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Trusts and Bankruptcy - Finally, Some Certainty

In January 2019, when the Ontario Court of Appeal released its decision in *The Guarantee Company of Canada v. Royal Bank of Canada*, 2019 ONCA 9, a collective sigh of relief went up from parties seeking to enforce *Construction Act* (the "Act") trust rights in the face of an insolvency.

Section 8 of the *Act* provides that amounts owing to or received by a contractor or subcontractor on account of an improvement constitute a trust fund for the benefit of the subcontractors and other suppliers of services or materials to the improvement. As trustee, the contractor or subcontractor cannot appropriate or convert any part of the trust fund to its own use or to any use inconsistent with the trust until all suppliers of services or materials to the improvement are fully paid.

However, in Ontario, when a trustee makes an assignment into bankruptcy, the question of whether the trust will survive the bankruptcy has historically been answered in the negative, leaving unpaid parties fighting to collect from whatever assets are available to the pool of other creditors.

In *British Columbia v. Henfrey Sampson Belair Ltd.*, [1989] 2 S.C.R. 24 ("Henfrey"), the Supreme Court of Canada laid out the test to determine whether a statutory trust ought to be excluded from a bankrupt's property for distribution to creditors pursuant to s. 67(1)(a) of the *Bankruptcy and Insolvency Act* (the "BIA"), which provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the

bankrupt in trust for any other person". The Supreme Court held that the three elements of a common law trust had to be present before a statutory trust could fall under s. 67(1)(a) *BIA*: certainty of intention, certainty of subject matter, and certainty of object.

In *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062 ("*Atlas Block*"), the court held that a supplier's trust claim under the Act did not survive Atlas's bankruptcy. Following Henfrey, the court held that s. 67(1)(a) of the *BIA* did not extend to assets subject to a deemed trust created by provincial statute where such deemed trust did not otherwise have all the attributes of a valid trust at common law. Since the funds from the projects in *Atlas Block* were commingled with funds from other sources, there was no certainty of subject matter and consequently no common law trust. In the words of the court, "once co-mingling has occurred, that is the end of the matter".

The court's analysis turned on the fact that, as in *Ivaco Inc. (Re)*, 2006 CanLII 34551 (ONCA), the *Act* did not set out specific obligations on the trustee, and therefore the subsequent receiver, to establish and maintain a separate account designated as a trust account. The court noted that a deemed trust was, in a sense, a legal fiction; that only a trust at common law was exempt from the bankrupt's estate; and that if the province wanted to require that a party maintain funds in a separate account, it could have legislated that separation, but it did not do so.

The authors of *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, took that last comment to heart and, after reviewing various options, including requiring parties to open project trust accounts or project bank accounts, suggested amendments to the trust regime. The legislature eventually settled on what is now s. 8.1 of the *Act*:

> (1) Every person who is a trustee under section 8 shall comply with the following requirements respecting the trust funds of which he or she is trustee:
>
> 1. The trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the trust funds, the funds shall be deposited into a bank account in all of the trustees' names.
>
> 2. The trustee shall maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information.
>
> 3. If the person is a trustee of more than one trust under section 8, the trust funds may be deposited together into a single bank account, as long as the trustee maintains the records required under paragraph 2 separately in respect of each trust.
>
> (2) Trust funds from separate trusts that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust.

The recent Ontario Court of Appeal decision in *The Guarantee Company of Canada v. Royal Bank of Canada* ("*GCNA v. RBC*") revisited the discussion concerning statutory trusts and bankruptcy. The conclusions reached by the court, read together with the requirements of the new s. 8.1 of the *Act*, should finally clarify this area of law.

In *GCNA v. RBC*, the court considered the s. 8 trust in the context of the bankruptcy of a contractor, A-1 Asphalt Maintenance Ltd. Multiple liens were registered against various A-1 projects. At the time of A-1's bankruptcy, it had four major ongoing projects, three with the City of Hamilton and one with the Town of Halton Hills. All four contracts had outstanding accounts receivable for work performed by A-1. The bankruptcy judge directed the receiver to establish a "Paving Projects Account" and a general post-receivership account. The order provided that all receipts from the four paving projects were to be deposited into the Paving Projects Account.

The City and the Town paid $675,372.27, which represented debts owing to A-1 by the City and the Town when A-1 filed its Notice of Intention, to the receiver, who deposited the funds into the Paving Projects Account. It was common ground that those funds were subject to the s. 8 trust, but GCNA, the bonding company that had settled the liens and become subrogated to the claims, further argued that the funds had to be excluded from A-1's property on bankruptcy pursuant to s. 67(1)(a) of the BIA. Not surprisingly, RBC, a secured creditor pursuant to a general security agreement, took the position that the funds formed part of A-1's estate and were available to creditors.

The motion judge concluded that GCNA had failed to establish sufficient certainty of subject matter and that the funds were not held in trust within the meaning of s. 67(1)(a). She held that GMAC Commercial Credit Corporation – *Canada v. T.C.T. Logistics Inc.* (2005), 74 O.R. (3d) 382 (C.A.) required segregation of funds to maintain a common law trust, and that even though the receiver's accounting could identify the

funds in the Paving Projects Account, that was not enough to establish certainty of subject matter. The mere fact of commingling the funds from the various projects into a single account was held to have destroyed the certainty of subject matter. According to the motion judge, therefore, GCNA was only entitled to a pro rata share of the funds as a secured creditor.

GCNA appealed. In allowing the appeal, the Court of Appeal began by finding that *Henfrey* contemplated that a provincial statute could supply the required element of certainty of intention for a statutory trust and that the trust created by the *Act* did not give rise to an operational conflict with the *BIA*. Accordingly, the doctrine of paramountcy did not apply.

