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BUILDING INSIGHT

GLAHOLT LLP NEWSLETTER

IN THIS ISSUE

Prescribed New Surety Forms under the *Construction Act*

On July 1, 2018, the modernization provisions of the *Construction Act* came into effect. In addition to various changes to the *Construction Act* (see Issue 2, Winter 2018) section 85.1 introduced mandatory surety bonds for "public contracts" if the contract price is $500,000 or more. A public contract is defined as a contract between an owner and a contractor respecting an improvement, if the owner is the Crown, a municipality or a broader public sector organization.

In addition to requiring labour and material payment and performance bonds for public contracts with a contract price of $500,000 or more, subsections 85.1(4) and (5) provide a prescribed form for labour and material payment bonds and performance bonds.

Further, ss. 22(4) provides a prescribed form for holdback repayment bonds. This article reviews the key provisions of each of these bonds.

Performance Bonds

A performance bond is a form of guarantee that the bonded contractor will perform its obligations under the contract. Performance bonds for public contracts are prescribed in Form 32 of O. Reg 303/18.

Section 8 of Form 32 outlines the four conditions precedent for a surety's liability under the bond, being:

1. the contractor is, and is declared by the owner to be, in default under the contract;

2. the owner has given notice to the contractor of a default;

3. the owner has performed its obligations under the contract; and

4. the owner has agreed to pay the balance of contract price to the surety or as directed by the surety.

The "balance of contract price" is defined as the total amount payable by the owner to the contractor under the contract, reduced by any amount deducted by the owner for the owner's direct expenses and all valid and proper payments made to or on behalf of the contractor under the contract.

If the surety accepts liability, the surety may select one of the following options:

- remedy the default;
- complete the contract in accordance with terms and conditions;
- obtain a bid for submission to the owner for completing the contract; or
- pay the owner the lesser of the bond amount, or without duplication, the owner's direct expenses plus the cost of completion of the contract less the balance of contract price (discussed in greater detail below).

The process for making a claim on a Form 32 performance bond is as follows:

1. An owner may request a pre-notice meeting with the surety

This does not constitute a notice under the bond or under the contract and is not a precondition to the giving a notice.

Upon receipt of a request for a pre-notice meeting, the surety must propose a mutually convenient time for a meeting between the contractor, owner and the surety. This meeting must take place within 7 business days of the surety's receipt of the owner's request, unless otherwise agreed to by all parties.

Importantly, the pre-notice meeting is without prejudice and no information provided by a party at this meeting will constitute a waiver or compromise of its rights and obligations.

2. An owner may make a demand on a surety by giving written notice to the surety

Schedule A to form 32 provides the form of notice to be given by the owner to the surety. Several notable statements are included in the form of notice, including a representation that the owner has honoured its obligations under the bonded contract.

In addition, Schedule A includes a list of documents and information which the owner may include with the notice, including, amongst others, a copy of the bonded contract, original and latest schedule, specifications and drawings, reconciliation of all invoices, accounting of all payments made and holdback retained, copies of claims for lien or legal proceeding received on the contract.

Although the owner's provision of these documents is optional, the owner is encouraged to provide any information or material that may expedite the investigation.

3. Post-notice conference is convened to discuss mitigation work

Upon receipt of a notice, the surety must propose a face-to-face meeting, telephone call or meeting with the owner within 5 business days.

The post-notice conference is convened to discuss what work must be done while the surety is conducting the investigation in order to effectively mitigate the costs the owner will seek to recover under the performance bond (defined as mitigation work).

The owner must allow the surety reasonable access to the work for the purpose of monitoring its progress. Any such mitigation work must be undertaken without prejudice to the rights of the owner, the contractor or the surety under the contract, the bond, or the applicable law.

Costs for mitigation work are to be borne by the owner. The owner may seek to recover this cost from the surety, but must keep separate records of all amounts related to mitigation work.

4. The surety acknowledges, investigates and responds

If the owner delivers a notice prior to a pre-notice meeting, the pre-notice meeting is deemed to be retracted. The surety must promptly initiate an investigation, using its best efforts to determine if the conditions precedent have been satisfied and to determine liability under the bond.

Unlike the previous forms used by the surety industry, Form 32 requires the surety to acknowledge the notice within 4 business days following receipt. To help sureties meet the short deadline, Schedule B of Form 32 includes a template acknowledgement.

The surety must provide the owner its written response within 20 business

days after receipt of a notice, unless otherwise agreed to between the surety and the owner. The surety's response must indicate whether the surety accepts liability under the bond or, if the surety is unable to determine whether one or more of the conditions precedent has been satisfied, the surety may propose a process for collaborating with the owner to complete the work.

If the owner requests a meeting to discuss the status of the investigation, the surety must meet with the owner within 5 days following the receipt of the request.

5. The owner has a right to do necessary interim work

During the investigation, the owner may undertake "necessary interim work", which is defined as actions necessary to: 1) ensure public or worker safety, 2) preserve or protect the work under the contract from deterioration or damage; and 3) comply with applicable law.

The owner must give written notice to the surety within 3 business days of the commencement of the necessary interim work.

The owner must allow the surety reasonable access to the work for the purpose of monitoring its progress. Any such necessary interim work must be undertaken without prejudice to the rights of the owner, the contractor or the surety under the contract, the bond, or the applicable law.

