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CONSTRUCTION LAWYERS

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IN THIS ISSUE

Prompt Payment on Federal Contracts

In past issues of this newsletter, we have commented on the forthcoming prompt payment and adjudication regimes in Ontario. Ontario is not alone in addressing prompt payment. On the provincial level, Manitoba and New Brunswick have issued reports on the modernization of their lien legislation which address prompt payment.

Quebec is introducing a pilot project to test prompt payment in public contracts. Saskatchewan is currently conducting a review of its legislation and invited stakeholders to comment on the desirability of adopting Ontario-style reforms.

On the federal level, "Building a Federal Framework for Prompt Payment and Adjudication," a report prepared for Public Services and Procurement Canada on June 8, 2018, was released. The purpose of the review was to provide the Canadian government with recommendations for the implementation of prompt payment and adjudication on federal construction projects.
The report concludes that the existing federal framework for prompt payment policies is inadequate, and implementation of federal prompt payment legislation would be beneficial. Legislation similar in many ways to Ontario's new Construction Act is recommended. Parties to construction contracts would not be able to contract out of this proposed legislation.

Applicability of the Proposed Legislation

The report recommends that the federal prompt payment legislation should:

1. Apply to federal construction projects on land owned by the federal government

2. Apply to "lands reserved for Indians," as used in the Constitution Act, 1867

3. Apply to construction projects that are a part of a federal undertaking or of general public importance

4. Apply to projects designated by a minister at the beginning of the project

5. Not apply to maintenance and repair work under long term contracts

6. Not apply solely on the basis that the federal government funded the project

7. Not apply to projects solely on the basis that the federal government has a specific regulatory authority

8. Not apply to fix up work for leased buildings

Prompt Payment

The proposed prompt payment provisions apply to the entire construction pyramid, and the timelines follow those set out in Ontario's Construction Act. The trigger for payment will be the delivery of a "proper invoice," following which a federal owner must pay the general contractor within 28 days, and parties below the general contractor on the construction pyramid must pay their subcontractors within 7 days from receipt of payment. The time limits will also apply to payment in relation to substantial performance of the work and final completion. Parties are otherwise free to contract for payment terms. There will be a provision that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or the owner's approval of no force and effect, with the exception of P3 projects.

Payers can deliver a notice of non-payment within 14 days after receipt of the proper invoice as long as the notice of non-payment sets out the amount that is being withheld and sufficient explaining details. Parties who withhold payment after receiving a notice of non-payment must undertake to adjudicate.

Consequences of failure to pay include the right to start an adjudication, mandatory interest, the right to suspend work without breach if an adjudicators' decision is not paid within 10 days, and resumption of work after suspension, conditional on payment, interest, and reasonable costs incurred by the payee from the suspension. The federal government keeps its current right to set-off. Payers below the owner will still be allowed to set off all outstanding debts.

Adjudication

Provisions for adjudication are meant to provide targeted dispute resolution to specific payment dispute issues. Any party in the construction pyramid can start an adjudication from the beginning of the project to final completion of the prime contract, but not after the contract's completion.

A single adjudicator with defined experience in the construction industry who has successfully completed training and certification run by an Authorized Nominating Authority is selected by the parties very shortly after the dispute arises. The Authorized Naming Authority, once created, will be responsible for training and certifying adjudicators, regulating conduct, addressing complaints, and appointing an adjudicators when the parties are unable to select one within the prescribed time, among other things.

The adjudication will be limited to one issue, unless the parties agree to consolidation. Each party is generally responsible for its own costs. Parties can subsequently litigate or arbitrate their disputes because an adjudicator's decision is binding on an interim basis only. Judicial review of decisions is allowed on limited specified grounds.

Timelines for the adjudication are as follows:

9. A notice of adjudication is delivered by the claimant, which includes a description of the dispute, the remedy sought and a proposed adjudicator, among other things

10. If parties agree on an adjudicator, the adjudicator has four days to agree to conduct the adjudication

11. If the parties do not agree to an adjudicator within the specified time frame, the Authorized Nominating Authority has seven days to appoint an adjudicator after receiving the request

12. After the adjudicator receives documents from the claimant, the responding party has a right of reply with in a specific time period

13. 30 days after receiving documents, the adjudicator should make a determination

14. After a decision, payment should be made within ten days, otherwise a right to suspend work and mandatory interest arise

The report suggests that the Standard Federal Government Construction Contract should allow for a request-based disclosure requirement where payees can request and receive defined information. Contracts between the federal government and its consultants should be updated to ensure prompt payment and adjudication timelines and to include the requirement that a consultant review payment applications and change order requests prior to the deadline for issuance of a notice of non-payment.

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Case Comment – *Capelet v. Brookfield Homes (Ontario) Limited*

Can the discovery of construction deficiencies in a new home, such as water infiltration leading to mould growth, support a claim for emotional and psychological injuries? While a recent decision of the Ontario Court of Appeal has found that, at least in some circumstances, it cannot, the Court of Appeal also makes clear that this decision is based on a very specific set of facts, and does not stand for the proposition that no claim for damages for psychiatric and emotional injury from negligent home construction can ever be advanced.

The Summary Judgment Motion

In Capelet v. Brookfield Homes (Ontario) Limited, 2018 ONCA 742, the Ontario Court of Appeal dismissed the plaintiff's appeal of the defendant Brookfield's successful summary judgment motion (2017 ONSC 7283) dismissing his action. Mr. Capelet had sought damages of over $6 million for losses he claimed to have suffered from mould discovered in a property he purchased from Brookfield in 1997 (the "Property"). The mould was discovered in February of 2002 and was remediated by Brookfield approximately one month later. Mr. Capelet commenced an action and claimed several categories of damages, including for psychological and emotional injuries, physical illness, and certain out-of-pocket expenses.

Upon discovery of the mould, Brookfield promptly retained Pinchin Environmental Ltd. to test the Property, and hired contractors to remedy the situation. Approximately eight days after Pinchin's test was carried out, it conducted a second inspection and concluded that no further work was required and that the Property was fit for occupancy. Mr. Capelet and his wife sold the home several months later, although Mr. Capelet acknowledged he did not suffer any loss on the Property sale due to the mould issue.