The court next concluded that the motion judge erred by finding that the requirement of certainty of subject matter was not met in this case. Citing from Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), the court held that to satisfy the requirement for certainty of subject matter, it "must be possible to determine precisely what property the trust is meant to encompass. The subject matter is ascertained when it is a fixed amount or a specified piece of property; it is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise."

The court held that the amounts owed by the City and the Town on account of the paving projects were debts, that a debt was a chose in action which could properly be the subject matter of a trust, and that consequently it did not matter that neither the City nor the Town had created segregated accounts or specifically earmarked the source of the funds they would use to pay the debts they owed for the paving projects. Sharpe J.A. wrote as follows:

> Section 8(1) embraces "all amounts, owing to a contractor or subcontractor, whether or not due or payable". That language designated precisely what property the trust is meant to encompass. A-1 owned those debts. They constituted choses in action which are a form of property over which a trust may be imposed. It follows that at the moment of A-1's bankruptcy, the trust created by s. 8(1) was imposed on the debts owed by the City and the Town to A-1.

Finally, since the evidence clearly established that the funds paid for each paving project were readily ascertainable and identifiable, the fact that they were commingled into the same Paving Projects Account did not deprive the funds of certainty of subject matter. Only when commingling is accompanied by conversion and tracing becomes impossible is the required element of certainty of subject matter lost.

Consequently, the court concluded that by operation of s. 67(1)(a) of the *BIA*, the funds satisfied the requirements for a trust at law and were not property of A-1 available for distribution to A-1's creditors.

In light of cases such as *Atlas Block*, it was not entirely clear whether s. 8.1 of the *Act* alone would have achieved its goal of turning the s. 8 trust funds into common law trust funds. However, going forward, the requirement in s. 8.1 that a trustee must maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information, in conjunction with the Court of Appeal decision in *The Guarantee Company of Canada v. Royal Bank of Canada*, should leave beneficiaries of the s. 8 trust in a good position to claim access to the trust funds in bankruptcy by excluding the funds from the property of the bankrupt and thus excluding them from the reach of other creditors.

AUTHOR:

AUTHOR:

Case Comment: *CM Callow Inc.v. Zollinger*

CM Callow Inc. v. Zollinger, 2018 ONCA 896, is an Ontario Court of Appeal decision that provides valuable guidance into the scope of the duty of honest performance in contractual relations.

The facts of the case are straightforward. The plaintiff, CM Callow, provided both summer and winter maintenance services to the defendants, ten residential condominium corporations. The condominium corporations had formed a "Joint Use Committee" to make decisions regarding the joint and shared assets of the corporations.

The plaintiff provided services under two multi-year contracts, one covering summer maintenance and the other covering winter maintenance. The winter maintenance contract, which ran from November 1, 2012 to April 30, 2014, contained a provision allowing for early termination by the defendants upon 10 days' notice (the "Winter Contract").

At the conclusion of the first term in the Winter Contract, in April 2013, the defendants held a meeting and voted to terminate the Winter Contract. The defendants' evidence was that the decision to terminate the contract was due to the plaintiff's sub-par performance. This decision was not shared with the plaintiff until September, 2013.

During the summer of 2013, the plaintiff, on its own initiative, performed extra "freebie" landscaping work with the hope that this would act as an incentive for the defendants to renew the Winter Contract. Members of the Joint Use Committee were aware that the plaintiff was under the impression that the contracts were likely to be renewed. In particular, over the summer of 2013, members of the Joint Use Committee discussed the "freebie" work and how the plaintiff was under the impression that they would work the upcoming winter. Further, an internal email between two members of the Joint Use Committee referenced keeping the plaintiff as a "back pocket option" regarding the Winter Contract. At trial, Justice O'Bonsawin found this conduct to be unsettling.

At trial, the defendants argued that this was a case of simple contractual interpretation, and that the contract allowed for termination, for any reason, with ten days' notice. Justice O'Bonsawin disagreed, citing *Bhasin v Hrynew*, 2014 SCC 71, ("Bhasin") for the proposition that good faith performance is a general organizing principle of common law contract and that parties to a contract have a duty to act honestly in performing their contractual obligations.

Justice O'Bonsawin concluded that the defendants breached their duty of honest performance by:

> 1) Withholding the fact that they intended to terminate the Winter Contract to ensure that the plaintiff performed the summer contract; and
>
> 2) Continuing to make representations to the plaintiff that the winter contract was not in danger of non-renewal.

The trial judge held that meeting the minimum standard of honesty would have required the appellants to address the alleged performance issues with the respondent, provide prompt notice or refrain from any representations in anticipation of the notice period.

On appeal, the Ontario Court of Appeal accepted the argument of the condominium corporations that Justice O'Bonsawin erred by improperly expanding the duty of honest performance in a manner that went beyond the terms of the Winter Contract.

In allowing the appeal, the Court discussed the common law duty of good faith and honest performance, as articulated by the Supreme Court of Canada in *Bhasin*, emphasizing how the concept of good faith was not to be applied so as to undermine longstanding contract law principles, thereby creating commercial uncertainty. On this point, the Court cited paragraphs 70 and 73 of the *Bhasin* decision:

> "The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002]

2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties." […]

In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance.of the contract.

> This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance…"

The Court held that the condominium corporations' decision to accept the "freebie" work and not inform the respondent of their decision to terminate "may suggest a failure to act honourably", however that this conduct did not rise to the high level required to establish a breach of the duty of honest performance. The Court then emphasised that the condominium corporations were free to terminate the Winter Contract with CM Callow upon ten days' notice, as this was all the parties bargained for, and were entitled to.

The Ontario Court of Appeal decision recognized that although the condominium corporations' actions were unseemly, the principle of commercial certainty in contractual relations ran paramount, as a necessary force in commerce.