Lastly, the surety must reimburse the owner for the reasonable costs incurred in undertaking such necessary interim work.

In the event a surety is liable, the surety must pay the owner's direct expenses, which is broadly defined by Form 32 to include "reasonable professional fees", "reasonable external legal fees", and "reasonable, miscellaneous and out-of-pocket expenses" incurred by the owner to complete the contract which would not have been incurred but for the default of the contractor. In addition, "direct costs" incurred as a result of extended duration of the contract, reasonable costs of necessary interim work and mitigation work, as well as any additional fees agreed to by the obligee, the principal, and the surety, all fall into the definition of "Owner's Direct Expenses".

Form 32 does clarify, however, that subject to an agreement to the contrary, the surety will not be liable under the bond for liquidated damages under the contract, any damages caused by delayed performance or non-performance of the contractor (except as provided for in Form 32), or any indirect or consequential damages.

Labour and Material Payment Bonds

A labour and material payment bond provides certain guarantees that contractors will be paid for the labour and/or material that it supplies pursuant to a specified contract. Labour and material payment bonds for the specified public contracts are prescribed in Form 31 of O. Reg 303/18.

Form 31 extends protection to subcontractors, sub-subcontractors, unions, and workers trust funds. It also provides a regimented timetable for the submittal and response to a claim. The process under the prescribed labour and material payment bond is as follows:

1) As a condition precedent, a claimant must complete and submit the prescribed "Notice of Claim" form within the specified time period;

a. In respect of any claims for holdback, the claimant must submit the notice of claim within 120 calendar days of the date in which the claimant should have been paid in full under its contract.

b. In respect of any claim for anything other than holdback, the claimant must submit the notice of claim within 120 calendar days of the date on which the claimant last performed labour or provided materials for which the notice of claim was given.

2) No later than 3 business days after a surety receives a notice of claim, the surety must (a) acknowledge receipt of the notice of claim, and (b) request any information or documentation, from the claimant, required to determine the claimant's entitlement under the bond;

3) The surety must provide a position in response to the notice of claim at the earlier of (a) 10 business days (15 business days for claims made by sub-subcontractors) after the receipt by the surety of a notice of claim; (b) 25 business days (35 business days for claims made by sub-subcontractors) after receipt by the surety of a notice of claim; or (c) such longer time as agreed by the parties;

4) Amounts not in dispute must be paid by the surety within 10 business days of the surety providing its position to the claimant, except if the surety makes an application to the Court with respect to such amounts;

5) Any suits or actions pursuant to a labour and material payment bond must be commenced within one year after the date the contractor last performed work on the contract.

It is also noteworthy that if the subject matter of a notice of adjudication, delivered in accordance with the *Construction Act*, is "substantially" the same as that contained in the notice of claim, the obligations of the surety under the bond are stayed until the surety receives a copy of the adjudicator's determination or there is otherwise a failure to complete or a termination of the adjudication.

Form 31 also incorporates 4 schedules, which are template forms for a notice of claim for subcontractors and sub-subcontractors, acknowledgement of notice of claim, and surety's position.

Holdback Repayment Bond

The *Construction Act* requires a payer to withhold 10 percent of the price of the services or materials supplied under a contract or subcontract, plus any amount specified pursuant to a written notice of lien. This obligation is typically fulfilled by a payer remitting not more than 90 percent of a contractor's progress draw (less any amount to satisfy a lien, if applicable). Section 22(4) of the *Construction Act* is a new provision allowing for alternative methods of retaining holdback, including a letter of credit (Form 4), a demand-worded holdback repayment bond (Form 5), and any other form that may be prescribed. However, at present, Regulation 303/18 does not prescribe any other form.

With respect to holdback repayment bonds, the prescribed form, Form 5, lists the contractor as the principal, owner as obligee and surety company as surety. It requires the parties to fill out basic information surrounding the construction contract, including when it was entered into and a brief description or title of the contract.

The second recital in Form 5 implies that in order to give effect to the prescribed holdback repayment bond, there must be a provision in the contract which allows for it:

> AND WHEREAS the Contract allows for the owner to make payments to the Contractor without retaining the holdback, as defined in the *Construction Act* (the "Act"), in the form of funds;

Making a claim on a holdback repayment bond requires, inter alia, the following:

1) Whenever a lien against the holdback in respect of the contract has not expired or been satisfied, discharged or otherwise provided for under the Act but is preserved, the owner may make a demand on the bond by sending a demand letter executed by two officers of the owner (form is provided for in schedule A of Form 5). The demand may include amounts required for security for costs;

2) The demand must be received by the surety on or before a period of 120 calendar days from the last date on which a lien arising from the contract could have been preserved under the *Construction Act*; and

3) All demands and notices under the bond must be delivered by facsimile or registered mail to the surety, with a copy to the contractor.

With respect to the requirement that the demand be received by the surety, Form 5 specifies that the demand must be sent by facsimile or registered mail. Sending the demand by email does not comply with the bond form even though the surety is required to provide an email address in the bond. Form 5 also stipulates that the demand must be addressed to the surety and copied to the contractor.