Mr. Capelet commenced an action on October 24, 2003, and the matter was set down for trial on May 21, 2009. Examinations for discovery took place in 2008, and further examinations took place in 2015. Brookfield served expert medical reports from a toxicologist, a forensic psychologist, and an opinion on mould impact to household items from Pinchin. These reports concluded that Mr. Capelet suffered no personal injury or damage to personal property. Mr. Capelet had not served medical or other expert reports as of late 2016, prompting Brookfield to bring this motion. Mr. Capelet only served reports from a physician and forensic psychiatrist when required to by the chambers judge, who ordered that if Mr. Capelet did not produce the reports, his action would be dismissed. While the reports provided evidence on his physical, emotional and psychiatric injuries, no reports were provided to opine on issues of property damage or financial losses.

The motion judge found that the damages claimed by Mr. Capelet were either not foreseeable, were unlikely to have been caused by the construction defects in the Property,

or were not supported by credible evidence. As there were no genuine issues requiring a trial, the motion judge granted Brookfield's motion for summary judgment and dismissed the action with costs.

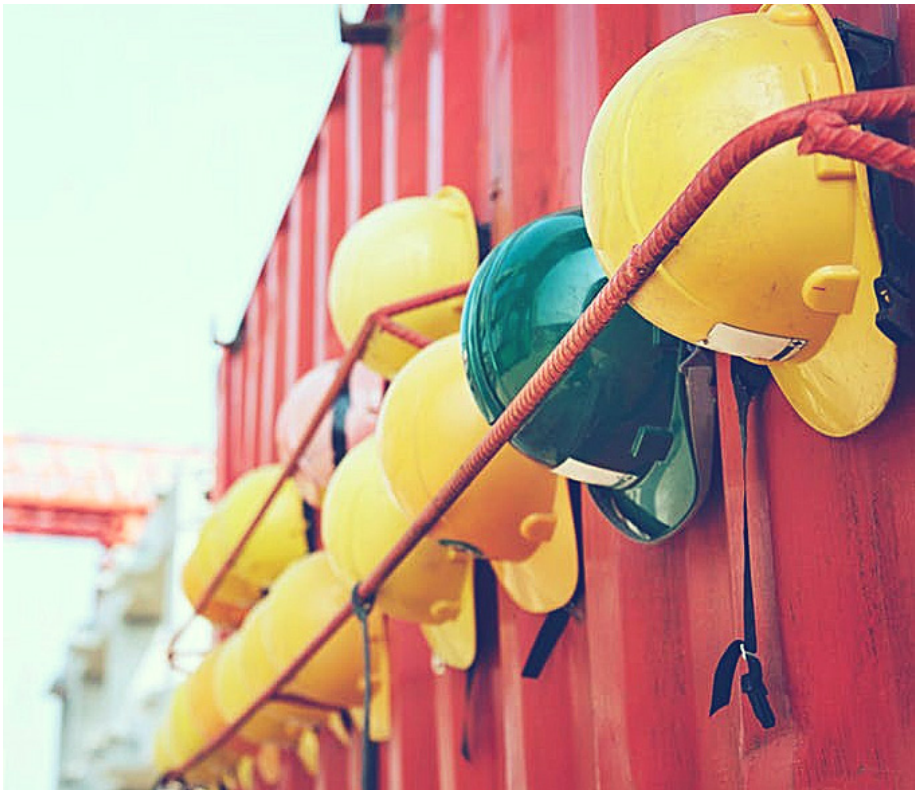
The motion judge relied on the principle set out in Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, in which the Supreme Court of Canada held that "in cases where mental injury is claimed, it must be shown that the injury in question is one that a person of 'ordinary fortitude' would suffer in the relevant circumstances." While there was evidence that the mould created emotional distress for Mr. Capelet that negatively impacted all aspects of his life, it was found that his reaction to the mould was "highly unusual and a product of particular sensitivities on his part." The loss suffered by Mr. Capelet was found not to be "a reasonably foreseeable consequence of faulty home construction." Further, the motion judge found that Ontario's regime for builders and purchasers of new homes does not provide compensation for emotional or psychiatric injuries suffered by purchasers arising from defects in their homes. In addition, after reviewing the expert evidence, the plaintiff failed to provide evidence that it is more likely than not that the mould caused physical injuries.

The Appeal Decision

The sole issue before the Ontario Court of Appeal was whether the motion judge erred in dismissing the claims for psychological and emotional injuries on the basis that they were too remote, and if so, whether Mr. Capelet was entitled to a trial on these claims. The Court of Appeal found that the motion judge had not erred, and dismissed Mr. Capelet's appeal.

In reaching its decision, the Court of Appeal found that the motion judge had assumed that Mr. Capelet had suffered considerable mental distress flowing from the discovery of mould at the property, and that his current emotional and psychiatric problems could be attributed in whole or in part to the exposure to and discovery of the mould.

The Court of Appeal agreed with the motion judge's conclusion that Mr. Capelet's claims for emotional or psychiatric injury were not recoverable as a matter of law. The appellant's arguments that the motion judge ignored or rejected evidence that he was a person of ordinary fortitude was not accepted.



What was less clear, however, was whether the Court of Appeal agreed with the motion judge's second ground for dismissing Mr. Capelet's claim, which was that the warranty in the parties' agreement of purchase and sale limited Mr. Capelet's recovery for "damage, loss or injury of any sort". The motion judge stated that Ontario has long regulated the rights and responsibilities of purchasers and builders of new homes in the province, including warranties regarding the proper construction of the home, a process for conciliation of disputes, and a guarantee fund to provide compensation to purchasers who have suffered losses from breach of warranty. The motion judge found, however, that "this scheme does not provide compensation for emotional or psychiatric injuries suffered by purchasers resulting from defects in their new homes". As a result, the motion judge found that Mr. Capelet's claims for emotional or psychiatric injury were not a reasonably foreseeable consequence of faulty new home construction by Brookfield.

