SUMMER 2019
ISSUE 8

GLAHOLT LLP
CONSTRUCTION LAWYERS

BUILDING INSIGHT

GLAHOLT LLP NEWSLETTER

IN THIS ISSUE

Summary of the ICC's 2019 Report on Effective Tools and Techniques for Managing International Construction Arbitrations

The complexities of international construction arbitrations, compared to other international commercial arbitrations, often make the resolution of the former more costly than the latter. Construction disputes frequently involve difficult points of law, a large volume of documents, expert witnesses and specialized arbitrators with construction expertise, to help bring clarity to the facts and issues in dispute.

In recognition of these complexities, in 2001, the International Chamber of Commerce's ("ICC") Commission on International Arbitration published its Final Report on Construction Industry Arbitrations – the commission's first report on how to successfully, and cost-effectively, manage the arbitration of international

construction disputes.

In 2019, the ICC released its update titled Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management ("2019 Report"). The 2019 update offers practitioners and arbitrators practical advice to ensure the cost-effective management of construction industry arbitrations. Below is a summary of the key takeaways from the 2019 Report:

Importance of Early Stages, including Terms of Reference and Early Case Management: Selection of Arbitrators

The selection of arbitrators directly impacts whether the management of a dispute is done cost-effectively or not. Parties to a construction arbitration should, to the extent possible, make inquiries of an arbitrator candidate's case management skills. This may prove as important or more so than an arbitrator's construction *bona fides*.

Availability is also an important, yet often overlooked component as part of the tribunal selection process. Due to the duration of international construction arbitrations, any potential arbitrator must be available to hear the case.

Terms of Reference

The Terms of Reference ("ToR") describe the nature of the dispute, establish the duties of the tribunal and set out the administrative factors relating to the dispute, including the names and backgrounds of the parties and the place of arbitration. The ToR will also contain a summary of the parties' claims and the relief sought, and a list of issues that need to be determined. Per Article 23(2) of the ICC Rules, the tribunal must draft the ToR within a thirty-day time limit from when the tribunal first receives the file from the Secretariat. Good ToR set the pace of the arbitral proceedings and facilitates fast and efficient progression.

The Case Management Conference and Procedural Timetable

Under Article 22(2) of the ICC Rules, a case management conference ("CMC") results in the first procedural order and procedural timetable. In essence, a CMC formalizes the process of organizing and setting out the arbitral proceedings. Matters which require the consent of parties will be included in either the ToR or the procedural timetable. Some of the matters that require consent include site visits, the use of material produced for a party's own purposes and the use of sealed offers. In any such case, it is prudent and recommended that the tribunal establish the parameters of what is being consented to in order to ensure the strict enforcement of the procedural timetable. Early CMCs are desirable as they help to narrow issues, ensure the timetable is followed and establish costs as an important consideration throughout the proceedings.

Importance of Timetables, Balancing Efficiency and Costs in Construction Disputes

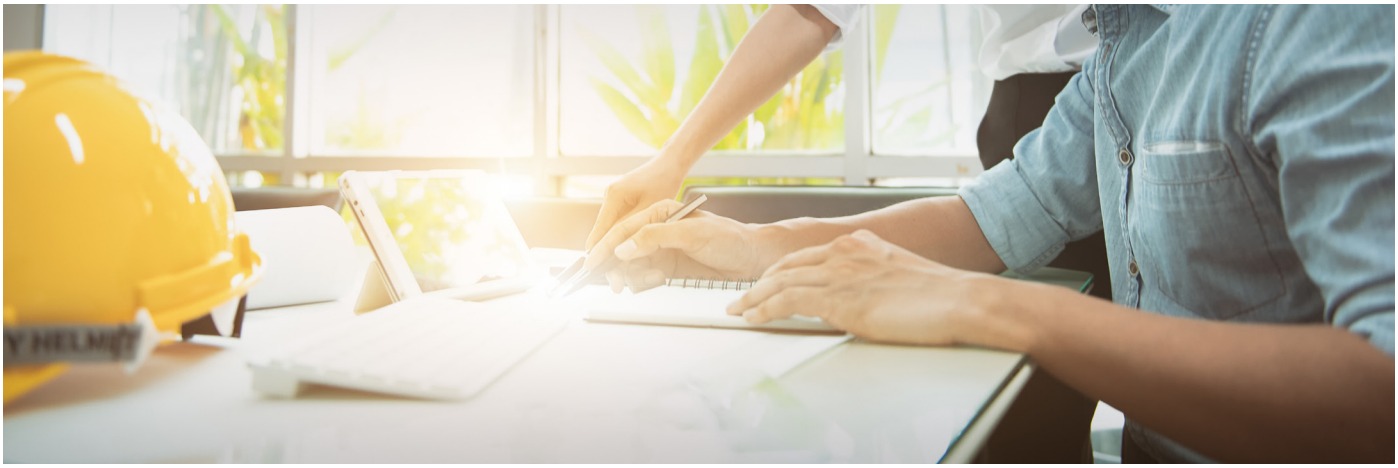
Article 24(2) of the ICC Rules provide that during or following the first CMC, the tribunal must establish the procedural timetable for the conduct of the arbitration. The need to control costs throughout the arbitral process requires that the procedural timetable be strictly adhered to. Given the complexity of international construction arbitrations, the tribunal should closely consider each party's financial position, as well as the resources at their disposal to ensure that all parties are able to satisfy the timetable's deadlines. When creating the procedural timetable, the tribunal should allow for "float" or flexibility. Procedural timetables must set out the parties' earliest practical dates of hearing(s) on the merits and should allow for the possibility for settlement discussions to take place.