The prescribed form stipulates that a surety's obligation to pay arises solely upon an owner delivering a demand in the prescribed form to the surety. The surety may not assert as a defence that a default has not occurred, or that the lien is invalid, or that the amount

demanded is inappropriate, or that the obligee is in default under the contract. Although Form 5 provides that payment will be made within 10 business days of receipt of a demand, the template demand form (Schedule A to Form 5) includes language that requires payment within 20 business days of receipt of the demand.

Conclusion

Parties involved in public contracts as defined by the *Act* must be aware of these prescribed bond forms, as they impose requirements and deadlines for submitting and resolving claims. Notably, regulation 306/18: adjudications under Part II.1 of the *Act* provides for disputes in relation to labour and material payment bonds to be referred to adjudication, with certain modifications.

With the adjudication regime coming into force on October 1, 2019, it is even more crucial for those involved in public contracts to understand and incorporate these prescribed bond forms into their project planning, as they may be the subject matter of an adjudication in the future.

AUTHOR:

AUTHOR:

Case Comment: *J.D. Strachan Construction Limited v. Egan Holdings Inc. and Egan Funeral Home*

J.D. Strachan Construction Limited v. Egan Holdings Inc. and Egan Funeral Home, 2019 ONSC 522, serves as a cautionary tale to those with lien rights. Even when engaged in settlement discussions, if you have lien rights, the lien rights should be preserved or perfected, because once lien rights expire, they are lost forever.

J.D. Strachan Construction Limited registered two liens against a property in Bolton owned by the defendants Egan for additions and renovations. One lien was for work done before the date of publication of the certificate of substantial performance ("CSP"), and the other was for work done after. The case focuses on the lien registered before the date that the CSP was published.

On June 26, 2014, Egan's lawyers advised J.D. Strachan that the holdback would be paid. It was not, so J.D. Strachan preserved their pre-publication lien on June 26, 2014. Their period to perfect their pre-publication lien ended August 11, 2014 under section 36(2) of the *Construction Lien Act*.

On June 30, 2014, Egan's lawyers advised that the holdback would be paid. It was not. On August 1, 2014, Egan's architect and payment certifier and J.D. Strachan had a meeting. The architect told J.D. Strachan that Egan agreed to pay J.D. Strachan what it was owed, and the parties were to meet in

person to finalize the details. They all agreed to meet on August 12, 2014, one day after J.D. Strachan's period to perfect its lien ended. Relying on the architect's statements alleged to have been made on behalf of Egan, J.D. Strachan believed the payment dispute was resolved and did not take any steps to perfect its lien.

On August 12, 2014, Egan, J.D. Strachan, and the architect met and agreed to terms of settlement. Minutes of settlement were drafted, but never executed by Egan. Egan did not pay J.D. Strachan for amounts owed with respect to the pre-publication lien. On September 17, 2014, more than a month after the pre-publication lien had expired, J.D. Strachan issued a statement of claim and registered a certificate of action.

Egan brought a motion to discharge the pre-publication lien and argued that the lien was expired because it was not perfected within 45 days pursuant to section 36(2) of the *Construction Lien Act*. Based on the first meeting with the architect, J.D. Strachan relied on promissory estoppel to argue that Egan was estopped from asserting what was referred to as a "limitations" argument.

The Court's Analysis

Justice Doi of the Superior Court of Justice came to the correct result when he declared J.D. Strachan's pre-publication lien expired and allowed the claim to continue in contract.

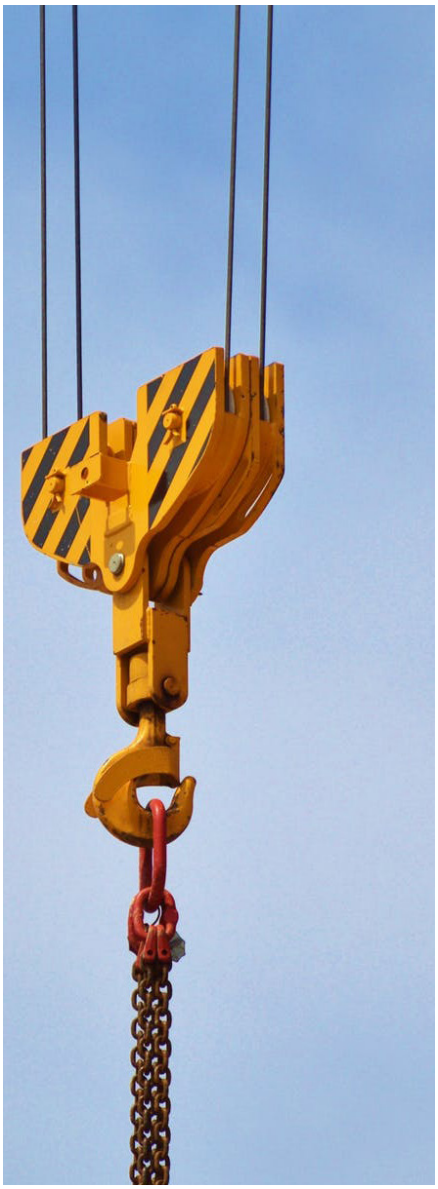
Justice Doi reasoned that promissory estoppel was not engaged by the first meeting that J.D Strachan had with the architect. Egan did not indicate they would waive or not enforce the "limitation" period for perfecting the lien. In fact, there was no reference to the "limitation" period. J.D. Strachan was influenced by the promise to pay, but as things stood at the first meeting, the promise to pay was unclear as the parties needed to agree on the terms of payment. Justice Doi reasoned that an admission of liability and a promise to pay later was not sufficient to engage promissory estoppel.