While the Court of Appeal considered the motion judge's finding that the warranty provision in the agreement of purchase and sale limited Mr. Capelet's right to recovery, and said that it was relevant to refer to the agreement of purchase and sale and what the parties would have anticipated at the time

of contract execution, the Court of Appeal also said that "there is no indication that the motion judge treated this part of his analysis as determinative of the negligence claim or the issue of remoteness of damages". By declining to rule on whether the warranty provision in the new home agreement of purchase and sale was a determinative factor in the negligence and foreseeability analysis, the Court of Appeal's decision leaves open the question of whether Ontario's new home warranty regime can conclusively dispose of any and all mental injury claims for negligent construction, to be decided in a future matter.

The Court of Appeal was careful to qualify that the motion judge's decision did "not rest on the proposition that all claims for damages for psychiatric and emotional injury from negligent home construction are foreclosed". Although in this case Mr. Capelet did not adduce sufficient evidence to prove his claim, the law of negligence since Mustapha has sought to "impose a result that is fair to both plaintiffs and defendants, and that is socially useful", and has thus allowed compensation for reasonably foreseeable injuries. It stands to reason that compensation for mental injury might be awarded in future cases where a builder's negligent construction does indeed affect a person of "ordinary fortitude", and is therefore foreseeable. Whether such damages can or should be awarded will necessarily be a fact-driven and case-dependent analysis.

Conclusion

Although not addressed specifically by the Court of Appeal, the motion judge's decision also provides yet another example of the court's willingness to apply the principles espoused by the Supreme Court of Canada in the decision of Hryniak v. Mauldin, and the view that summary judgment under Rule 20 of the Rules of Civil Procedure should be seen as a legitimate and important means of facilitating access to justice and reducing the time and cost involved in civil litigation. In this case, it had been over 14 years since the litigation was commenced, numerous affidavits and expert reports had been filed by both parties, and extensive cross-examinations had been conducted. It was clear to the motion judge that a sufficient evidentiary record had been filed to determine the issues in the litigation. The motion judge also affirmed the importance of both parties putting their best foot forward on such motions by mustering all their evidence for the motion, instead of attempting to save some for trial.

The motion judge's decision also illustrates the tendency of the court to shy away from partial summary judgment. In reaching his decision, the motion judge considered the entirety of Mr. Capelet's claim on this motion, including certain expenses and financial losses that were not, in Mr. Capelet's view, specifically addressed in Brookfield's notice of motion. Mr. Capelet's argument that the motion judge should not deal with these points during the motion would, in essence, have made the motion a motion for partial summary judgment, which the motion judge was not prepared to accept. To support his decision on this point, the motion judge held that the notice of motion was drafted broadly enough to include summary judgment on Mr. Capelet's claims for financial losses arising from the move to a new home, and included a report dealing with claims for losses to personal property. The motion judge found that Mr. Capelet had ample time and opportunity to submit evidence and argument on this point during the motion, but failed to put his best foot forward.

The decision of Capelet v. Brookfield Homes (Ontario) Limited therefore provides a good example of the use of summary judgment to dispose of long-lingering claims, and a reasoned application of the Mustapha "ordinary fortitude" test to a construction case. The Court of Appeal decision does not, however, definitely rule on whether claims for mental injury stemming from faulty home construction are (or are not) recoverable at law, opting to limit its decision to this particularly unique set of facts. It will take future cases, and a different factual matrix, to reach a conclusion on this interesting legal issue.

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The Consumer Protection Act, 2002 and Construction Contracts

This article explores some of the different ways Ontario's consumer protection legislation applies to construction contracts. It identifies key provisions of the *Consumer Protection Act, 2002* ("CPA") and notable decisions of the Ontario courts.

Application of the CPA to Construction Contracts

As the name of the legislation suggests, the CPA is not intended to apply to business-to-business relationships but rather to transitions between businesses and individuals acting for personal, family or household purposes.[1] These relationships are common in many home renovation, repair or new build construction contracts.

While it has been generally accepted that the CPA can apply to consumer contracts for repairs and home renovations,[2] there is some ambiguity in the case law as to whether or not the real property exception listed in section 2(2) of the CPA prevents the act from applying to construction contracts for new home builds.[3]

Ontario (Ministry of Consumer Services) v. K-Tech Building Systems Inc.[4] is a lengthy decision regarding a contract for the construction of a cottage in South Algonquin. In *K-Tech*, the property owners contracted with the defendant, K-Tech Building Systems, to supply and install pre-fabricated exterior walls, windows, doors, roof shingles, lumber, roof trusses and other building materials on a concrete foundation that the owners had to arrange for separately, with a different contractor.

When the contractor was unable to fulfill its contractual requirements, the property owners initiated a complaint to the Ontario Ministry of Consumer Services pursuant to the CPA. The defendant claimed, in part, that the CPA did not apply to the agreement in question since the "transaction concerns building a year-round home which are not 'goods', but a transaction involving 'real property'".

The Ontario Court of Justice rejected the defendant's argument, stating that the components and materials were still a type of "good" that would only be legally transformed into "real property" after the proposed cottage had been completed and became attached to the land, and that K-Tech had not sold real property.

The decision in *K-Tech* was distinguished in *BCR Construction Inc. v. Humphrey* ("*Humphrey*").[5]

In Humphrey, the Divisional Court accepted the decision of the trial judge in holding that the CPA did not apply to a contract to construct a custom built home on a property that the owners had purchased from the contractor 23 days earlier. In that case, the trial judge found that the construction contract was "not independent of the [Agreement of Purchase and Sale for the land], and although the two contracts were formalized on separate dates, that the "real substance" of the parties' "transaction" was one ongoing agreement for the purchase and sale of the lot and construction of the custom built home." The trial judge, as a result, concluded that the CPA was not applicable. On appeal, the Divisional Court held that given the evidence provided, the trial judge's conclusion as to the real substance of the transaction was within a range of reasonable outcomes.

The two decisions, Humphrey and K-Tech, are somewhat at odds with each other in the broad sense that both cases were for the construction of new properties and the courts arrived at different conclusions as to whether the CPA would apply. However, one can rationalize the two decisions by emphasising the fact that the Court in Humphrey found that the "real substance" of the owners' transaction was for the purchase of the real estate, and not the building contract.