AUTHOR:

When Bankruptcy and Construction Law Meet:

Lifting a Stay in the Context of a Breach of Trust Action

The bankruptcy or insolvency of a party can bring considerable complexity to even the most straightforward construction litigation files. Two issues that are frequently encountered when construction law and bankruptcy law converge are (1) the implementation of a stay of proceedings; and (2) the impact of a bankruptcy under the *Bankruptcy and Insolvency Act* (the "BIA") on a breach of trust claim under the *Construction Act*, formerly the *Construction Lien Act* ("CLA").

The decision of *Campoli Electric Ltd. v. Georgian Clairlea Inc.*[1] provides an example of such a situation, specifically how a stay of proceedings under the *BIA* is viewed in the context of a breach of trust claim under the former *CLA*.[2] In his decision, Master Short methodically and helpfully lays out his analysis and the applicable legal tests, thereby creating a useful guide for any lawyer faced with similar issues.

This article will first lay out a brief, high-level introduction to stays of proceedings, as well as the *CLA*'s breach of trust provisions. It will then apply these concepts in examining Master Short's reasons in the *Campoli* decision.

Stay of Proceedings

The stay of proceedings is an automatic component of an insolvency proceeding and includes all bankruptcies and court-appointed receiverships which are governed by the BIA, the *Courts of Justice Act* ("CJA"), as well as Plans of Arrangement under the *Companies' Creditors Arrangement Act* ("CCAA").

A proposal proceeding is a means whereby a debtor (whether a business or individual), subject to approval by its creditors and the Court, can compromise its debts and continue. A bankruptcy, on the other hand, contemplates finality and closure as it relates to an enterprise or an individual.

Section 69.1 of the *BIA* provides that "no creditor has any re`medy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt."

A similar provision is included in the model order for receiverships granted pursuant to the *BIA*.[3] The stay provision under the model *CCAA* Initial Order is similar to that in a receivership other than that it is usually limited in time with extensions requiring a further Court Order.[4]

The stay takes effect upon the filing of a voluntary bankruptcy or upon the granting of a Bankruptcy Order, a Receivership Order, or an Initial Order under the *CCAA* and operates to prevent creditors from taking steps to enforce their rights against the debtor subject to the legislative provisions allowing for an application by a creditor to have the stay lifted.

Section 69.4 of the *BIA* provides the court with the discretion to lift the stay if it is satisfied that the creditor or person is likely to be materially prejudiced by its continued operation or where it is equitable on other grounds to make such a declaration. As we will see in the *Campoli* decision, the lifting of a stay pursuant to section 69.4 is far from automatic.

The *CCAA* does not contain similar provisions to those contained in the *BIA* with respect to the lifting of the stay. That having been said, the Ontario Superior Court of Justice in *Canwest Global Communications*

1. 2017 ONSC 2784 (Master); aff'd 2018 ONSC 2008 (Div. Ct.).

2. Master Short's decision specifically addresses the previous *CLA*, and not the current *CA*. However, it is anticipated that his reasons will be helpful in looking at cases under the *CA*. For the sake of clarity, the abbreviation "*CLA*" will be used in this article when referring to the *Campoli* decision.

3. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

4. THIS COURT ORDERS that until and including [DATE – MAX. 30 DAYS], or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

Corp, Re[5] held that the court should have regard to the objectives of the CCAA, the balance of convenience, the relative prejudice to the parties, the merits of the proposed action (where relevant), and the good faith and due diligence of the debtor company. There is jurisprudence which suggests that there is a heavy onus on the party looking to lift the stay where doing so would impede, if not destroy, the proposed re-organization.

The stay of proceedings can become a complicating factor for a lien claimant with respect to the preservation and perfection of a claim for lien, which must still be done in accordance with the timeframes imposed by the *Construction Act*. The model Orders for both receiverships[6] and *CCAA* filings[7] contain provisions specifically permitting lien claimants to preserve their liens. It is important to note that commencing an action to perfect lien claims will require leave of the court or the consent or the monitor or receiver. With respect to a bankruptcy proceeding, the *BIA* makes lien claimants secured creditors who are technically unaffected by a stay. Common practice is still for lien claimants to seek the Licensed Insolvency Trustee's consent and leave in any event. With respect to a proposal proceeding, even secured creditors are prevented from enforcing their rights, and therefore leave of the court is required to preserve and perfect lien rights. The monitor, receiver, or Licensed Insolvency Trustee in a bankruptcy or a Proposal will typically consent to granting leave to lift the stay for this limited purpose. There will also likely be an additional application for leave to have the lien action set down within the two years of the commencement of the action perfecting the lien.[8]

This is among the reasons why it is so important for a bankruptcy search to be conducted when a party is in the process of preserving and/or perfecting a claim for lien.[9]

Breach of Trust

The *Construction Act* imposes a very powerful remedy for those who are unpaid on a construction project in for the form of a claim for breach of trust. Master Short provides a helpful summary of the Act's breach of trust provisions in his decision. Pursuant to the *CLA*, "all amounts owing to a contractor or subcontractor, whether or not due or payable or received by a contractor or subcontractor, on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor." The power of the breach of trust provisions is due to the fact that, amongst other things, plaintiffs are able to sue officers, directors, and those with effective control of a corporation personally, if a trust fund is appropriated or converted to their own use or a use inconsistent with the trust until all subcontractors and other persons who supplied to the improvement are paid all amounts related to the improvement owed to them. However, it is a defence to breach of trust if one creditor is paid in preference to another, so long as the party has a legitimate claim to payment. The section does not require a *pro rata* distribution among all creditors, so long as the funds go to a proper recipient.[10]

Trusts will impact how property is dealt with in a bankruptcy or insolvency situation. Section 67(1)(a) of the *BIA*, which is federal statute, provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person." For such a trust to be enforceable, it would require the three certainties of a trust at common

5. 2009 CarswellOnt 7882 (S.C.J.).