The difficulty with Justice Doi's analysis regarding promissory estoppel is that such an argument is not consistent with the *Construction Lien Act* or the *Construction Act*. The period to perfect a lien under section 36(2) of the *Construction Lien Act* is an expiration period, not a limitation period. The wording of section 36(2) is clear that a preserved lien expires unless it is perfected in time. Once the expiration period to preserve or perfect a lien has lapsed, the lien cannot be revived (see, for example, *Monaco Electric Ltd. v. Empire Myers Road Inc.*, 2004 CanLII 34330 (On SC) at para. 30). Since the period to perfect a lien is not a limitation period, it cannot be extended as such.

In the analysis by Justice Doi, he referenced that there was no indication that the lien period would be waived or not enforced. Consider, for example, where Egan advises that the time for perfecting the lien is waived, the parties meet but are not able to agree on terms of settlement. Just as a claimant cannot be required to waive its lien rights, owners are permitted to rely on the expiration period for preserving and perfecting liens set out in the Act.

Justice Doi referenced cases that were decided under the *Mechanic's Lien Act*, which was overhauled in 1983. The *Mechanic's Lien Act* allowed parties to contract out of lien rights. The Attorney General's office set up an Advisory Committee to assist with the drafting of the *Construction Lien Act*. The Advisory Committee noted that matters involving the expiration of lien rights were in great need of clarification.

Pursuant to the Advisory Committee's recommendations, the *Construction Lien Act* clarified the expiration of lien rights. Parties can no longer contract out of lien rights. Similarly, the wording of the *Construction Lien Act* is clear that the expiration period for preserving and perfecting liens cannot be extended. The promissory estoppel analysis should have addressed whether such a doctrine could apply to expiration periods in the Act. In reference to the two-year period to obtain an order for trial or set a lien action down for trial, our courts have clearly indicated that it is an expiration period and that the court has no jurisdiction to extend the expiration period (see, for example, *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 ONSC 881 (S.C.J.)). The same analysis should apply to the time to preserve or perfect liens.



Practice Notes

When you have lien rights, preserve and perfect the lien. Once lien rights are expired, they are lost forever and cannot be revived. A lien claimant can always discharge its lien at a later date if a settlement is reached. If a lien claimant is having settlement discussions, it should be very wary about a request to meet the day after an expiration period to preserve or perfect ends.

Take the expiration periods for preserving and perfecting liens seriously. The court will not extend these expiration periods and has no jurisdiction under the Act to do so. Be sure to mark the dates in your calendar and set reminders to preserve and perfect your lien within the time allowed.

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Ontario Practice Directions

In Ontario, practice directions provide guidance on how courts expect proceedings to be conducted. It is imperative to be aware of and understand both province-wide and regional practice directions before filing any court documents or appearing before the court. Both province-wide and region-specific practice directions are listed on the Superior Court of Justice website under Practice and Procedure.

Parties must ensure that court documents being filed comply both with the *Rules of Civil Procedure* and with the relevant practice directions. Penalties for failure to comply with the applicable practice directions vary from rejection of the court documents at the counter to a costs award against the party who failed to comply.

Below is a summary of key practice directions as of the date of this newsletter that parties should be aware of when dealing with construction matters.

Manner to address Masters

Effective December 7, 2018, masters should be addressed as "Your Honour". Gowning requirements remain the same. Counsel are not required to gown for appearances before masters.

Construction Lien Motions before a Master (Toronto)

Long and short motions in construction lien actions must be scheduled through the Assistant Trial Coordinator at the Masters' Office.

Prior to scheduling a long motion before a Construction Lien Master, parties are required to attend a telephone case conference with the Master who will be hearing the motion in order to determine the length of time required and set a timetable for any steps required on the motion.

Motions made without notice and consent motions in construction lien actions are heard daily from 9:30 to 10:00 a.m.

Motions in writing in a construction lien file or reference should be filed with the Assistant Trial Coordinator for the Construction Lien Masters located on the 6th Floor, 393 University Avenue.

Special appointments before a Construction Lien Master

If a party is intending to bring more than 3 motions at the same time at the *ex parte* court, a special appointment is to be made through a Construction Lien Trial Coordinator. The moving party will have to send an e-mail to the Construction Lien Trial Coordinator listing all the matters, the purpose of the hearings and total time required for the motions. A special appointment before a Construction Lien Master will be typically provided for the next or the following day, depending on the total time required.

Motions to dismiss/discharge construction liens

Motions to dismiss lien actions and discharge liens preserved in Toronto are typically brought before a Construction Lien Master at the *ex parte* court. Masters in Toronto are very unlikely to hear motions which relate to proceedings in other jurisdictions.

When bringing a Motion to dismiss/discharge, ensure to review title carefully and make a note of any other construction liens that may have been registered on title in relation to the project.

In the event that other liens were registered, it is prudent to identify those liens as part of the supporting affidavit and address the manner in which those liens were disposed of.