Procedure

International construction arbitrations often involve parties from different legal backgrounds. The first CMC is an opportunity for the tribunal to both assess whether the parties' different jurisdictions (if applicable) mandate *lex fori* requirements and to understand the parties' expectations regarding the procedure of the arbitration. The tribunal should adopt a procedure that conforms to the parties' agreed upon expectations and is cost-effective pursuant to Article 22(1) of the ICC Rules. This will require the tribunal to consult the parties throughout the arbitral process, identify issues as they arise and guide the parties to address these issues.

Use of Schedules

Just prior to, or even just after, the execution of the ToR, parties should submit documents to the tribunal outlining the key persons involved, the chronology of events and a glossary of terms. The report encourages parties to create and use a working document, in the form of a schedule, as a concise way to maintain and present the key issues to the tribunal. A schedule should identify the allegations in dispute and the claims admitted, identify which claims must be proved, and set out the parties' position on quantum for each claim. In this respect, schedules require parties to adopt a constructive approach and cooperate with the tribunal and with each other to identify the scope of the claims and gaps between the parties. Schedules are not a substitute for submissions, but are an excellent case management tool that, when prepared correctly, can help save time and reduce costs.



Critical Path Network Methodology and Analyses

Construction disputes frequently involve claims for delay and disruption. To properly assess these claims, the triggering events causing the delay and disruption must be identified by the tribunal. Experts are usually required to evaluate such claims. Parties should be encouraged to agree on a baseline methodology for claim evaluation.

Critical path networks ("CPN") have become the common project planning methodology to manage and monitor construction. The nature of CPN programming, specifically the need to make assumptions about the progression throughout the phases of the construction project, makes CPN a helpful means to present a party's claims only when CPN is the methodology adopted to oversee and manage the construction project at the core of the dispute. CPN software is therefore unhelpful if the methodology is meant to account for a project retroactively, or after construction has ended. Parties should agree to a program or methodology prior to embarking on substantiating their claims for delay and disruption and should choose a methodology that matches or aligns with the methodology adopted by the project management on the construction project at issue.

Documents and Document Control

Article 24 of the ICC Rules requires the tribunal to cost-effectively manage and control e-disclosure and the tribunal should address these issues early on with the parties. The 2019 report recommends that the tribunal direct the parties to organize documents electronically using a common numbering system to make the documents easily identifiable and accessible.

Deciding which issues are relevant and necessary to a dispute is important for effective case management. When producing principal documents, parties should state the relevance and necessity of each document being produced. In particular, a party should state what points at issue each document is intending to prove. Bundling a group of documents that are intended to prove a particular issue is a helpful method in this regard. Hyperlinked documents are a handy tool that are quickly becoming standard practice in construction arbitration practice.