6. 10. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

7. 15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien

8. Michael P. McGraw, *Construction and Insolvency Law, Process and Priorities the Intersection of Complex and Confusing*, Ontario Bar Association Construction Law Section, Nuts and Bolts, February 2013, p. 2.

9. Duncan W. Glaholt, *Conduct of a Lien Action* 2018 (Toronto: Carswell, 2017) at p. 91.

10. Short decision, paras. 51-56.

law: certainty of intent, certainty of subject matter, and certainty of object. A trust under the *Construction Act*, which is created by provincial statute, does not require these three certainties. Therefore, a statutory trust under the *Construction Act* may not be a trust under the meaning of the *BIA*, unless it otherwise conformed to the three common law certainties.[11] It is important to note that section 8.1 of the *Construction Act* imposes requirements for how a trustee under section 8 must manage trust funds, including depositing them into a bank account in the trustee's name and maintaining specified written records respecting the trust funds. Whether the new section 8.1 will help align trust funds under the *Construction Act* with the common law trust requirements remains to be seen.

Similarly, section 178(1)(d) of the *BIA* contemplates a circumstance where an order of discharge does not release the bankrupt from, inter alia, any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. However, as cited by Master Short in reliance on commentary from Duncan Glaholt and David Keeshan from the 2016 *Annotated Ontario Construction Lien Act*, a breach of trust under the *Construction Act* only survives bankruptcy if there is "some element of dishonesty, wrongdoing, or misconduct". Such conduct is not a prerequisite for a breach of trust under the *Construction Act*, and therefore there will be many cases where a breach of trust under the *Construction Act* does not survive bankruptcy.

Campoli Electric Ltd. v. Georgian Clairlea Inc.

Georgian Clairlea Inc. ("Georgian") owned and developed a construction project comprised of 112 stacked townhomes and 30 freehold townhomes (the "Project"). In 2009, three years after the Project began, it experienced financial difficulty resulting in subcontractors not being paid and liens being registered. Georgian subsequently went bankrupt. Eugene, Anthony and Frank Maida, who were at the material time officers, directors and persons with effective control of Georgian, all made Proposals related to their insolvencies.

Two creditors, E-M Air Systems Inc. ("EM Air") and Campoli Electric Ltd. ("Campoli") brought motions for Orders under section 69.4 of the *BIA* in order to lift the stay of proceedings imposed under section 69(1) due to Anthony Maida filing a Proposal and Eugene Maida filing a Notice of Intention to file a Proposal. By lifting the stays, the claimants would be able to move forward with their breach of trust actions. Likewise, Triumph Aluminum and Sheet Metal Inc. ("Triumph") brought a similar motion to lift the stay to allow it to move forward with its breach of trust action. Adding to this somewhat complicated web of motions examined by Master Short was the fact that a previous Master had, on consent, lifted the stay imposed relating to the Notice of Intention to File a Proposal by Frank Maida. Frank Maida was now seeking, via cross-motion, to have the stay reinstated. If any of the stays were or remained lifted, the Maidas sought summary judgment on the basis that the actions concern issues that were settled in 2009, that they were statute barred by the *Limitations Act, 2002* and that there was no genuine issue requiring a trial since the plaintiffs could not establish breach of trust under the *Construction Act*.

Issue 1: Lifting the Stay

First, Master Short examined section 69.4 of the *BIA*, and the test set out above with respect to who may apply to the court for a lifting of a stay. Master Short considered section 69.4 alongside section 178(1), dealing with claims involving fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. The moving parties relied on this subsection to support their position that regardless of whether there is a discharge, the personal defendants would remain liable for breach of trust.

In his decision, Master Short addressed several arguments made by the

11. The principle that a provincial statutory trust must constitute a trust at common law and meet the three certainties of intent, object and subject matter in order to survive bankruptcy has been held as recently as the 2018 Ontario Superior Court of Justice [Commercial List] decision of *RBC v. A-1 Asphalt Maintenance Ltd.*, 2018 ONSC 1123, para 4, currently under appeal.

plaintiffs as to why the stays should be lifted. One argument advanced by Campoli and EM Air was that the stays had to be lifted so that their claims against Eugene and Anthony Maida could be valued, allowing them to participate in their Proposals. Another argument was that Anthony and Eugene were necessary parties for the complete adjudication of several of the various actions. Master Short disagreed, stating that evidence of these individuals could be obtained even without lifting the stays, and that Campoli and EM Air could still prove their entitlement and participate in the Proposal without establishing a violation of section 13 of the *CLA*.

Issue 2: Breach of Trust

Master Short provides a helpful summary of the *CLA*'s breach of trust provisions, as set out above. On the basis of the fact that some element of dishonesty, wrongdoing or misconduct is required for a breach of trust under the *CLA* to survive bankruptcy, Master Short concluded that the conduct of the Maida brothers would be a significant factor to consider.

Master Short, citing the Ontario Court of Appeal's decision of *Airex Inc. v. Ben Air System Inc.*, also clarified that once the beneficiary of a trust showed that it was a contractor on the project in question who supplied materials to the alleged trustee, that the beneficiary had not been paid, and that the trustee had received payment, the onus was on the trustee to show that the trust monies had been properly applied. Master Short concluded, however, that the moving parties had failed to establish that any funds were misapplied, stating that their evidence was contradictory and lacked documentary support. In doing so, he said that breach of trust was not established simply because a project lost money. In essence, "simply because the project lost money does not turn the principals or officers or directors of a corporation into guarantors of the liabilities of the Corporation." In this case, the fact that the Maida brothers provided personal guarantees on mortgages was held not to establish a breach of trust. Master Short also found in this particular case, as long as the necessary holdbacks were maintained, any payments made on account with respect to mortgages on the Property were authorized uses of those funds, and not a breach of trust. The units took six years to sell and resulted in a $9 million loss for Georgian, its related companies, and the Maidas.