In order to expedite the hearing time, it is highly recommended to provide the Master with a chart, separately from the motion record, which would provide a summary of each lien, such as the sample chart provided below:

No.	Reg. Date	Instrument No.	Lien Claimant	Lien Amount	Date Vacated	Application to Delete instrument no.
1	Jan 2, 2019	AB123654	ABC Corp.	$120,000.00	Feb 10, 2019	AB465321

Electronic filing of motion materials on long motions before judges (Toronto)

Effective April 3, 2018, on long motion before judges in Toronto, in addition to filing of the paper copies, parties must file electronic copies of their materials on a USB stick. The USB must include a copy of the motion materials, including the factum, where required. The naming convention of the electronics documents can be found on the Superior Court of Justice website under Practice and Procedure.

Elimination of Placeholder Motions in Toronto and Newmarket

Where a motion has been booked through the motion scheduling unit (Toronto) or Trial Coordinator (Newmarket), a Notice of Motion must be served and filed no later than 10 days after the motion date is booked. In the absence of the Notice of Motion, any booked motion date will be vacated without notice to counsel or the moving party.

Facta

Facta are required for long civil motions and encouraged for all other motions unless otherwise directed by a judge. In the Toronto region, no factum may exceed 30 pages unless leave is granted. The Central East region allows a maximum of 25 pages. In all other regions, no factum may exceed 20 pages in length. In *Yim v. Song*, 2016 ONSC 1707 (S.C.J.), failure to follow practice directions had an effect on costs. Neither party followed paragraph 64 of the Central West Consolidated Practice Direction which limits facta to 20 pages unless leave is granted to exceed that limit.

Under special circumstances, a judge may grant leave to deliver lengthier facta. In *Shibish v. Honda of Canada Inc.*, 2010 ONSC 6766 (S.C.J.), for example, Justice Robert granted leave to all parties to submit facta that exceeded the 30-page limit prescribed by the practice direction.

Books of authorities

Judges of the Superior Court of Justice, Divisional Court and Court of Appeal are supplied with a List of Often-Cited Cases. This list contains certain cases that are frequently relied on by parties. Parties need no longer include listed authorities in any book of authorities, however, extracts from those authorities which counsel intend to refer to the court must be included in facta or books of authorities.

First pre-trial conference before a Construction Lien Master in Toronto

Once the matter has been referred to a Construction Lien Master, a first pre-trial conference will be scheduled. The following is a practical checklist to documents that should be presented by the parties at the first pre-trial conference:

1. The pleadings brief should include the pleadings from the main action as well as the pleadings from any subcontractors' actions;

2. Brief of Documents to be relied upon during the pre-trial:

a. Updated Parcel Registers (retrieved 12 days before the hearing date);

b. List of existing lien claimants;

c. Chart explaining registrations on title, including mortgages, easements etc. (see sample chart below);

d. Copies of construction liens and/or orders vacating the liens;

e. Order for trial and notice of trial with affidavits of service (served 10 days before the hearing);

f. Copy of judgment of reference;

g. Execution searches (conducted 12 days before the hearing);

h. Bankruptcy searches (conducted 12 days before the hearing);

i. Seizure letters;

j. Any correspondence with subcontractors regarding acknowledgements and releases.

Sample Chart of Documents Registered on Title:

No.	Reg. Date	Instrument No.	Party with Registered Interest	Lien Amount	Document	Type of Deletion	Notes
1	March 5, 2015	AB123456	Royal Bank of Canada	n/a	Mortgage	n/a	Mortgage in the amount of $10,000,000

Gowning for counsel

Counsel are required to gown for all trials, motions and appeals before the presiding judge in the Ontario Superior Court of Justice.

Counsel who are pregnant are free to modify their traditional court attire in order to accommodate their pregnancy as they see fit, including dispensing with a waistcoat and tabs.

Counsel are not required to gown for appearances before masters or judges and deputy judges of the Small Claims Court.

Counsel are not required to gown before a Superior Court judge when appearing in assignment court, case conferences, settlement conferences, trial management conferences, trial scheduling courts, or pre-trials.

Motions for leave to appeal to the Divisional Court

As of July 1, 2017, motions for leave to appeal to the Divisional Court from interlocutory orders of a judge must be brought in writing and leave must be obtained from a panel of three Divisional Court judges, rather than a single judge. Such motions for leave to appeal must be filed at the Divisional Court Office in Toronto.

Three printed copies of the motion record, factum and transcripts, if any, must be filed. It is also mandatory to include a copy of the signed and entered order from which leave to appeal is sought and a costs outline. Filing materials in electronic format, in addition to hard copies, is strongly encouraged.

Appeals from interlocutory orders obtained in a construction lien action are now permitted with leave, unless the amount claimed is $10,000 or less.

Motions to the Court of Appeal

A single judge of the Court of Appeal hears motions Monday through Friday in chambers court located in Courtroom 7 at Osgoode Hall. From September to June, motions court starts at 10 a.m., unless the court orders otherwise. In July and August, motions court starts at 9:30 a.m., unless the court orders otherwise.

If the moving party's estimated time for arguing a motion is 15 minutes or more, the moving party must serve and file a factum. If a party does not file a factum on a motion, the party will be limited to 15 minutes of oral argument at the hearing of the motion.

Self-represented parties' motions receive priority on Wednesdays and Thursdays, therefore parties that are represented by lawyers are encouraged to schedule their motions on other days of the week in order to avoid delays in having their motions heard.