Witness Statements and Witness Panels

The use of witness statements is now standard practice in international construction arbitrations and helps to reduce hearing time. While it is cost-effective for counsel to help in the preparation of witness statements, some jurisdictions disallow this practice. A CMC should address: 1) consensus on the role and content of witness statements; 2) define the number of rounds and timing of witness statements; and 3) maintain only relevant witness testimonials and statements. While a witness can be heard, the instances in which a witness will be required to attend for questioning are limited. Tribunals also have the ability to limit the time available to question a witness.

In addition to witness statements and hearing witnesses, witness panels are another tool to effectively manage hearing time. Witness panels can help to expedite complex cases where many fact witnesses are involved to provide evidence on the same subject. By placing a particular emphasis on the key facts in dispute, witness panels can streamline the hearing time by limiting the repetition of evidence that can occur with a one-witness-at-a-time approach.

Use of Hearing Time and Chess Clocks

The tribunal decides the order in which the issues are to be heard and should do so as early in the proceedings as possible. In addition to determining the order, the tribunal should decide

which issues are to be decided by partial award prior to hearing other issues. At this early stage, the tribunal often attempts to achieve an agreement amongst the parties on which issues are to be decided through written submissions and evidence only. Importantly, the parties are not obligated to follow the tribunal's suggestions.

Before a hearing starts, submissions should be made in writing, be full and exhaustive, be numbered or organized to match the other party's submissions and should be delivered at the earliest time possible. Using written material, rather than oral, reduces hearing time which in turn expedites the proceedings and reduces costs.

Article 22(4) of the ICC Rules requires the tribunal to treat both parties fairly and impartially and to ensure that each party has a reasonable chance to present its case. In this respect, the tribunal requires the parties to decide how hearing time should be allocated. Although the basis when allocating time is equality, fairness may require adjustments in the split. If parties are unable to agree to the time allocation, the tribunal retains the authority to allocate the time as they deem appropriate.

A common approach to time allocation is the use of a "chess clock" whereby the parties collectively decide how much time to devote to contesting the other party. The entire duration of the hearing, excluding breaks, is then determined in terms of number of hours, which are split in terms of the agreed upon allocation. During a party's submissions, the party's "chess clock" would tick off the hours and minutes until the allocated time limit is reached. Overruns, or time that exceeds the limit, may be addressed by extending the total daily hearing time or strictly enforcing it.

At the pre-hearing stage, the parties should agree on the documents needed at the hearing, which online platforms will be used to store and exchange documents, and the process of accessing and presenting documents at the hearing. Timing issues often arise when parties attempt to submit documents and bring in new evidence just prior to the hearing. The risk of this impacting the schedule and increasing costs can be reduced by the parties agreeing on a cut-off date for the submission of evidence.

At the hearing stage, it is becoming more common for fact witnesses to be heard before experts. This procedural modification is gaining support as it allows the expert to gain a better grasp of the case/issues which can lead them to change or withdraw their opinions. As previously mentioned, experts or witnesses that tender evidence on the same topic should be questioned together to address and bring clarity to any misunderstandings between them. A suggested order of witness appearances is: 1) factual witnesses; 2) technical experts; 3) delay and disruption experts; 4) quantum experts; and 5) legal experts.

In terms of closing submissions, these are often best presented in writing shortly after the conclusion of the hearing. Post-hearing briefs are the norm and, pursuant to Article 38 of the ICC Rules, post-hearing submissions are often required on issues of costs and cost allocation. The tribunal should set the deadline to deliver written closing submissions well before the hearing on the merits. Parties must be aware of this deadline as no further submissions are to be considered once the deadline has passed. Article 27 of the ICC Rules states that once the arbitral proceedings are closed, no new facts or opinions may be submitted, unless specifically requested and authorized. Where a party submits new facts or opinions past the deadline under the belief that they were authorized but were never so, the tribunal will disregard and send back the submissions.

Conclusion

The resolution of international construction arbitrations remains complex and costly. By offering techniques, tools and recommended practices, the 2019 Report serves as a useful practical guide for arbitrators and parties to help facilitate timely and cost-effective resolution of construction disputes. Ultimately, the tools and techniques set out by the 2019 Report are only suggestions, and arbitrators will take their cue from the parties and counsel. Therefore, it remains the responsibility of conscientious arbitration lawyers to work together with arbitrators to craft a process to fit the dispute.