Issue 3: Settlement Agreements and the Limitation Period

The Plaintiffs signed Minutes of Settlement dated June 17, 2009 (and amended on July 7, 2009). EM Air signed additional Minutes of Settlement in February 2011 re-affirming that all claims against Georgian were settled, and Triumph signed Supplementary Minutes of Settlement in 2011 containing a full and final release of all Project-related claims. These documents were signed to allow the Project to be completed and end any lien actions and other litigation in order to complete the Project. Master Short found that the trades knew they were giving up all Project-related claims, including all registered and unregistered liens, in the hopes of being paid from the Project's sale proceeds surplus through a Trades Mortgage intended to replace Georgian's debt that would rank behind the main Project financing. Master Short found that the Plaintiffs all had legal advice and were experienced in the construction industry, and that they all knew that they would (1) only be paid after the Project was sold; (2) that the prior mortgages would be paid first; and (3) that they were giving up the right to sue for any debts related to the Project.

Relying on the *Limitations Act*, Master Short concluded that the Plaintiffs were aware of their breach of trust claims in 2009, and were therefore out of time when they started their action in 2012. He also found that no tolling agreement was entered into, nor was there anything in the Minutes of Settlement to preserve a breach of trust claim. Citing the Ontario Superior Court of Justice decision of *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd. (2008)*, which was upheld by the Divisional Court, Master Short found that the "trust claim clock runs from when the default entitling a party to lien a project, is discovered."

Outcome: Putting the Pieces Together

With respect to Frank Maida's request to restore the stay previously lifted on consent, section 187(5) of the *BIA* states that "every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction", but subsection (6) states that "every order of a court may be enforced as if it were a judgment of the court." In light of this, Master Short declined to vary the order of Registrar Jean. He noted that the power granted by section 187(5) should be used sparingly, and that if the order was to be varied, such a request must be brought before the judicial officer who initially made the order. Master Short therefore declined to reinstate the stay.

In determining whether to lift the stays of the other Maida brothers, Master Short considered the fact that even if the stays were lifted or reinstated (in the case of Frank Maida), a judgment for breach of trust would make no difference since the Canada Revenue Agency had a claim that was much larger than the Plaintiffs' claims. If CRA were to vote in favour of the Proposals, they would be accepted, and if they voted against them, the Maidas would be bankrupt. He also considered the position taken by the Maidas that allegations made with respect to fraud against the Maidas were significantly

undermined on cross-examination.

In considering the case law surrounding the lifting of a stay, Master Short cites the Ontario Court of Appeal's 2001 decision in *Ma, Re*. This decision stated that lifting a stay is "far from a routine matter", and that there is an onus on the applicant to establish that the situation falls within the meaning of section 69.4. The court must ensure that there are "sound reasons consistent with the scheme of the *Bankruptcy and Insolvency Act*." One reason cited as to why a stay would not be lifted is "if it were apparent that the proposed action had little prospect of success."

Master Short found that the Plaintiffs had little prospect of success, for the reasons cited throughout the decision but also because the Plaintiffs' claims could not survive bankruptcy. The case law is clear that some element of dishonesty, wrongdoing or misconduct must be established for a breach of trust claim to survive bankruptcy pursuant to section 178(1)(d). This creates a zone where there will be breaches of trust pursuant to the *Construction Act* that do not fall within section 178(1)(d) of the *BIA*. Master Short found that there was no evidence that any of the Maidas deliberately misappropriated trust money for their own use, and since any judgment they might receive would not survive bankruptcy, there were no sound reasons for lifting the stays.

Lastly, Master Short considered whether summary judgment should be granted. He found that this motion could be determined under Rule 20.04(2)(a), which states that "the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." Master Short determined that he did not need to exercise any of the enhanced fact finding or mini trial powers reserved to judges. There was no "air of reality" to the argument that the cause of action was only discoverable two years before the action was commenced, there was no meaningful evidence of misappropriation of funds, and the parties went into their settlement agreements with eyes wide open. Both parties had the opportunity to put their best foots forward on the motion, and the motion must be decided on the basis of the evidence actually before the court. Here, the plaintiffs failed to put forth sufficient evidence that trust funds were being paid to someone other than those entitled to receive them under the *Construction Act*. Accordingly, the plaintiffs failed to satisfy their onus. He also cited the doctrine of promissory estoppel as a reason to uphold the Minutes of Settlement and related Trade Mortgages. On the basis of all of the above, and applying the legislative test contained at section 69.4 of the *BIA*, Master Short found that it was not likely that the moving parties would be materially prejudiced by not lifting the stay, and that it would not be equitable in consideration of the steps taken in reliance upon the Trade Mortgages and the related documents.

The motions seeking to lift the stays of Eugene and Anthony Maida were therefore dismissed, the motion to reinstate a stay of the actions against Frank Maida was dismissed, and the motion of Frank Maida to have the actions dismissed against him were granted.

Appeal to the Divisional Court

Master Short's decision was upheld by the Divisional Court, which determined that it was only necessary to consider the limitations issue. On this point, the Divisional Court determined that Master Short was correct and that the limitation period for breach of trust had expired before the appellants had issued their claims.

Conclusion

Master Short's decision in *Campoli* is useful to review and revisit for new and experienced lawyers alike. Not only does it serve as a helpful guide to the key principles and tests a lawyer must deal with when it comes to lifting stays and dealing with breach of trust claims in the context of a bankruptcy or insolvency, but it also as an example of a pragmatic and well-reasoned application of these principles in order to untangle a messy multi-party construction litigation file.