When a party seeks to bring a motion without notice, it is mandatory that the notice of motion indicates the reasons for bringing the motion on a without notice basis. Upon reviewing the notice of motion, the judge will have to be satisfied that service of the notice of motion is unnecessary.

Long motions in Milton

In Milton, a long motion must be confirmed no later than three weeks prior to the date the motion is to be heard, and all material must be filed by the moving party by that date. The litigant or counsel, as the case may be, will be advised of this requirement at the time the motion is booked.

If the motion material and the confirmation are not filed at least three weeks in advance of the date the motion is to be heard, the motion will be removed from the list and will not be heard. If possible, the time can be used to hear another motion by arrangement with the trial office.

In *Onunkwo v. Anambra State Progressive Assn., Canada*, 2015 ONSC 2006 (S.C.J.), the Applicant confirmed a long motion 17 days prior to the hearing date rather than the required three weeks. The matter was struck from the list because it was not confirmed in time. The applicant's request that the motion be reinstated was denied. It was no answer that the applicant was not aware of the practice direction. Judicial resources had been reallocated and there was no longer a judge available to hear the motion. The parties were free to arrange for new date for the matter to be heard.

Electronic filing and issuance of court documents

On April 24, 2017, the Ministry of the Attorney General launched Phase 1 of the E-Filing Pilot in Ontario. The Pilot was initially launched in five Court locations across Ontario, being Brampton, Ottawa, London, Newmarket and Sudbury. Province-wide expansion of Phase 1 started in November, 2017 and notices of action and statements of claim can now be issued electronically.

On May 28, 2018, the Ministry of the Attorney General launched another phase of the Civil E-Filing Pilot which allows the filing of the following documents online:

- Statement of Claim – Form 14A, Form 14B or Form 14D
- Notice of Action – Form 14C
- Affidavit of Litigation Guardian of a Plaintiff under a Disability (Form 4D)
- Request for Bilingual Proceedings (Form 1)
- Consent to file documents in French
- Statement of Defence – Form 18A (with only up to 50 Defendants)
- Notice of Intent to Defend – Form 18B
- Consent or Court Order (Form 59A) required in support of filing a document online
- Proof of Service for documents filed online (Form 16B, 16C, 17A, 17B, 17C or any documents listed in Rule 16.09).

All other forms must still be filed in-person at a civil courthouse.

Construction claims that require the issuance of the Certificate of Action must be issued at the courthouse in person and cannot be issued online.

No crossclaims, counterclaims or third-party claims can be filed through the civil e-filing system at this time.

If a defendant has been noted in default, the system will automatically populate a message to that effect and will not allow to file a notice of intent or statement of defence online.

It is also important to note that a party who electronically files a document through the Civil Claims Online Portal and intends to rely on the document in a hearing or conference must include the document in paper format together with any documents required to be filed by the party for the purposes of the hearing or conference.

Conclusion

The above is not an exhaustive list of the practice directions issued by Ontario courts. It is prudent to review all practice directions regularly and to be aware of the particular practices in the various jurisdictions to avoid delays and additional costs.

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When are Proceedings "Appropriate"? *Presley v. Van Dusen*

On January 30, 2019, the Ontario Court of Appeal released another decision on when a proceeding becomes "appropriate" for the purposes of the *Limitations Act*.

Presley v. Van Dusen, 2019 ONCA 66 concerned the improper installation of a septic system on the plaintiffs' property. The system was installed in 2010. Problems arose a year later when smell began to emanate from the system.

The defendant replaced a pump, which initially appeared to fix the problem. Another year later, in 2012, the smells were back, but the defendant assured the owners that they were the result of unusually wet weather and that many people were having the same problem.

In 2013, the system still smelled and had also started leaking.

The defendant told the owners that the problem could be remedied with a load of sand added to the septic bed and assured them that he would be back to do that work.

He actually attended at the property with the sand in 2013, but the owners were not home and he could not access the property. In the spring of 2014, the property was too muddy to enter. However, the defendant kept assuring the owners that he would come back and fix the problems.

In 2015, the owners called the municipal health unit, which had approved the system. After inspecting the system, the health unit condemned the system and ordered the owners to replace it.

Later in 2015, the owners commenced a Small Claims Court action against the defendant contractor and the health unit.

Section 5 of the *Limitations Act* provides as follows:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

The Small Claims Court judge held that by the spring of 2013, when there was smell and effluent coming from the septic system, "any reasonable thinking individual or homeowner" would know from the smells and the lack of additional work by the contractor that (i) the injury, loss or damage had occurred; (ii) the injury, loss or damage was caused or contributed to by an act or omission; and (iii) the act or omission was that of the contractor and perhaps the Health Unit. In light of that finding, the judge declined to consider s. 5(1)(a)(iv) of the *Limitations Act*, holding that "it is not necessary for me to make any determination under that subsection and I do not do so as I only have to find the earliest date and I have no difficulty, as I have said, in finding that that date was the spring of 2013." A judge of the Divisional Court upheld that decision, agreeing that "there was no requirement for the [trial judge] to make an explicit finding as to what [the appellants] actually knew in relation to subsection 5(1)(a)(iv)".