The full 2019 Report can be downloaded from the link below:

https://iccwbo.org/content/uploads/sites/3/2019/02/icc-arbitration-adr-commission-report-on-construction-industry-arbitrations.pdf

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Substantial Compliance Overcomes Irregularity in Public Procurement

The Ontario Court of Appeal's recent decision in *Reaction Distributing Inc. v. Algonquin Highlands (Township)*, 2019 ONCA 433, suggests that substance may triumph over form when it comes to compliance with the contractual requirements of a tendering process. Tenders cannot be lawfully disqualified if they remain substantially compliant with the tender contract's material terms. As this decision illustrates, such disqualifications may count as a breach of the underlying tendering contract and lead to a successful lawsuit for damages.

This dispute centered on Reaction Distributing Inc.'s tender to win work from the Township of Algonquin Highlands. Reaction submitted its tender to the Township in a box. The box was not labelled with Reaction's name, nor was it labelled with a return address. The tender delivered by way of an unlabelled box contravened the contractual tender terms because it was not delivered in a sealed envelope. Even if the box had satisfied the sealed envelope requirement, it also violated the Township's contractual tender terms that required the sealed envelope to be labelled with a name and return address.

The Township disqualified Reaction's tender on the grounds that the unlabelled box was non-compliant with the tender contract, despite the fact that the contract had a provision that permitted the municipality to waive any non-compliance. The Township awarded the contract to the only other company who submitted a tender. Had Reaction's tender been considered by the Township, Reaction's tender would have been the lowest and it would have won the work.

Reaction commenced an action against the Township for breach of the tender contract.

Reaction was successful at trial. The court found that the unlabelled box and lack of a sealed envelope were mere irregularities. The court held that Reaction's tender was substantially compliant with the contractual tender requirements and the Township's decision to disqualify Reaction breached the tender contract. The trial judge made a finding that the Township did not act in good faith when rejecting Reaction's tender. The trial judge made further findings that the price of Reaction's tender was lower than its only other competitor, and that had it been considered, Reaction would have won the work. The result was a judgment for damages in favour of Reaction for $71,063.60 in lost profit against the Township.

The Township appealed on three issues, proceeded with argument on only two issues, and lost its appeal on both counts.

The first issue was whether the trial judge erred in finding a breach of contract. The Ontario Court of Appeal stated that: "the law is that substantial compliance is the test to be applied in considering tender requirements," referring to the Supreme Court of Canada's decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3. In *Double N*, a four-judge panel, dissenting on other issues, stated that "[s]ubstantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with. A bid is substantially compliant if any departures from the tender call concern mere irregularities." [emphasis added, citations removed]

The Court of Appeal applied *Double N* to uphold the trial judge's finding that Reaction's unlabelled box tender was substantially compliant with the contractual tender requirements. The appeal court did not consider whether the other contractual requirements for a sealed envelope, labelled name, or labelled return address were immaterial. The appeal court only upheld the trial judge's finding that the breach itself—the unlabelled box—was a mere irregularity.

The second issue was whether the trial judge erred in finding that the Township did not act in good faith. The Court of Appeal decided that the trial judge's finding was "a factual one that is not to be interfered with absent palpable and overriding error." Finding no palpable and overriding error, the Township was unsuccessful on this issue as well. There was no evidence put before the trial judge as to the reasons why the Township was not was not prepared to waive the non-compliance.

This duty to review tenders in good faith pre-dates the Supreme Court of Canada's seminal decision *Bhasin v. Hrynew*, 2014 SCC 71, where the court recognized a general duty of honesty and good faith in the performance of contracts. In *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, the court found that a public body can apply its discretion to find that non-compliance is more than a formality, whether correct or not, as long as the reviewer acts reasonably and in good faith. In this case, the noted absence of evidence on why the Township was not prepared to waive non-compliance may have significantly limited the Township's ability to defend itself on the basis that it made its decision reasonably and in good faith.

The third issue was whether the trial judge erred in finding that Reaction "would have been awarded the contract for the work, if [the Township] had considered its tender." The Township did not proceed with argument on this issue at the appeal.

Reaction's trial judgment was ultimately upheld by the Ontario Court of Appeal. Costs were fixed at $6,500 against the Township.