Requirements of Consumer Contracts

Construction contracts governed by the CPA are required to comply with specific requirements. In particular, the CPA prescribes certain

1. *Consumer Protection Act, 2002*, SO 2002, c 30, ss 1-2.

2. See: *Tecton Construction Inc v. Yeung*, 2016 ONSC 3039 at 73, *Grainger v. Flaska*, 2013 ONSC 4863 at 75, *Sawh v. Par-Tek*, 2017 CarswellOnt 12658 at 12 (application of the *Consumer Protection Act* was conceded by the parties)

3. CPA, supra note 1 at s 2(2). "This Act does not apply in respect of, … (f) consumer transactions for the purchase, sale or lease of real property,…"

4. *Ontario (Ministry of Consumer Services) v. K-Tech Building Systems Inc*, 2012 ONCJ 219.

5. *BCR Construction Inc. v. Humphrey*, 2014 ONSC 5576.

requirements for all "future performance agreements". Future performance agreements are defined in section 1 of the CPA as "a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement."

Section 22 of the CPA requires that every future performance agreement be in writing and "be made in accordance with the prescribed requirements". Among other requirements prescribed in the regulations, consumers must be provided with:

> "5. An itemized list of the prices at which the goods and services are to be supplied to the consumer, including taxes and shipping charges.
>
> 6. A description of each additional charge that applies or may apply, such as customs duties or brokerage fees, and the amount of the charge if the supplier can reasonably determine it.
>
> 7. The total amount that the supplier knows is payable by the consumer under the agreement, including amounts that are required to be disclosed under paragraph 6, or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.
>
> […]
>
> 9. As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur."
>
> O. Reg. 17/05

In addition, section 5 of the CPA requires that where any information is required to be disclosed, the disclosure must be "clear, comprehensible and prominent".

For a business owner, there may be seemingly harsh consequences for failing to meet the requirements of CPA. For example, section 23 of the CPA allows a consumer to cancel a future performance contract up to one year after entering into it.

Further, section 95 of the CPA states that "the cancellation of a consumer agreement in accordance with this Act operates to cancel, as if they never existed, (a) the consumer agreement; (b) all related agreements; (c) all guarantees given in respect of money payable under the consumer agreement; (d) all security given by the consumer or a guarantor in respect of money payable under the consumer agreement; and (e) all credit agreements… and other payment instruments… (i) extended, arranged or facilitated by the person with whom the consumer reached the consumer agreement, or (ii) otherwise related to the consumer agreement". In addition, section 96(1) of the CPA states that "[i]f a consumer cancels a consumer agreement, the supplier shall, in accordance with the prescribed requirements (a) refund to the consumer any payment made under the agreement or any related agreement…".

Equitable Powers of the Court

The purpose of the CPA is to protect consumers from unscrupulous vendors of services and materials. However, it is not difficult to imagine a scenario where the broad and powerful remedies available under the CPA can be used against a innocent contractors or suppliers.

The good news for such contractors or suppliers is that Courts have recognized that construction contracts differ from your typical door-to-door sales transactions, and just as consumers may require protection, contractors may be in need of protection from homeowners who try to use courts to take advantage of them.[6] To this end, section 93(2) of the CPA grants a court the ability to order that a consumer be bound by all or a portion or portions of a consumer agreement, despite the consumer agreement not being in strict compliance with the Act. Courts have relied on this provision where they have found it would be unequitable to render the consumer contract unenforceable.

In Grainger v. Flaska, the defendant homeowner admitted, at trial, that she deliberately deferred payments to the plaintiff contractor, with the intention of inducing the contractor to complete the work on her project without ever paying him. In support of her position, the homeowner "decided that she did not have to pay [the contractor] because he had not provided her with a written contract." The owner relied on the CPA as authority that she was entitled to the benefit of the contractor's work for free.[7]

The Court found that "[s]he deceived [the contractor] by promising payment even though she had no intention of paying him and every intention of filing a complaint with the Ministry of Consumer and Business Services seeking a refund of all the money she paid him." In addition to this egregious behaviour, once the contractor completed its work, the homeowner "threatened

6. *Tecton Construction Inc. v. Yeung*, 2016 ONSC 3039 at 73.

7. *Grainger v. Flaska*, 2013 ONSC 4863 at 68.

prosecution under the CPA and pointed out that conviction carries fines of up to $250,000."

The Court in *Grainger v. Flaska* condemned the homeowner's behaviour, stating "hard working contractors are in need of protection from homeowners who try to use the courts to take advantage of workers." Despite finding that the CPA applied to the contract, and that the consumer contract was not compliant since it was not made in writing, the Court relied on section 93(2) of the CPA, finding that it would "be inequitable if the court were to relieve [the homeowner] of her contractual obligation to pay [the contractor] because the contract is not in writing." The Court further stated that the homeowners conduct was "reprehensible".

What to know as an Owner and Contractor

Homeowners and contractors should both be aware of consumer protection legislation and whether the CPA applies to their specific contract. Having a lawyer review the contract to ensure that it adheres to any applicable legislative requirements could prevent unanticipated issues down the road. Contractors should take time to ensure that any standard form contract they prepare meets the requirements of the CPA.

Homeowners should also be aware that it is more cost effective to negotiate a fair contract that accurately addresses their specific needs than to try and rely on consumer protection legislation once the contract has already been executed. Entering into a contract drafted entirely by another party, without first obtaining legal advice, can result in unintended consequences once the project is underway.

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Case Comment – *Mega Reporting Inc. v. Yukon*

The Yukon Court of Appeal's decision in *Mega Reporting Inc. v. Yukon (Government of)*, 2018 YKCA 10, serves as a note of caution for bidders who would seek redress from a court for unfair conduct by an owner in a tendering process. The Court applied an exclusion clause to limit the government's liability in a case where the government had conducted itself in contravention of its own tendering policy, and had disqualified the bid of Mega Reporting Inc. based on criteria which were not disclosed in the tender.

