work, and capable of doing the work within the project time requirements. The ultimate goal of the procurement endeavor is to secure the successful bidders under contract and direct them to commence the work": American Bar Association, Forum on the Construction Industry, The Annotated Construction Law Glossary (Chicago: ABA Publishing, 2010).

While that is a useful and accurate description of the term, it does not clarify when the procurement process *commences*.

In the international trade context, the Canadian International Trade Tribunal has consistently taken the view that a procurement process for the purposes of free trade agreements commences after an entity has decided on its requirements and continues up to and including contract award: *Atlantic Catch Data Ltd. v. Department of Public Works and Government Services*, 2018 CarswellNat 1927. Again, though, that is based on statutory definitions elsewhere and therefore not directly applicable.

Article 1017(1)(a) of of NAFTA provides that the procurement process "begins after an entityhas decided on its procurement requirement and continues through the contract award."

Section 87.3(2) provides that "the making of a request for qualifications, a request for proposals or a call for tenders" are examples triggering the commencement of the procurement process. Even on projects where an owner makes a request for proposals, however, it is at least arguable that the procurement process began well before the RFP, potentially even as early as the planning stage, perhaps when the owner requested a feasibility study from a consultant. While that might seem far-fetched, the Government of Canada, for example, does consider the procurement process to start in the planning phase.

The Government of Canada website sets out the phases of the procurement phase (https://buyandsell.gc.ca/for- government/buying-for-the-government-of-canada/the-procurement-rules-and-process/phases-of-the-procurement- process):

Phases of the Procurement Process Table of Contents

- Pre-contractual phase: Planning
- Contracting phase: Bidding and awarding of contract
- Contract management phase: After the contract is awarded
- Postcontract phase: Close out, warranty and audit

The website also provides a description of the planning, pre-contractual phase:

Pre-contractual phase: Planning

Includes activities related to requirement definition and preliminary procurement planning up to issuance of bid solicitation. During this phase, various activities may arise such as:

- Verify the requisition form for goods and services, the funding and the security requirements
- Review the requirement and analyze options
- Verify the statement of work
- Identify environmental performance considerations
- Choose the appropriate procurement instrument
- Verify the Intellectual Property Considerations
- Develop the procurement strategy
- Review the non-competitive justification
- Review the evaluation criteria
- Develop the solicitation document
- Determine the appropriate contractor selection methodology
- Approval of the procurement process

Based on that understanding, the procurement process would commence long before the actual "making" of the RFP or call for tender. Again, the *Construction Act* stipulates that the "making of the RFP" may commence the process, but the Act does not say that it automatically does on every project where it occurs.

There is much to be said for a more restrictive reading of the Act. The examples given in s. 87.3(2) are all readily ascertainable by the participants in the project. The more expansive reading would lead to a scenario in which it would be impossible for anyone but the owner to know which Act applies. However, had it been the intention to always link the commencement to one of those s. 87.3(2) events, the drafters of the Act could have provided for that outcome.

The Act provides that the commencement of a procurement process, if any, triggers the application of the old Act. Given the potentially expansive interpretation of a "procurement process", what about an owner who picks up the phone to informally get prices from two contractors for a home renovation project? Does that qualify as a "procurement process"? If so, there would be very few projects indeed without a procurement process, but again, it is at this point arguable that those calls commenced the process.

What of a situation in which five bidders respond to a call for tenders, but all come in over budget? After negotiations with the lowest bidder fail, the owner invites the three lowest bidders to rebid on slightly modified bid documents under a new bid call, as per CCDC-23. Which tender call commenced the procurement? Arguably, the second call for tenders with its revised scope could be in respect of a different "improvement" for the purposes of the Act, making the second call the relevant one. Again, though, there is at least room for argument.

While the answers to all these issues will have to await determination by the courts, until there is clarity and guidance from the courts, the prudent course for lien claimants and their counsel will be to preserve and perfect liens as if the old Act, with its stricter time frames, applies.