The decision serves as a warning to procurement staff who may consider rejecting tenders for strict non-compliance with contractual tender requirements. Where tender contracts provide for the discretion to waive non-compliance, courts may later scrutinize why a party refused to exercise that waiver. To satisfy the court's test from *Double N*, a tender ought not be disqualified if it remains substantially compliant with the tender contract. Lawful grounds for disqualification should refer to non-compliance with a material condition that exceeds mere irregularity. Where tender contracts permit public bodies to exercise discretion to waive non-compliance, tender reviewers ought to be prepared to provide evidence that supports a good faith and reasonable basis for any refusal to exercise that discretion. Otherwise, the evaluating party risks significant exposure to damages, costs and legal expense.

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Case Comment: *9585800 Canada Inc. v. JP Gravel Construction*

In 1877, an article on the new Ontario *Mechanics' Lien Act* appeared in the *Canada Law Journal*, commenting that "the enactment is in itself unnecessary and illogical, the wording is obscure and its provisions unintelligible and contradictory".

While the wording has become clearer since then, at least to those who practice construction law on a regular basis, even today not too many things in the world of construction liens are crystal clear. One thing that *had* been crystal clear for the last quarter of a century was that the discharge of a lien is irrevocable. Ever since Master Sandler's decision in *Southridge Construction Group Inc. v. 667293 Ontario* (1992), 2 C.L.R. (2d) 177, aff'd (1993), 2 C.L.R. (2d) 184 (Div. Ct.), section 48 of the *Construction Act* has been interpreted to the effect that once a lien is discharged, a claimant cannot lien again for services performed prior to the date of the perfection of and included in the first, discharged lien.

Section 48 of the *Construction Act* (unchanged from the *Construction Lien Act*) provides as follows:

> *A discharge of a lien under this Part is irrevocable and the discharged lien cannot*

> *be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by the person subsequent to the preservation of the discharged lien.*

In *Southridge*, a lien claimant liened for certain work done over a period of time, then realized that it had underliened, discharged the first lien and registered a second lien for the same work. In discharging the second lien, Master Sandler pointed to two aspects of section 48. First, the section clearly makes the discharge "irrevocable". Second, the section provides that the discharge does not affect the claimant's rights to lien for services supplied *after* the preservation of the discharged lien, which must mean, conversely, that the discharge does affect the right to claim for work done *before* the preservation.

The Divisional Court upheld the master's decision, holding that "although in equity the result appears harsh I agree with the decision of the master".

That decision has since been uniformly applied,[1] until the recent decision in *9585800 Canada Inc. v. JP Gravel Construction*, 2019 ONSC 3396 (S.C.J.). In that case, a lien claimant registered a lien in the amount of $662,100.48 on May 15, 2018, discharged that lien and registered a second lien for the same amount and using substantially the same information as contained in the May 15, 2018, lien. That should have brought the case squarely within *Southridge*. However, the court distinguished *Southridge* on the following basis:

> I find that this matter is distinguishable from *Southridge* in which the error related to the amount listed in the lien. The second registered lien encompassed the work completed in the first lien. Consequently, s. 48 of the *CLA* applied. In this matter, the error related to the year in which the work was performed. As per article 4.1 of the Subcontract, the "*Subcontractor* shall perform the *Subcontract Work*: . . . 3 starting on or about 30/10/2017 and substantially perform the *Subcontract Work* by, on or about 31/01/18." In the First Lien that was registered, the document noted under the heading "Statements": "Time within which services or materials were supplied from 2017/10/30 to 2017/05/09." This timeframe is clearly incorrect since the work was not performed during this period. I find the First Lien to be a nullity since it was a lien for non-existent work. Consequently, I find that the Second Lien is an appropriate lien. Since the Second Lien is valid, s. 48 of the *CLA* does not apply in this matter.

The main distinction therefore seems to be that the error in *Southridge* concerned the amount of the lien, while the error in *JP Gravel* concerned the date of supply. The fact that the claimant in *JP Gravel* had used the wrong timeframe was held to have turned the lien into a "nullity".

With respect, there are two problems with that conclusion. To begin with, nothing in section 48 would seem to indicate that the basis on which a lien is discharged matters. If a lien is discharged, it is discharged forever and precludes liening again for work done before the preservation. Why it was discharged should not matter. A third party reviewing title should not have to guess at motives or speculate as to whether the lien may re-appear. A discharge is irrevocable.