Facts

In 2013, the Yukon government decided to transition its court reporting services from live transcription to digital recording with later transcription as needed. Yukon issued a Request for Proposals for an independent transcription service. The RFP directed that each proposal contain two sealed envelopes. The first was to contain information related to the bidder's experience and performance. The second was to contain the price bid. The RFP provided that the second envelope would be opened and price considered only if a certain minimum score was awarded in relation to the information in the first envelope. Yukon was not obliged to accept the lowest price.

The RFP explicitly provided that it was governed by both the Yukon Contracting and Procurement Regulation and the Contracting and Procurement Directive.

Section 2 of the Directive included a number of principles, including:

> a) Fairness: to observe procedural policies as expressly laid out in this Directive free of bias, personal interest and conflict of interest.
>
> b) Openness and transparency: to create the maximum number of competitive procurement opportunities, and to be transparent in the way

The RFP also contained the following broad exclusion clause purporting to limit Yukon's liability to bidders:

> Except for a claim for costs of preparation of its Proposal or other costs awarded in a proceeding under the Bid Challenge Process as described in the Government of Yukon Contracting Regulations and Contracting and Procurement Directive, each proponent, by submitting a Proposal, irrevocably waives any claim, action, or proceeding against the Government of Yukon including without limitation any judicial review or injunction application or against any of Government of Yukon's employees, advisors or representatives for damages, expenses or costs including costs of Proposal preparation, loss of profits, loss of opportunity or any consequential loss for any reason including: any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process; if the Government of Yukon does not award or execute a contract; or, if the Government of Yukon is subsequently determined to have accepted a noncompliant Proposal or otherwise breached or fundamentally breached the terms of this Instructions to Proponents.
>
> [Emphasis added.]

Mega was one of two bidders. Yukon established an evaluation committee to evaluate the two bids. It met once. The committee did not create or preserve a bid scorecard of any kind. Neither did it make contemporaneous records of its discussions, nor record the reasons for its decisions.

Apparently on its own, the evaluation committee adopted a methodology whereby a bid would receive less than 50% of the total available points in a category if it did not meet the minimum requirements set out in the RFP. A bid would receive 50% of the total points if it met the minimum requirements exactly. And a bid would receive more than 50% of the total points only if it exceeded the minimum requirements.

The committee concluded that Mega's proposal did not meet the minimum technical requirements and did not open the envelope containing Mega's price. The committee therefore awarded a one-year contract, with option to renew for up to two additional years to the other bidder at a price of $191,347.25 per year. Mega's submitted price was $176,684.60 per year.

Several weeks later, Mega met with Yukon officials to discuss why it had not been awarded the contract. A member of the committee, Mark Daniels, prepared a document that ostensibly indicated the points that had been awarded to Mega's proposal. However, this document did not reflect the actual evaluation, and was merely based on Mr. Daniels' memory and his handwritten notes. On examination for discovery, Mr. Daniels could not recall the conversation among members of the committee that led to the scores given to Mega, nor could he recall what he meant in some of his notes. He interpreted one of his notes, "process not clear" as referring to the process in its entirety.

One of the handwritten notes was "no letters of reference", indicating that Mega had not submitted letters of reference in its bid materials. The RFP did not require letters of reference and only stated that bidders must submit "three references for work similar in scope to that described in this RFP". Mega did submit names and contact information of three references; however, Mega apparently received a reduced score as a result of not submitting reference letters.

Mega commenced an action against Yukon alleging that Yukon breached its duty to fairly review the bids.

Trial Decision

Madam Justice M.A. Bielby of the Supreme Court of Yukon held (at 2017 YKSC 69) that Yukon failed to meet its duties of fairness, accountability, and transparency in the way it evaluated Mega's bid, both at common law and under the Directive. She concluded that the evaluation committee acted unfairly in marking Mega down for failing to provide letters of reference, and that the process for awarding points was not described in the RFP. She also found that the committee's failure to keep a record of its decision prevented Yukon from refuting concerns with the decision-making process. The court declined to draw the inference that Yukon fairly and properly evaluated the proposal from the fact that Yukon did evaluate the proposal, because Yukon was in total and sole control of the creation of the evidentiary record.

Justice Bielby went on to conclude that the exclusion clause in the RFP did not bar Mega's claim. She applied the test from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, and held that public policy reasons justified refusing to enforce the exclusion clause. The court relied on various cases which established that public policy generally prevented a government from avoiding duties owed under statutes for the public benefit. The fair procurement principles in the Directive established duties that could not be avoided by contracting out of them.

Justice Bielby held that the text of the waiver in the RFP spoke so directly to the principles in the Directive, that it was impossible to conclude that the exclusion clause was not intended at annulling the effect of the legislation. To give effect to the waiver would allow Yukon to represent to the public that it engages in fair procurement, without suffering any consequences for failing to do so.

While Justice Bielby's reasons hold that it was unfair of Yukon to mark down Mega's bid for failing to include letters of reference, her reasons do not comment on the jurisprudence following the Supreme Court's decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619, which held that it was appropriate to imply a term into Contract A that only disclosed criteria would be used in the evaluation of bids.

Appeal

On appeal, the Yukon Court of Appeal overturned Justice Bielby's judgment. Most notably, the Court of Appeal's reasons turned not on any finding that Yukon had acted properly in the procurement process, but rather that the exclusion clause barred any claim by Mega.

Chief Justice Bauman, writing for a unanimous panel of the Court of Appeal, conducted an analysis of the factors identified by the Supreme Court of Canada in Tercon for determining whether a court will

enforce an exclusion clause. *Tercon* identified three factors for a court to consider:

> 1. Whether as a matter of interpretation the exclusion clause applies to the circumstances based on the intention of the parties;
>
> 2. Whether the clause was unconscionable at the time the contract was made; and
>
> 3. Whether the Court should nevertheless refuse to enforce the valid clause because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts, the proof of which lies on the party seeking to avoid enforcement.

The Court of Appeal concluded that the exclusion clause did apply to the circumstances of the case. The clause applied to any proponent who submits a proposal, and waived damages for loss "for any reason", including any loss arising from "any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process", or if Yukon "otherwise breached" the terms of the Instructions to Proponents.