The Court of Appeal held that both courts below erred in law by failing to conduct a proper analysis under s. 5(1)(a)(iv):

> *The analysis of both the trial judge and the Divisional Court judge of ss. 5(1)(a)(iv), 5(1)(b) and s. 5(2) of the Limitations Act is flawed. The trial judge explicitly stated that he was not considering s. 5(1)(a)(iv). A determination under s. 5(1)(b) as to the date a reasonable person would have discovered the claim requires consideration of all four "matters referred to in clause (a)". Similarly, the finding that there was insufficient evidence to rebut the presumption under s. 5(2) that the plaintiff knew all the matters referred to in s. 5(1)(a) cannot stand as there was no consideration of s. 5(1)(a)(iv).*

Based on two recent Court of Appeal decisions, *407 ETR Concession Co. v. Day*, 2016 ONCA 709 and *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325 (see Issue 1, Fall 2017), the court held that legal proceeding against an expert professional were not appropriate if the claim arose out of the professional's alleged wrongdoing but could be resolved by the professional himself or herself without recourse to the courts, rendering the proceeding unnecessary. Importantly for construction cases, the court clarified that that principle applies not only to traditional expert professionals such as doctors, accountants or engineers, but to anyone with special training or expertise, such as a contractor specializing in septic systems in this case.

The court held that while the appellants could be criticized for not being more insistent that the contractor fulfill this assurance more promptly, the evidence established that they were engaged in ongoing discussions with him and took actions to enable him to access the property. He continued to assure them that the problem could be readily fixed and that he would fix it. The appellants reasonably relied on those assurances, which led the appellants to the reasonable belief that the problem could and would be remedied without cost and without any need to have recourse to the courts. The evidence showed that the owners still thought the contractor would fix the system in the winter of 2014, so that that the action commenced in 2015 was well within the limitation period.

Since the owners did not know that a proceeding against the contractor was appropriate until that time, the court held that it followed that they could not know that a proceeding was appropriate against the health unit until then either.

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"Transforming" Tarion: An Update

Since its conception, the Tarion Warranty Corporation, a statutory home warranty program which was designated to carry out the legislative objectives of the 1976 *Ontario New Home Warranties Plan Act*, has had a dual mandate. In addition to providing warranty protection to Ontario's new home owners, Tarion also licenses new home builders and vendors. This dual role received significant attention in 2015 on the basis that it may create a conflict of interest, and prompted the Minister of Government and Consumer Services to appoint the Honourable Justice Douglas Cunningham Q.C. to conduct an independent review of the existing legislation.

The 2016 release of Justice Cunningham's report led to the Ontario Liberal government's enactment of *Bill 166*, *The Strengthening Protection for Ontario Consumers Act, 2017*. *Bill 166* was to repeal the existing legation and enact two separate pieces of legislation: the *New Home Construction Licensing Act, 2017* and the P*rotection for Owners and Purchasers of New Homes Act, 2017*. However, despite receiving Royal Assent on December 14, 2017, the majority of *Bill 166* was never proclaimed into force.

On February 20, 2019, the Ministry of Government and Consumer Services announced that the Progressive Conservative government of Ontario intends to revive the previous government's efforts to transform Tarion, and will also be implementing initiatives to better protect purchasers of cancelled pre-construction condominium projects. The government intends to:

- establish a separate regulator from Tarion for new home builders and vendors to address conflicts of interest;
- introduce legislative amendments that, if passed, will enable the government to require Tarion to make executive and board compensation publicly available and move to a more balanced skills-based board composition;
- explore the feasibility of a multi-provider insurance model for new home warranties and protections in Ontario; and
- introduce new initiatives to better inform and protect purchasers of cancelled condominium projects.

In an effort to establish a separate regulator of builders and vendors, Tarion has been asked to work with the Home Construction Regulatory Authority to create a new administrative authority that will act as the independent regulator of new home builders and vendors.

The province is also planning to conduct an analysis of the multi-provider insurance model proposed by Justice Cunningham and explore the feasibility of its implementation. Consultations with stakeholders from insurance and new home building sectors, consumer groups, Tarion, and ministry partners are expected to begin in early 2019, with a final decision on the proposal being rendered in late 2019.

Tarion has also been tasked in conjunction with the Condominium Authority of Ontario with initiating the following consumer protection enhancements over the next six months:

- updating the Ontario Builder Directory to include information about developers with a history of condominium project cancellations;
- developing options to require developers to post information about their condominium development projects on their websites (e.g., information about outstanding approvals or other matters that could cause a project to get cancelled);
- working with the Condominium Authority of Ontario to educate prospective buyers about the condominium purchase process; and
- improving information collection on new home construction projects.

While this "transformation" is underway, Tarion is expected to continue to provide services to new home owners, builders, and vendors, with greater government oversight. While the language of the new legislation remains unknown, more information about how the changes are expected to impact builders can be found here.

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Notable Case Law

Brock Contracting v. Kozikowski, 2018 ONSC 7618 (S.C.J.)

A lien was registered by a corporation that did not have lien rights on the date of registration. The sole proprietorship that had lien rights was discontinued prior to the registration of the lien. This was not a minor error or irregularity and not a case, like *Stubbe's Precast* or *G.C. Rentals*, in which a minor, inconsequential error in the name of the corporation was used to describe the lien claimant.

R & V Construction v. Baradaran, 2019 ONSC 1551

When deciding a motion for summary judgment, a construction lien master does not have the statutory jurisdiction to use the so-called "enhanced powers" provided to a judge under Rule 20.04(2.1). That is so despite s. 58(4) of the *Construction Act,* which provides that a master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action.