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Case Comment: *Mega International Commercial Bank (Canada) v. Yung*

It is often the case in construction disputes that the defendant will make claims for contribution and indemnity against a third party. Although often pursued together, the concepts of "contribution" and "indemnity" are not one and the same.

A contribution claim seeks shared liability between a defendant and a third party for a plaintiff's injury. For example, should a plaintiff property owner sue a defendant contractor for breach of contract because of an undue delay in the plaintiff's development project, the defendant contractor may make contribution claims against subcontractors who contributed to the delay.

Indemnity, on the other hand, seeks full recovery from a third party. Returning to the above example, should a subcontractor's negligence be the sole cause of the undue delay, the defendant contractor may seek indemnification from the subcontractor, considering it would be inequitable for the defendant contractor to be "on the hook" for an injury caused by no fault of its own. In other words, the difference is the extent of the recovery. Indemnity is the recovery of all that was paid, contribution is recovery of only some portion of what was paid (*Canaccord Capital Corp. v. Roscoe*, 2013 ONCA 378).

Claims for both contribution and indemnity are routinely brought together as a means of risk and damages mitigation by defense counsel for their clients. Indeed, contribution and indemnity claims are treated together under section 18 of Ontario's *Limitations Act, 2002*.

Subsection 18(1) provides:

For the purpose of subsections 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

Until recently, decisions in the Ontario Superior Court of Justice were split over the interpretation of this provision. Specifically, it was unclear whether the provision provides for an absolute or a presumptive limitation period of two years from the day the plaintiff serves the defendant bringing a third party claim. An absolute limitation period would bar any claim brought more than two years after this date, without exception. A presumptive limitation period would bar any claim brought more than two years after this date, subject to the principle of discoverability.

The issue was addressed in an Ontario Court of Appeal decision *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, released on May 7, 2018. Although not a construction case, it is highly relevant to the construction industry due to the prevalence of third and even fourth party claims in construction disputes. With both projects and disputes often measured in spans of years, the limitations risks of claims for contribution and indemnity seems particularly acute in respect of construction project claims.

In *Mega International*, Justice Paciocco interpreted the provision using the purposive approach of statutory interpretation. The purposive approach establishes that:

> …there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Rizzo & Rizzo Shoes Ltd (re), [1998] 1
>
> SCR 27 at para 87.

With this as a guiding principle, Justice Paciocco first turned to the opening line of section 18, which states "[f]or the purposes of subsection 5(2) and section 15" of the *Limitations Act, 2002*. Subsection 5(2) establishes a rebuttable presumption to the effect that the limitation clock begins to run against the plaintiff on the date of the alleged injury unless the they neither knew nor ought to have known of their injury on this date. Section 15 establishes an absolute limitation period of 15 years in Ontario from the date of any wrongdoing.

In regards to subsection 5(2), Justice Paciocco found that section 18 provides the "variable" used in subsection 5(2) to trigger a presumptive limitation period for contribution and indemnity claims. That said, subsection 5(2) provides that the limitation

clock begins to run against the plaintiff on the date of the alleged injury, subject to the principle of discoverability. Section 18 provides that the date of the alleged injury for contribution and indemnity claims is the date the "first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought".

In regards to section 15, Justice Paciocco relied on the Supreme Court of Canada decision *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, which stands for the proposition that one can presume that a legislature avoids using "superfluous or meaningless" words in a statute. Justice Paciocco found that the reference in section 18 to section 15 would be superfluous and meaningless if section 18 provided for an absolute two year limitation period, reasoning that any invocation of the absolute limitation in section 15 would not make sense if section 18 established its own absolute limitation period ending thirteen years earlier.

Accordingly, section 18 provides for a presumptive, not an absolute limitation period. The Court found that this interpretation aligned with the goals of the Act, which is to strike a balance between a plaintiff's right to sue and a defendant's need for certainty and finality.