The Court of Appeal noted that Mega had not alleged unconscionability at the time of tender.

The Court of Appeal's reasons turned on the third branch of the test – whether the court ought to refuse to enforce an otherwise valid clause for public policy reasons.

On this point, the Court of Appeal noted the high threshold identified in the jurisprudence for overcoming the presumptive enforceability of a contractual bargain. The Court cited Justice Binnie's dissenting reasons in Tercon which discuss the threshold for declining enforcement for public policy reasons. (The majority's reasons turned on whether the clause applied to the circumstances of the case, and did not give detailed consideration to the issue of public policy.)
Justice Binnie had quoted Chief Justice Duff in the 1937 Supreme Court case of *Re Millar Estate*, in which he had held that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." The Court of Appeal took notice of the fact that the British Columbia Court of Appeal had approved of the "substantially incontestable" standard in the case of *Niedermeyer v. Charlton*, 2014 BCCA 165.

The Court of Appeal held that Justice Bielby erred in failing to consider "the high threshold necessary to establish that public policy outweighs the interests in enforcement." It was not enough to weigh whether "one policy interest outweighs the other", without considering the "substantially incontestable" test.

In conducting its own analysis, the Court of Appeal was of the view that "the obligations to conduct a bidding process fairly and transparently are as much for the benefit of those tendering, and the public at large, as they are for bidders like Mega." The court reasoned that tendering processes are designed to ensure "that parties can effectively bid and the process can be sufficiently competitive, ensuring that taxpayers receive value for their money."

The Court's comment is surely correct, but it seems to be precisely the point in this case that by disqualifying a bid based on criteria that were apparently invented by the bidding committee only after tenders were submitted, Yukon acted to the prejudice of a fair competitive process designed to ensure value for money. If it is permissible to make up undisclosed criteria, keep no records of decision making, and face no consequences for disqualifying bidders who have complied with the disclosed criteria, then that would seem to take the modern tendering process a step backwards to the sort of Wild West behaviour that occurred pre-Ron Engineering.

The Court of Appeal went on to reason that because Yukon sees it as in its interest to exclude liability for a breach of the duty of fairness, surely there could not be substantially incontestable harm to the public interest:

> Yet the government, one of the parties whose interests the procurement principles are ostensibly supposed to advance, and who in fact adopted them in the first place, has come to the conclusion that the public policy interest motivating those principles should not override their ability to protect themselves from liability. Why should the Court step in now and tell that party that they misunderstand their interests or that they are improperly weighing the impact that enforcement of the exclusion clause will have on the competitiveness and efficiency of future RFPs?
>
> [Emphasis added.]

This suggests that the mere fact that an owner sees fit to limit its own

liability is enough to defeat a public policy argument against the exclusion clause. On this reasoning, no exclusion of liability would ever be rendered unenforceable for policy reasons, because the owner must have had some reason for protecting itself from liability.

The Court of Appeal suggests that giving effect to a public policy argument amounts to telling an owner that it misunderstands its own interests. But arguably the public policy exception exists not because owners misunderstand their own interests, but precisely because owners do understand their own interests – namely, protecting themselves from litigation when they act unfairly – and draft exclusion clauses to protect those interests. It is worth recollecting that in *M.J.B.*, the Supreme Court implied a contractual duty to use only disclosed criteria, based on the facts of the case before it. The Court of Appeal's decision suggests that owners are free to expressly contract out of any duty of fairness, and that courts will enforce such an exclusion.

Caught in the middle of all of this are bidders. While the court emphasized the sophistication of the parties, the reality is that in many sectors of the economy, companies cannot afford to ignore opportunities for public-sector work, or other work let through tender processes. To say that bidders can simply decline to bid if they do not like the terms of the tender documents is to put blinders on to commercial reality.

Governments are not going to stop receiving bids if courts enforce unfair exclusion clauses. But bidders will more likely to be treated unfairly, and prices are more likely to go up over time as a result. The Court of Appeal reasons that if the public does not like such a result, "they have recourse through the ballot box if they believe the territorial government is not getting value for money."

It seems unlikely, however, that the public would have the capacity to evaluate the effect of exclusion clauses on the price of public-sector contracts over the years; still more unlikely that it would become a serious enough political issue to constrain governments' desire to insulate themselves from lawsuits.

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Case Comment – *Vestacon Limited v. ARC Productions Ltd.*

Vestacon Limited v ARC Productions Ltd. involves a unique project where Allied Properties REIT ("Allied") linked two previously separate historic low-rise buildings, 134 Peter Street and 364 Richmond Street West, with a multi-story atrium and a 12-storey tower atop 134 Peter Street. Allied branded the project as Queen Richmond Centre West, or QRC West. Allied owns several single purpose nominee corporations, two of which are Peter Co., which owns 134 Peter Street, and Richmond Co., which owns 364 Richmond Street. The two nominee corporations were formed solely to own their respective properties.

Arc Productions Limited ("Arc") contracted with Peter Co. and Richmond Co. to lease space in their respective properties. Arc's leased space spanned across both properties. Vestacon Limited ("Vestacon") and Arc entered into a contract for leasehold improvements. Vestacon contracted with Plan Group Inc. ("Plan Group") for electrical services and materials. Arc hired X-Design Inc. ("X-Design") as its consultant and payment certifier.

Vestacon registered a claim for lien on June 6, 2016 for $1,990,602.49 and perfected its lien on July 19, 2016. The lien was registered against the PIN for 134 Peter Street, but not the two PINs that correspond with 364 Richmond Street. Plan Group registered a claim for lien on August 9, 2016 for $841,383.13 and perfected their lien on September 13, 2016. The lien was registered against the PIN for 134 Peter Street, and only one of the two PINs for 364 Richmond Street West.

Arc declared bankruptcy in January of 2017.

Master Albert was tasked with four motions, heard together, for the following relief:

4. Motion 1: Peter Co. asked the court to declare Vestacon's lien claim expired and dismiss the corresponding action against Peter Co.