Lopes Limited v. Guarantee Company of North America, 2019 ONSC 804 (S.C.J.)

After a general contractor failed to pay its subcontractor and abandoned the project, the subcontractor claimed against GCNA under an L&M bond. The surety defended by arguing that the subcontractor had not suffered any damages, because any damages had been fully mitigated when the same subcontractor was chosen as the HVAC subcontractor for the completion contractor. The amount paid to the subcontractor under the completion subcontract significantly exceeded the amount the subcontractor would have received had it performed the remaining work under the original subcontract. Thus, GCNA argued, no damages were suffered.

The court disagreed, holding that the breach of the subcontract upon which the subcontractor relied for its claim under the bond was the general contractor's failure to pay invoices for services performed and materials supplied. This breach was separate from the general contractor's abandonment of the project which deprived the subcontractor of the opportunity to earn profits through fulfillment of its obligations under the subcontract. By entering into the completion subcontract, the subcontractor did not mitigate a loss that was consequent on the general contractor's failure to pay invoices. That loss had already crystallized. The court granted the subcontractor summary judgment in the amount it was owed by the original general contractor.

Bisquip Leasing Corporation v. Coco Paving Inc., 2019 ONSC 341 (S.C.J.)

Despite the Ontario Court of Appeal warnings against partial summary judgment in *Butera v. Chown, Cairns LLP,* 2017 ONCA 783 and *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*, 2019 ONCA 6, this decision by Justice Lemon shows that such motions can still be successful in construction cases.

Impact Painting Ltd v. Man-Shield (Alta) Construction Inc., 2019 ABCA 57

In determining liability for the cost of extra work, the first question to be answered is whether the work performed was, in fact, extra work; that is, it did not fall within the scope of the work originally contemplated by the contract. If so, did the owner give instructions, either express or implied, that the work be done or was the work otherwise authorized by the owner? Next, was the owner informed or necessarily aware that the extra work would increase the cost? Finally, did the owner waive the provision requiring changes to be made in writing or acquiesce in ignoring those provisions? If the plaintiff can establish these elements, the defendant is liable to pay a reasonable amount for the extra work. These elements must be proved with respect to each extra claimed.

MKM Custom Homes Ltd. v. 1101731 Alberta Ltd., 2019 ABCA 18

An owner and a contractor entered into cost-plus renovation contract. The contract required the contractor to support progress payment applications with "receipted vouchers or other satisfactory evidence of payment for all items included in the preceding applications". The owner was entitled to "withhold payment in respect of such amount from the current application until satisfactory evidence of payment is given by the Contractor." The contractor failed to provide all underlying invoices to it from its subtrades or copies of all cancelled cheques payable to its subtrades. This failure was partly due to the loss of documentation in a flood. However, the contractor tendered oral

evidence at trial to show it had paid its subtrades in full. The trial judge held that the contractor had proven some of its claim and awarded just over $40,000. That decision was upheld by the Court of Appeal, which found that "satisfactory evidence" did not need to be in the form of supporting invoices so long as it established payment by the contractor.

The Town of Rothesay and Bird Construction Group v. Fundy Bay Holdings Ltd., 2019 NBCA 15

The New Brunswick Court of Appeal reversed a Queen's Bench decision which had held that a public place maintained purely for recreational purposes, with no connection to any transportation functions ordinarily associated with a highway, did not fall within the definition of "highway" and was not exempt from being liened. The court held that while the Rothesay Common might not have been a highway in the sense that most people would use the term, it was a highway for purposes of the *Mechanics' Lien Act*.

Building Insight Podcasts

Episode 1: Liens Under the *Construction Act*, January 2019
January 2019

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

glaholt.com/linktopodcast01

Episode 2: *Capelet v. Brookfield Homes (Ontario) Limited*
January 2019

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

glaholt.com/linktopodcast02

Episode 3: Diversity in Construction: Views from the Industry
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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Episode 4: *Jacobs v. Leboeuf Properties Inc.*
February 2019

Brennan Maynard, associate, and Andrew Salvador, associate, discuss *Jacobs v. Leboeuf Properties Inc.*, 2018 ONSC 4795.

glaholt.com/linktopodcast04

Episode 5: Collaborative Settlements
March 2019

Duncan Glaholt, partner, and Bruce Reynolds, partner at Singleton Urquhart Reynolds Vogel LLP, discuss a groundbreaking collaborative settlement model for alternative dispute resolution.

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Episode 6: Discoverability of Construction Deficiencies
March 2019

Brennan Maynard, associate, and Madalina Sontrop, articling student, discuss three recent decisions regarding discoverability of construction deficiencies under provincial limitation acts in Ontario and Alberta.

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Episode 7: *Ex Parte* Courts and First Pretrial Conferences
April 2019

Andrew Salvador, associate, and Katherine Thornton, articling student, discuss tips for success in *ex parte* court and first pretrial conferences for construction matters.

glaholt.com/linktopodcast07

Episode 8: *The Guarantee Company of Canada v. Royal Bank of Canada*
April 2019

Andrea Lee, partner, and Markus Rotterdam, director of research, discuss the important Ontario Court of Appeal case *The Guarantee Company of Canada v. Royal Bank of Canada*, 2019 ONCA 9.

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