*This article was co-authored with Philip H. Gennis, J.D., CIRP., LIT, Senior Principal, msi Spergel inc., Licensed Insolvency Trustees

AUTHOR:

The Uncertainty of Construction Without a Written Contract

Case Comment: *Demir v. Kilic*, 2018 ONSC 949; 2018 ONSC 7279

Differing understandings of an agreement to renovate a home is a scenario that may be familiar to many. When the parties are individuals, the budget is low, and everyone seems trustworthy, the idea of spending a lot of time and money up-front on a detailed, written contract can seem counterproductive to both owners and contractors alike. Yet each party comes away from verbal discussions with at least a slightly different idea of what was decided, and those differences compound over weeks and months of follow-up discussions, detailed design, changes, complaints, errors, and more. *Demir v. Kilic* is yet another case which should convince everyone to confirm in writing the essential terms of an agreement (usually at least: scope, price, and time) at the start of a project. Not only did the parties in this case disagree about what their contract was, the courts disagreed about whether there even was one at all.

Facts

In 2012, Erdal Kilic purchased a house in Bedford Park, Toronto and contacted Haci Ahmet Demir about renovating the property. Mr. Kilic paid preconstruction costs of $18,000 up front, and then gradually over about one year of work reimbursed Mr. Demir for about $275,000 of labour and material expenses he incurred. With the project nearly done but Mr. Demir requesting more money, Mr. Kilic refused. Mr. Demir invoiced, liened, and then claimed for about $32,000 in remaining unpaid costs plus a 20% management fee for the entire project (approximately $66,000 plus HST). Mr. Demir claimed in both breach of contract and in the alternative quantum meruit (unjust enrichment for compensable services provided). Mr. Kilic defended the claim on the basis that the contract had been lump-sum, for $250,000 only, and counterclaimed for deficiencies amounting to approximately $15,000.

Trial before the Master

The case was referred to Master Albert for trial, following which she delivered a report. Master Albert found that neither Mr. Kilic nor Mr. Demir were credible witnesses, and there was very little reliable evidence about an agreement on the price for labour, materials, or the project as a whole. She did hear that they both agreed there was a contract, and she found that there was a "meeting of the minds as to the role of each of the parties" – Mr. Demir to perform the work and Mr. Kilic pay the cost of it.

Master Albert awarded Mr. Demir his $32,000 claim for unpaid construction costs, but found that Mr. Demir had failed to prove that the 20% management fee was a term of the contract. Finding as she did regarding the contract, Master Albert determined she did not need to consider the quantum meruit claim. The alleged deficiencies were assigned almost negligible value at trial and not reconsidered on appeal. $48,000 in costs were claimed, but Master Albert awarded just $5,000.

Motion opposing confirmation of the Master's report

Mr. Demir made a motion under Rule 54.09 to oppose confirmation of the report (essentially an appeal), which was heard by Justice Perell. While Justice Perell's decision was framed in terms of deference to the facts found by Master Albert, he found her conclusion that a contract was formed to be unreasonable. He found instead that the facts "could only lead to the opposite conclusion; that [the parties] had not agreed on the essential terms of the renovation contract". He therefore found it necessary to consider the quantum meruit claim, which he associated with Mr. Demir's claim that he himself put over 2,500 hours of work into the project. Justice Perell awarded Mr. Demir the full amount he claimed for both the outstanding construction costs and management fee, totalling approximately $106,000. In addition, he increased the trial cost award to $38,000, plus $6,000 for the motion, payable by Mr. Kilic to Mr. Demir.

Appeal to the Divisional Court

A three-judge panel heard a further appeal, this time by Mr. Kilic, and overturned Justice Perell's decision. The Divisional Court noted that Mr. Demir himself did not challenge Master Albert's original finding that there was a contract, and found two further problems with Justice Perell's decision to award the entire management fee claim. First, Justice Perell determined that aside from the management fee, Mr. Demir had received no compensation for his work, but this determination was his own, not rooted in the facts found by Master Albert. Second, he accepted Mr. Demir's claim that he spent 2,500 hours working on the project, despite Master Albert's finding that he was not a credible witness.

The Divisional Court confirmed Master Albert's original report, reinstating her award of just $32,000 to Mr. Demir for unpaid construction

costs. Not only did the Divisional Court overturn the cost award by Justice Perell, but quizzically, they reversed the costs previously awarded by Master Albert to Mr. Demir for the trial, finding that Mr. Demir now owed Mr. Kilic a total of $25,500 in costs for all proceedings to date. As of their decision in December 2018, over five years had passed since the lien claim was registered.

Conclusion

An oral contract is still a contract, but proving its terms can be challenging and expensive.

Moreover, if the evidence suggests parties never truly shared one understanding of the essential terms, a court may find no contract was ever formed between them.

In construction without a written agreement, what is payable and how to calculate amounts owing can become so unclear as to test the ability of even experienced Masters and Judges to set things straight. Clearly, the potential cost of not having a written contract – in uncertainty, inconvenience, time, and money – should caution everyone against just getting started with work and seeing how it goes.

AUTHOR:

The Society of Construction Law North America

Glaholt LLP recently had the privilege of being the Platinum Sponsor of the 8th International Society of Construction Law Conference, hosted by the Society of Construction Law North America ("SCL NA"), in Chicago, Illinois.

Incorporated in May 2017, SCL NA is the newest chapter of the Society of Construction Law, originally founded in the United Kingdom in 1983. While it was the SCL's 8th biennial international conference, it was the first of its kind held in North America. Over 250 delegates from all corners of the globe attended to learn from expert panels comprised of owners, senior construction executives, general counsel, construction lawyers, design professions and consultants. The result was a tremendously successful conference that provided attendees with diverse, global perspectives of construction law issues facing us all.