5. Motion 2: Vestacon asked the court (i) to declare that Vestacon's claim for lien was registered in time; (ii) to declare all three CSPs, or alternatively the first two CSPs, invalid; and (iii) to grant leave to add Richmond Co. as a defendant to Vestacon's action.

6. Motion 3: Vestacon asked the court to find that it served a proper notice on the landlord/owner pursuant to section 19 of the Construction Lien Act (the "Act").

7. Motion 4: Peter Co. and Richmond Co. asked the court to declare Plan Group's lien claim expired and dismiss the corresponding action.

Only if motion 3 was decided in the affirmative did motions 1, 2, and 4 have to be decided.

Motion 3: Were Vestacon's section 19 notices valid?

Due to Arc's bankruptcy, Vestacon's claim was predicated on serving a proper section 19 notice and the absence of the owner serving a Form 3 notice denying responsibility.

On November 30, 2015, Vestacon delivered an email with start-up documents to Allied, and began work that day. The covering email lists the documents attached, including the section 19 notices.

One of the issues with respect to the section 19 notices was whether Vestacon served the notices properly. Vestacon argued that the Construction Manual contained Allied's consent, and consent on behalf of Peter Co. and Richmond Co., to deliver documents by email, and that Allied was identified in the lease as the proper party for service. Allied, Peter Co., and Richmond Co. argued that the notices should have been served on Peter Co. and Richmond Co., not Allied.

Master Albert decided that the section 19 notices served on Allied constituted service on Peter Co. and Richmond Co. Allied acted as agent for Peter Co. and Richmond Co., neither Peter Co. nor Richmond Co. have bank accounts, and all three entities have the same business address. Allied's organizational structure is not easily ascertainable to a contractor, which should not be used to defeat the rights of lien claimants on technicalities. Vestacon had provided notices by email to Allied on other projects. Allied consented to receiving the notices by email when it provided email addresses in the construction manual. Master Albert concluded that the section 19 notices were properly served, and that Allied did not serve Form 3 notices denying liability.

Motions 1 and 2: Did Vestacon preserve its claim for lien in time?

Three published certificates of substantial performance were at issue ("CSP 1", "CSP 2", and "CSP 3"). On March 9, 2016 Vestacon received CSP 1 from X-Design and caused it to be published. CSP 1 certified that Vestacon's work in 134 Peter Street was substantially performed as of February 23, 2016, but in fact Vestacon's work was only 75 percent complete. Vestacon had not applied to X-Design for CSP 1.

On April 21, 2016, Vestacon received CSP 2 from X-Design and caused it to be published, certifying substantial performance of Vestacon's work at 364 Richmond Street West as of April 21, 2016. Vestacon did not apply to X-Design for CSP 2.

Peter Co. argued that Vestacon's lien claim was registered more than 45 days after CSP 1 was published and is therefore expired. Peter Co. relied on section 2(2) of the Act, and CD1, which provides for the acceleration of Vestacon's work at 364 Richmond Street West. Vestacon argued that any CSP published before substantial completion of the contract is void, subject to the exception in section 2(2). Vestacon asserted that their lien claim period started at the contract completion date and sought to have at least the first two *CSPs declared invalid*.

Section 2(2) of the Act provides the following:

> Where a substantial part of an improvement is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor, or where the owner and the contractor agree not to complete the improvement expeditiously, the incomplete portion may be hived off from the contract price to determine substantial performance.

Master Albert determined that section 2(2) of the Act did not apply to CSP 1 or 2 because there was no extraordinary delay, and CD1 called for an acceleration of the project. X-Design improperly treated one contract as two contracts for each municipal address for the purposes of certifying substantial performance. There is no evidence of an agreement between Arc and Vestacon to treat the properties separately for determining substantial performance. Master Albert concluded that both CSP 1 and 2 were not valid.

X-Design issued CSP 3 for the entire contract, and Vestacon published CSP 3 on April 22, 2016. Vestacon contended that CSP 3 only described the lands by municipal address, not legal description, and the contract had not been substantially performed. Vestacon also argued that the value of work completed when CSP 3 was issued did not meet the statutory test.

Master Albert noted that the court is reluctant to declare a CSP invalid on technical grounds, but the omission of a legal description is serious and prejudiced Vestacon. With the legal description, Vestacon would have known the correct PINs to register its claim for lien against. Master Albert concluded that all three CSPs are invalid because they lacked a legal description of the property. Master Albert also agreed with Vestacon that the value of the work left to be completed was more than the monetary threshold required. Therefore, Vestacon preserved its claim for lien within the time required.

Motion 2: Did Vestacon's lien include 364 Richmond Street West?

Vestacon's claim for lien was not registered against the PIN for 364 Richmond Street West, nor does it name Richmond Co or Allied as owners. Vestacon sought to have its claim for lien declared valid as against 364 Richmond Street West and to obtain leave to add Richmond Co as a defendant. To succeed, Vestacon must prove that 364 Richmond Street West is land "enjoyed with" 134 Peter Street.

Vestacon relied on several facts to argue that 346 Richmond Street West constituted "lands enjoyed" with 134 Peter Street. To name a few, the City of Toronto and developer treated the two buildings as one for planning and zoning, the project operates with shared common expenses, the addresses were marketed together as QRC West, the buildings are linked by an internal door, and the buildings share gas, water, security, garbage services, mechanical systems, and electrical systems.

Peter Co. and Richmond Co. relied on several facts to deny the proposition that 364 Richmond Street West does not constitute lands "enjoyed with" 134 Peter Street, namely that the properties have different owners, construction schedules, start up documents, construction meetings, and that Arc had moved into 134 Peter Street before the completion of the work in 364 Richmond Street West.

Master Albert noted that to determine this question of fact, the

commonality of officers and directors, whether separate legal owners are related, whether there is a visible separation or property line and whether there is an integrated or common use must be assessed.

Master Albert applied the reasoning found in Phoenix Drywall v Mississauga Rest Home Two Inc., where a rest home and its adjacent parking lot were separately owned by related owners. The contractor inadvertently registered a claim for lien on the parking lot and not the rest home. The contractor successfully argued that the lands served "a common and integrated use" with a global objective.