Mega International clarified a few other points. Firstly, the words "the day on which the first alleged wrongdoer was served with the claim", in subsection 18(1) refer to the day the defendant who is bringing the third party claim is served by the plaintiff in the parent action. In this case, the third party suit was brought by two defendants the plaintiff had served two years apart in the parent action. The motion judge erroneously found that the limitation clock for the third party claims began to run against the second defendant when the plaintiff served the first defendant. The motion judge thus based his findings on a misinterpretation of "the first alleged wrongdoer" under subsection 18(1).

The second holding relates to the principle of discoverability and its relationship to fraudulent concealment. The defendants brought a third party claim for contribution and indemnity against their solicitor and his law firm after the solicitor allegedly failed to release the defendants from personal guarantees that formed the basis of the plaintiff's parent action. Despite conflicting accounts, the motion judge found that both defendants knew they had a claim against the solicitor more than four years prior to bringing their third party claim. The motion judge reasoned that the plaintiff had sent letters to the defendants prior to commencing the parent action explaining the guarantees were never released.

Justice Paciocco clarified that even though the defendants might have known of the facts giving rise to their claim against the solicitor, this did not imply that they knew a claim against the solicitor was legally appropriate. The defendants made a number of allegations against the solicitor including that he assured the defendants they could not be found personally liable on the basis of the guarantees. This would by definition be considered fraudulent concealment and therefore the facts presented a genuine issue for trial. Justice Paciocco thus held that the motion judge committed an "error in principle" in granting summary judgment to the solicitor and his law firm.

The case was remanded for further proceedings in accordance with Ontario's *Rules of Civil Procedure.* For construction practitioners, the counsel of prudence is to ensure that third party claims and the like which seek contribution and indemnity are served within two years of service of the statement of claim, remembering that the claim is deemed to be discovered on that date. This should always be the default advice of the careful lawyer.

However, *Mega International* is a helpful reminder that there are very few "absolutes" in our system of law, and in a proper case this presumption may be rebutted. This could be very useful in multi-year disputes where additional causes of action for contribution and indemnity are only uncovered during a process of discovery well after service of the original statement of claim. Counsel will at least be able to argue that the deemed discovery upon service of a statement of claim is a presumption that can be rebutted in an appropriate case. As always, each case will depend on its own facts to determine when it is appropriate to permit third party claims brought more than two years after service to proceed.

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The Early Resolution of Construction Disputes: No Pain, Big Gain

Intro

As mediation, med-arbs and collaborative settlement have become more common as a part of the dispute resolution process, these methods have also become more commonly used in the construction arena. As with other disputes, parties to construction disputes value the confidentiality, effective and efficient dispute resolution and the prospect of maintaining working business relationships that these dispute resolution mechanisms can facilitate.
Construction disputes are often complex, with many players, complex issues and large sums at stake. This can make the litigation of construction disputes lengthy and expensive. The time required to get the matter to trial and secure a resolution will frequently exceed the time spent completing the project.

Mediation

Mediation is gaining acceptance within the construction community as an effective means for resolving disputes both during the life of a project and after it has been completed, in a manner consistent with the construction relationship.

Since mediation is now a mandatory step in the litigation process in many jurisdictions, parties will come together before a mediator at least once before a case goes to trial. Mediators are able to facilitate settlement both directly at a mediation session, and when the mediation prompts a change in the settlement discussion, the approach or the options at play for the parties (see Stitt, Allan J., "A 'Failed' Mediation", *Construction Law Letter*, Vol 34, No. 3. January/February 2018) Disputes that are not resolved quickly tend to lead to hardening of positions and become more difficult to settle as the commitment to position and time and resources increases. The more time and money that goes into the pursuit of a dispute, the more entrenched parties become in their positions causing the mediation to be less likely to succeed.

Mediation affords the parties an opportunity to reach complete or partial, permanent or interim, resolutions to keep a project moving while actively working to resolve the dispute. Each party's rights and interests can be preserved, and work can continue on the project while resolution is pursued.