The Society of Construction Law has more than 3,000 members worldwide, across more than a dozen chapters. Since its inception, SCL NA has already more than tripled its ranks from its original 31 Founding Members.

The object of SCL NA is to promote education, study and research in construction law and in particular construction alternative dispute resolution, arbitration and adjudication, and to disseminate that research through publications, courses, seminars, and conferences. To this end, the SCL and the SCL NA do not limit membership to practicing lawyers, but are comprised of members from all corners of the construction industry.

The founding of the SCL NA, and the success of its inaugural conference, are the direct result of the efforts of Dr. Anamaria Popsecu, who with the help of Keith Kirkwood, the SCL UK's 2016 Chairman, spearheaded the initiative to open the North American chapter, and bring the conference to the United States. Glaholt LLP wishes to thank Dr. Popsecu, and the entire conference committee, for all of their hard work that made the conference the resounding success that it was.

International industry organizations, like the SCL, are more important than ever. As construction projects grow in scale and complexity, they increasingly involve parties from different jurisdictions and diverse legal backgrounds. In this context, industry participants, including owners, construction executives, in-house counsel, construction lawyers and consultants must be prepared to operate and collaborate in different legal frameworks to be successful. For that reason, the SCL, with its diversity of membership and far reaching connections through its international chapters, has become a critical industry hub for practitioners looking to increase their international network, and to share

their experience and learnings with construction law professionals from around the world.

Ontario's recent adoption of adjudication under the new Construction Act, to be introduced in October 2019, highlights the value of strong connections to practitioners from international jurisdictions. With no prior construction adjudication experience anywhere in North America, our industry will rely heavily on the adjudication expertise of our colleagues in the UK, Australia, New Zealand, Singapore, and Malaysia, each of which has a very strong and well established SCL Chapter.

Glaholt LLP is proud to announce that two of its Partners, Charles Powell and Michael Valo, have been appointed SCL NA Regional Directors for the Ontario Region. The SCL NA is actively expanding its membership ranks from all sectors of the construction industry in Canada and the US, and Charles and Michael are looking forward to helping drive that effort through regional events throughout the year.

Benefits of joining the SCL NA include:

- Access to SCL members only publications, videos and other resources from the SCL International Library
- The ability to publish papers with worldwide recognition, and gain exposure to international perspectives on construction law
- Interacting with construction industry professionals from the North American and International construction communities
- Reciprocal Benefits with sister societies including discounted attendance at International and regional conferences and seminars.

Glaholt LLP and its lawyers are proud to support the SCL NA and encourage anyone in the construction industry to join this impressive organization.

For more information on SCL NA, and to become a member, please visit the SCL NA website at www.scl-na.org.

AUTHOR:

AUTHOR:

Notable Case Law

***Ben Air Systems Inc. v. Toronto Transit Commission,* 2018 ONSC 2375**

Section 48 of the *Construction Act* makes it clear that the discharge of a lien means that the claimant cannot lien again for the services performed and materials supplied before the date of the perfection of the first, discharged lien (see: *Southridge Constructions Group Inc. v. 667293 Ont. Inc.* (1992), 2 C.L.R. (2d) 177 (Ont. Gen. Div.), para. 18). Lien rights continue for services and/or materials supplied after the perfection of the discharged lien (see: *Khalimov v. Hogarth*, 2015 ONSC 6244 (S.C.J.), para. 23). A claimant can lien for the unpaid balance of the contract only if it stays on the job and intends to finish the job (see: *Landmark II Inc. v. 1535709 Ontario Ltd.*, 2011 ONCA 567, para. 25). By logical extension, where a party terminates the contract because he or she accepts the breach by the other party, the party may lien only for services and goods delivered to the time of the termination.

***Hogg Fuel v. Historic Royal Wales,* 2018 ONSC 6106 (S.C.J.)**

Where the owner failed to retain holdback, but the lien claimants did not preserve their liens within 45 days of the publication of the certificate of substantial performance, the lien claimants were only entitled to priority over the building mortgage for the deficiency in the finishing holdback in accordance with s. 31(4) of the *Construction Act*. The lien rights had expired in relation to a claim against the basic holdback.

***Ampscon Inc. v. Melloul-Blamey Construction Inc.,* 2018 ONSC 7046 (Master)**

In setting aside a register's dismissal for delay under r. 48.14 of the *Rules of Civil Procedure*, the court held that the decision whether restore action to trial list was discretionary. The court had to strike a balance between the need for efficiency and the need for flexibility. As long as there is a reasonable explanation for the delay, cases should be determined on the merits in the absence of prejudice to the other party.

***992426 Ontario Inc. v. Koenpack Canada Inc.,* 2018 ONSC 4769 (S.C.J.)**

***2518358 Ontario Inc. v. 3070 Ellesmere Developments Inc.*, 2018 ONSC 6924 (Master)**

The *Construction Act* is a comprehensive code as to how liens are to be preserved, and it would subvert the statutory requirements as to how and when a claim for lien must be registered to allow contractors to ignore the time limits, lose their statutory lien and then assert an interest in the land and obtain a certificate of pending Litigation.

***Northridge Homes Ltd. v. Sandhu,* 2018 ONSC 5689 (S.C.J.)**

Where issues of timeliness of lien and lienability of services provided were raised for the first time at trial, the failure to raise the issues before trial was fatal to those claims.

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

Despite recent Court of Appeal authority mandating strict compliance with notice provisions, there were questions before the court in this case concerning the knowledge of the City of the subsurface issues and the steps taken in relation to it, as well as questions as to whether the pattern of conduct between Clearway and the City had the effect of varying the terms of the Contract. Therefore, even though there was no question that the manner by which Clearway had advanced its claim for additional expenses through was non-compliant with the notice provision, summary judgment could not be granted on that basis.