Master Albert declared 364 Richmond Street West to be lands enjoyed with 134 Peter Street and granted leave to add Richmond Co. as a defendant.

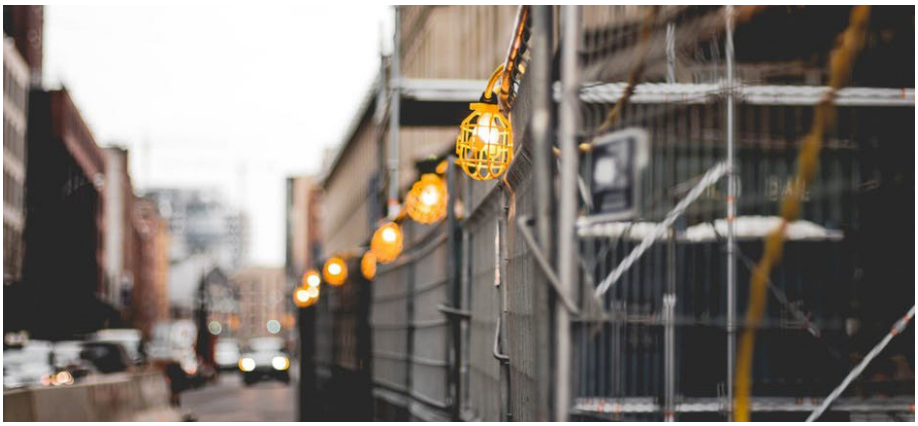
Motion 4: Did Plan Group's lien claim expire?

Peter Co. and Richmond Co. asked the court to declare Plan Group's lien expired prior to registration and dismiss the action. Plan Group argued that their lien was preserved within 45 days of their last day of supply.

Master Albert determined from the evidence presented that there is a genuine issue for trial, and the motion to declare Plan Group's lien expired must fail. Additional evidence about the nature and value of the work supplied in the final month of work is required.

Conclusion

Master Albert reaffirmed several well-established principles, and provided clarification on difficult concepts, such as the service of section 19 notices by email. This decision is currently under appeal to the Divisional Court.



AUTHOR:

Notable Case Law

Jacobs v. Leboeuf Properties Inc., 2018 ONSC 4795 (S.C.J.)

A covenant to insure a project and add the contractor as a named insured relieved the contractor of liability for damages caused by its negligence. The owner's action was dismissed on a R. 21 motion.

Association of Professional Engineers of Ontario v. Leung, 2018 ONSC 4527 (Div. Ct.)

Divisional Court discussion of the scope of jurisdiction of a Discipline Committee under the Professional Engineers Act and the standard of review from decisions by that Committee.

D & M Steel Ltd. v. 51 Construction Ltd., 2018 ONSC 2171 (S.C.J.)

Ontario Superior Court decision on the standard of review to be applied by a Superior Court Judge on a motion to oppose confirmation of a master's report. In jurisdictions where a reference to a master for

the trial of a lien action is possible, a motion to oppose confirmation of the master's report is in effect the appeal of the trial decision at first instance. Justice Perrell confirmed that the applicable standard of review on such a motion is consistent with the standard of review of an appellate court on an appeal from a trial judgment, namely "palpable and overriding error". This requires a deferential approach such that the master's conclusions on matters of fact should not be readily interfered with by the judge hearing the motion to oppose confirmation of the master's report.

Interpaving Limited v. City of Greater Sudbury, 2018 ONSC 3005 (Div. Ct.)

Divisional Court review of a City's decision to debar a contractor from bidding on its jobs for issuing a claim against the City and for health and safety violations. The City's decision was upheld.

Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd., 2018 ONSC 1123 (S.C.J.)

While it might be possible that a statutory trust created by the Construction Lien Act could be recognized as a true trust for purposes of s. 67 of the Bankruptcy and Insolvency Act, on the specific facts of this case, the court was not satisfied that funds paid to the Receiver were to be properly characterized as common law trust funds such that the trust survived the defendant's bankruptcy.

Pollard Windows v. 1459855 Ontario Limited, 2018 ONSC 558 (Div. Ct.)

A lien claimant delivered windows and doors to the site, but did not deliver screens for same. The screens were not separately invoiced. The Divisional Court upheld a finding that the lien claimant intentionally kept the screens to attempt to extend an otherwise expired lien. The motions judge made no reviewable error in concluding that the appellant failed to register its lien within the required time period.

Cam Moulding & Plastering Ltd. v. Dupont Developments Ltd., 2018 ONSC 3126 (Master)

For purposes of s. 78(3) of the Construction Lien Act, a vendor take-back mortgage is the same as an institutional mortgage, and is not equivalent to a collateral mortgage. The master found that the VTB mortgage was fully advanced to fund the purchase price, with an additional cash payment making up the balance. The mortgagee's interest therefore had priority over the lien claimants' interests and the mortgagee was entitled to the funds held in court.

Clearway Construction Inc. v. The City of Toronto, 2018 ONSC 1736 (S.C.J.)

A summary judgment motion brought on the basis of a failure to meet notice requirements and limitation periods was dismissed. The court found that the record before it on the summary judgment motion was inadequate to make findings necessary to resolve the issues of discoverability and an alleged pattern of conduct on the part of the owner of tolerating departure from the contractual notice provisions. A trial was required.

H.I.R.A Limited v. Middlesex Standard Condominium, 2018 ONSC 1526 (S.C.J.)

The court significantly reduced security to vacate a lien including extended duration costs for supervision, temporary services, insurance, acceleration and overhead where those claims were 'more than doubtful'.

Coco Paving Inc. v. Durham (Municipality), 2018 ONSC 2849 (Master)

Where a contract between a general contractor and a subcontractor contained an arbitration clause, sub-subcontractors' lien actions were stayed pending the outcome of the arbitration. It was just in the circumstances of these actions that the sub-subcontractors should wait and see what happened with the arbitration before advancing their claims any further.

Rabb Construction Ltd. v. MacEwen Petroleum Inc., 2018 ONCA 170

Discovery of the extent of damages arising from the same defect does not amount to discovery of a separate cause of action.