Due to the direct correlation of time and cost, parties should be encouraged to bring a dispute to mediation sooner rather than later in the process. Addressing disputes immediately after they arise will almost always be a more efficient and cost-effective approach (Olivella Jr. M. A., "Toro's Early Intervention Program, After Six Years, Has Saved $50m" (1999) 17:4 Alternatives 1; as quoted in Golann, D. Folberg,J., Mediation: The Roles of Advocate and Neutral, 2nd ed. (New York: Aspen Publishers, 2010), p. 96). Parties may be well advised to appoint a neutral project mediator at the outset of a project, before any dispute has arisen (Morrison, S. "The Better Way: Pre-Litigation Mediation of Construction Disputes", Construction Law Letter, Vol 34, No. 3. January/February 2018).

This individual would remain available during the course of the project to assist parties in the resolution of disputes in a timely and confidential manner whenever the parties choose to seek a resolution. Preventing disputes or resolving them promptly is more effective, indicating that the closer the mediation takes place to the time of the dispute, the more efficient the mediation process may be. Engaging the services of a mediator as early in the dispute process as possible, and even at the outset of the project could make all the difference to an effective resolution process for construction clients.

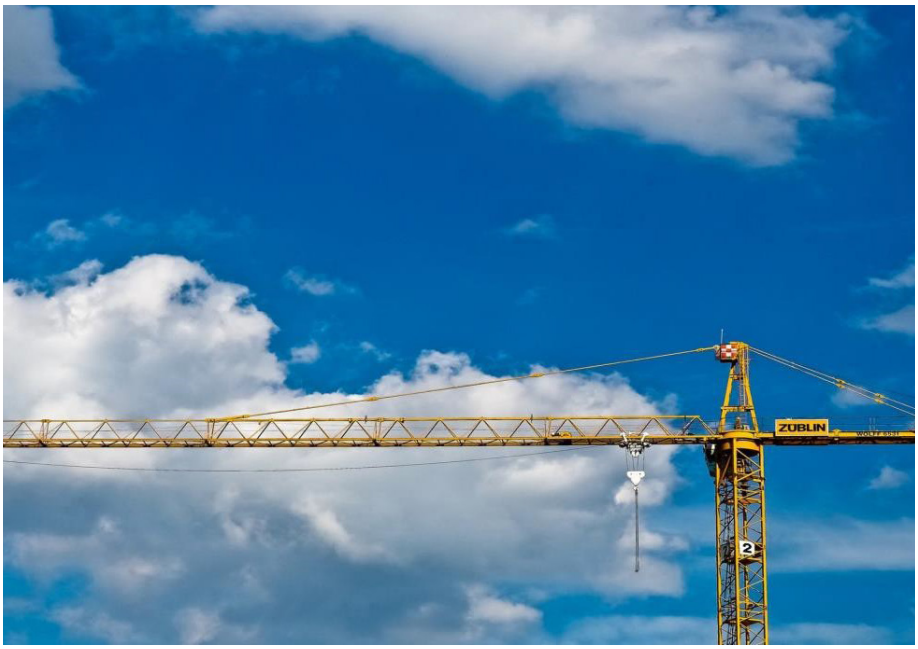
Med-Arb

Med-Arb is a hybrid form of dispute resolution. As the name suggests, it combines both mediation and arbitration. In same- neutral med-arb, the parties work initially with a mediator to determine a solution to their dispute. If the mediation is unsuccessful, the neutral assumes the role of an arbitrator and will make a final and binding determination.

The advantages of this process are that it gives parties the opportunity to try mediation before the commencement of an arbitration, which provides parties with all of the benefits of mediation early in the dispute, before resorting to binding proceedings. The med- arb process allows parties to save time and money on "re-starting" or "re-doing" discovery and document exchange in two separate arenas.

One disadvantage to this process is the use of the same neutral in both the mediation and arbitration elements of the dispute. Parties may not feel as though they can fully participate in a mediation, as they may divulge information to the mediator that they would not want disclosed in arbitration. If they know

that the same neutral will then have that critical information when acting as an arbitrator in the same dispute, parties may fear that the neutral may consider or weigh this information in the arbitration (Stipanowich, Thomas J. "Mixed and Changing Roles", in Golann, D. Folberg,J., *Mediation: The Roles of Advocate and Neutral*, 2nd ed. (New York: Aspen Publishers, 2010), p. 429). There is a risk that the power associated with the arbitration phase will overshadow the mediation phase, causing it to be ineffective and redundant.