***Vision Air Conditioning and Heating Corporation v. Golden Dragon Ho Inc.,* 2018 ONSC 3520 (S.C.J.)**

While s. 7 of the *Construction Act* is broad enough to capture any funds specifically earmarked for financing a construction project or improvement, such as insurance proceeds, funds advanced by landlords, guarantees or inter-company transfers provided they are funds received (or receivable) by the owner for the specific purpose, general revenues of a corporation or even general borrowing on a line of credit are not funds impressed with a trust even if the owner originally intended to use those funds to pay for the construction. The section requires that there is a distinct fund which is identifiably for the purpose of completing the improvement.

***AgriRecycle, Inc. v. RTK WP Canada*, 2018 ONSC 716 (S.C.J.)**

Following *Yuanda Canada Enterprises Ltd. v. Pier 27 Toronto Inc.*, 2017 ONSC 1892 (Master), the court held that the test on motions for security for costs in construction lien actions should be narrower in light of the requirement to show necessity under the leave provisions of the *Act*.

***Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2018 BCCA 272**

In 1963, the Supreme Court of Canada held in *Clarkson Co. v. Ace Lumber*, [1963] S.C.R. 110, that while lien statutes merited a liberal interpretation with respect to the rights it conferred upon lien claimants, they had to be strictly construed in determining if someone was a lien claimant. In Iberdrola, the British Columbia Court of Appeal questioned whether this approach to interpretation was still timely. Based on subsequent SCC decisions such as *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 and *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, the court held that the era of strict construction should be seen to be largely behind us and that even in cases where statutory regimes interfere with property rights, "today 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".

***PCL Construction Management Inc. v. Saskatoon (City)*, 2018 SKQB 119**

This Saskatchewan Queen's Bench decision offers a good example of the common sense interpretation of a lien statute advocated by the British Columbia Court of Appeal discussed immediately above :

> "I am not attracted to the argument that a bridge is not a bridge. The prime contract itself refers to these structures as bridges. They meet the normal understanding of what a bridge is. They are bridges. I accept the suggestion that the bridges can be viewed as being part of the road system, but they do not become roads instead of bridges. Their being part of a road system does not change the fact that they are bridges."

***Japan Canada Oil Sands Limited v. Toyo Engineering Canada Ltd.*, 2018 ABQB 844**

The Court ordered the consolidation of a domestic and an international arbitration under the *International Commercial Arbitration Act* even though one of the parties, Toyo Japan, the parent company of Toyo Canada, did not consent to the consolidation. Based on s. 108 of the *ICAA*, which allowed the Court to consolidate arbitration proceeding "on terms it considers just", the court held that it had jurisdiction to consolidate in the absence of consent.

***Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172**

The British Columbia Court of Appeal has established a two-prong test for applications to reduce security in court. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. The focus on the first stage is whether a lien claim or a component of the lien claim is bound to fail. The party seeking to reduce the amount of security posted must show that there is no prospect that a lien claim or component of a lien claim will succeed, in other words, that it is plain and obvious that the claim, or part of the claim, is bound to fail. If the applicant alleges that it is plain and obvious a claim or a component of the claim is bound to fail, the judge must examine the lien claimant's position to determine if it raises a prima facie case or discloses "a reasonable prospect of success".

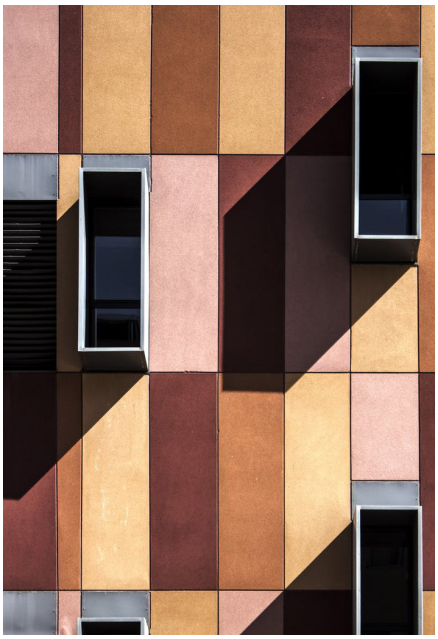
If the lien survives the first stage of the analysis, the second stage of the analysis requires looking at the evidence as a whole to determine whether the security should be reduced. Although the court can order less security than the claim, the court cannot make a determination on the merits with the material at hand and should be cautious in ordering a reduced amount of security. The caution at this stage operates in favour of the lien claimant.

***Neptune Coring (Western) Ltd. v. Sprague-Rosser Contracting Co.*, 2018 ABQB 883 (Master)**

Work on a sanitary sewer system under a road was not incidental to any road work, did therefore not come within definition of "road" in s. 1(1)(2) of the *Municipal Government Act*, and was therefore lienable.

***Terra Services Inc. v. Her Majesty the Queen*, 2018 NLSC 221**

Failure to name a defendant against whom the lien is to be enforced is not a procedural defect, but a substantive failure to comply with the requirements of the *Act* to commence an action within the limitation period that cannot be cured.



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January 2019

Brendan Bowles, partner, and Katherine Thornton, articling student, discuss liens under the *Construction Act*.

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Episode 2: Capelet v. Brookfield Homes (Ontario) Limited

January 2019

Max Gennis, associate, and Katherine Thornton, articling student, discuss *Capelet v. Brookfield Homes (Ontario) Limited*, 2018 ONCA 742.

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February 2019

Andrea Lee, partner, and Kaleigh Du Vernet, articling student, talk about diversity in the construction industry with Faisal Gaya, a project director at Multiplex in Toronto, Kerri Smeaton, a lawyer with Infrastructure Ontario in Toronto, and Magda Warshawski, an architect with Dialog in Edmonton.

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