Collaborative Settlement

Collaborative law is a fairly newly introduced process in the construction dispute resolution arena, and is described as combining the facilitative problem solving focus of mediation, with the built-in legal advocacy and counsel of traditional settlement- oriented representation (Glaholt, D. W., Reynolds, R. B., "The Collaborative Settlement of Construction Disputes" (2018) 1:2 *The American Journal of Construction Arbitration & ADR* 1. This process is unique in that it does not include a third party neutral to assist in the resolution of the dispute. Rather, parties and their counsel work together, agree on how they wish to proceed with all aspects of the negotiation process, exchange documents, select experts and agree on a timeline for the negotiations to take place.

The process can begin with a selective, consensual and meaningful disclosure exercise where the goal is to obtain a reasonable degree of information and mutual understanding of the issues before proceeding with the negotiations.

Collaborative construction industry dispute resolution is designed to equip both counsel with an objectively validated narrative of their opponents case to allow for productive client to client negotiation. (see Glaholt, D. W., Reynolds, R. B., "The Collaborative Settlement of Construction Disputes" (2018) 1:2 *The American Journal of Construction Arbitration & ADR* 1). Counsel must learn both sides of the case, and should be able to demonstrate to opposing counsel that each side is understood to the other's satisfaction. This should include a review of the opposite side's case brief, acknowledging the strengths and weaknesses from both perspectives to objectively look at the case and develop a settlement plan.

The final step in this process is the settlement itself. In the process described by Glaholt and Reynolds, counsel withdrew at that stage and left the clients' management to use the information gathered to develop an interest- based, comprehensive, commercial settlement.

Crucial to the success of the process was a disqualification provision to the effect that if either party believed that the other had frustrated the purpose and intent of the process, that party could end the process, and thereafter neither lawyer involved in the collaborative process could act in the ensuing litigation or arbitration.

The Future: Adjudication

Adjudication, an up and coming dispute resolution method that will be implemented following the coming into force of the pertinent provisions in Ontario's new *Construction Act*, is a swift and flexible mechanism of dispute resolution that has been used with much success in many common law legal systems worldwide. It is a proven, effective and efficient solution (Reynolds, R. B., Vogel, S., *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. April 30, 2016).

Adjudication is designed to prevent the stopping of work and delays on construction projects that are normally the result of disputes. This quick and pragmatic solution frees up cash flow and resources during the course of a project disputes so that work may continue,

while also reconciling the competing interests of the parties involved. Adjudication involves the determination of a construction dispute that arises out of a contract by a qualified adjudicator who will conduct an investigation and make an expedited determination, within about 40 days on average. This decision will be binding on an interim basis.

This dispute resolution process is revolutionary in Ontario as it will see to the swift and effective resolution of disputes that cause significant impact on the cost and delay of projects.

Timing in dispute resolution is everything. Adjudication provides the earliest possible timing of effective, binding interim dispute resolution, and involves a quick turn-around for a decision. Adjudication has the ability to resolve issues of payment as they arise, and allows the project to continue while the dispute is being adjudicated (Glaholt, D.W, "The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada"(2006), 53 C.L.R. (3d) 8).

Conclusion

All parties suffer when a dispute drags on and is not resolved. Tackling disputes as early as possible can benefit all players, through saving time and resources that would be required in pursuing traditional litigation, while allowing parties to maintain control of their own dispute and its outcome.

AUTHOR:

Notable Case Law

Construction cases

Thunder Bay (City) v. Canadian National Railway Company, 2018 ONCA 517

In a case concerning the interpretation of a 112-year- old construction contract, the Ontario Court of Appeal held that CN owed the City a duty to maintain a bridge between Thunder Bay and Fort William First Nation and to reopen it for motor vehicle traffic. The 1906 contract obliged CN to "maintain the bridge in perpetuity without costs to the Town except the cost and maintenance of street car rails and trolley wires which will be furnished by the Town or Electric Railway Company using the bridge; and that the space allowed for Town traffic on each side of the bridge, be sufficient to accommodate street car, vehicular traffic and sepa-rate passage for foot passengers".

After a fire in 2013, CN reopened the bridge for rail traffic and pedestrians, but not for cars, claiming that the bridge was not safe for motor vehicles since a car that left the roadway could go across the sidewalk and into the river. Evidence showed that that had never happened. CN argued that to make the bridge safe, it would have to make significant structural chan-ges to the bridge and that this would go beyond its obligation to "maintain" the bridge. The trial judge held that the parties intended that CN would maintain the bridge for the type of traffic that existed in 1906, i.e. streetcars, horses and carts, not motor vehicles. That, the Court of Appeal held, was unreasonable, since the agreement did not so limit the meaning of vehicle traffic, and since the trial judge's reasoning failed to give effect to the words "in perpetuity". The appeal was allowed, and CN was ordered to reopen the bridge and maintain it for vehicle traffic. How it would do so was left for CN to decide.

Iamarino v. Brampton Hardwood Floors Ltd., 2018 ONSC 3408 (Div. Ct.)

The Divisional Court set aside a Deputy Judge's decision which had held that the limitation period for a claim for deficient installation of hardwood flooring did not commence while negotiations were ongoing and efforts were being made to remediate the problems

caused by the installer. To that extent, the Deputy Judge erred in law given the jurisprudence that ongoing communications or efforts to remediate defective work do not extend a limitation period.

Krypton Steel Inc. v. Maystar General Contractors Inc., 2018 ONSC 3836 (Div. Ct.)

The Divisional Court confirmed the well- established principle that a judgment of reference under s. 58 of the ***Construction Act*** is not an order fixing a trial date and does therefore not stop the clock for the purposes of s. 37. To satisfy the require-ments of s. 37, an order under s. 9(1) of O.Reg. 302/18 is necessary.

J.C. Carcone Carpenters Corporation v. Richard Stahl, Court File No. 3799/10, June 6, 2018 (Ont. Master)

A party that brought an improper counterclaim in a lien proceeding could not rely on s. 86(2) of the Act to support an argument that the other party failed to take the least expensive course by defending the claim rather than bringing a motion to strike.

Arbitration cases

Popack v. Lipszyc, 2018 ONCA 635

The issue before the court was when an international commer-cial arbitration award becomes "binding" on the parties for the purposes of judicial recog-nition and enforcement.

The application judge had dismissed the appellant's application for recog-nition and enforcement of the award, holding that the award was not yet binding on the parties because the respondents were seeking to raise further issues before the arbitral panel and the panel had expressed its willingness to consider the further issues. The Court of Appeal held that the application judge erred in law in interpreting the recognition and enforce- ment provisions of the Model Law and made palpable and overriding errors in applying the Model Law to the circumstances of the case:

> [85] On the facts of this case, the potential jurisdiction of the Beth Din to entertain a new issue about post-Award events does not affect the binding nature of the Award. The Award is framed as a final one. The Arbitration Agreement did not permit any review or appeal from the Award. Mr. Popack's set aside proceeding under art. 34 is at an end. Mr. Lipszyc's request for post-Award costs does not fall within the categor-ies of matters covered by art. 33 of the Model Law. The Award therefore is "binding" for the purposes of arts. 35 and 36 of the Model Law and should be recognized and enforced.
>
> [86] That conclusion is not affected by the Beth Din's June 7, 2017 state-ment that the Award is stayed. Under art. 36(1)(a)(v) of the Model Law, recognition or enforcement may be refused only if the award has been "suspended by a court of the country in which, or under the law of which, that award was made". No such court order has been made – the application judge dismissed the respondents' motion for a stay, and the respondents have not cross-appealed from that order.