Secondly, in *David J. Cupido Construction Ltd. v. Humphrey Funeral Home & Chapel Ltd.*, 2008 CarswellOnt 4382, Master Albert held that where a claim for lien contains erroneous dates, the claim can be amended at trial if the court is satisfied that evidence proved that materials or services were supplied on different dates. Both the Nova Scotia and Saskatchewan Courts of Appeal have similarly held that wrong dates in a claim for lien are curable under the lien legislation in those provinces: *Garden Crest Developments Ltd. v. W. Eric Whebby Ltd.*, 2003 NSCA 59; *Imperial Lumber Yards Ltd. v. Saxton*, 1921 CarswellSask 163 (C.A.).

Bristow, Glaholt, Reynolds & Wise, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed. (Toronto: Carswell, 2005) at 6.3.5 states that "if the wrong date is stated in the claim for lien, the lien should not be invalidated where no person has been prejudiced", and that "if some prejudice can be shown, the lien will be invalidated only to the extent of the prejudice".

In other words, a lien containing wrong dates is not a "nullity".

If the first lien registered in *JP Gravel* was not, in fact, a nullity, then the discharge of that lien triggered section 48. Following the long line of cases that have applied *Southridge*, the second lien in *JP Gravel*, being for the very same work and the very same amount as the first lien, ought to have been discharged as well.

It is well-settled law that an

1. See, for example, *Ben Air Systems Inc. v. Toronto Transit Commission*, 2018 ONSC 2375 (S.C.J.); *Khalimov v. Hogarth*, 2015 ONSC 6244 (Master); *Carpenters' Local 27 Benefit Trust Funds (Trustee of) v. Embee Properties Ltd.*, 2003 CarswellOnt 5535 (Master); *N.K.P. Painting v. Polygrand Developments Inc.*, 1995 CarswellOnt 417 (Master).

unsuccessful motion to discharge a lien is interlocutory in nature, so it is likely that the motion judge's decision in *JP Gravel* will be the final word as between the parties. It will be for future cases to determine whether the court's distinguishing of *Southridge* was valid. In the meantime, the court's finding in *JP Gravel* that the first lien was a nullity could in fact have unintended consequences which on the whole could harm, not assist, future lien claimants where an error is made in the description of the timeframe in which services were provided.

AUTHOR:

AUTHOR:

Case Comment: *Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.*

In *Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.*, 2019 ONSC 3671, the Divisional Court overturned a trial judge's decision that granted a charging order in favour of a contractor's solicitor priority over a subcontractor's trust claim.

Facts

Agostino and Giuseppina Plati (the "Platis" or "owners") entered into a contract with King Road (the "contractor") to renovate a barn in Schomberg, Ontario. King Road entered into subcontracts with Great Northern and Webdensco. Great Northern and Webdensco both registered timely liens in respect of their claims, but the contractor did not. At some point, Webdensco and the contractor settled and Webdensco assigned its lien to the contractor pursuant to section 73 of the *Construction Lien Act* ("*CLA*").

Sutherland Law represented the contractor in the litigation and obtained a charging order in its favour. The trial judge held that the charging order had priority over subcontractor Great Northern's claim. While the granting of the charging order was not appealed, Great Northern did appeal the trial judge's finding that the charging order had priority over Great Northern's claim.

Justice Corbett, writing for a panel which included Justices Myers and Sheard, held that while the trial judge correctly stated the law that a charging order in favor of the contractor's solicitors could not take priority over *CLA* trust funds, the trial judge erred in finding that the amount payable to Great Northern did not constitute trust funds.

Issue on appeal

The primary issue was whether the funds paid to the contractor on account of the assigned Webdensco lien constituted trust funds. The trial judge held that Webdensco's *pro rata* share of owners' holdback was not trust funds for the benefit of Great Northern. The Divisional Court held that the trial judge erred in this finding.

Section 8(2) of the *CLA* requires contractors to use funds received from owners on account of the contract price to pay all their subcontractors before using those funds for other purposes.

In this case, the owners had previously paid the contractor $105,800 "on account of the contract price", rendering this money trust funds for the benefit of subcontractors. At some point, the contractor settled with Webdensco. The court reasoned that if the contractor used any portion of the $105,800 to pay the settlement, then Webdensco's trust claim would be extinguished, but the contractor would not be entitled to retain funds now paid to it by owners without first paying the trust entitlement of Great Northern. If the contractor used non-trust funds to settle with Webdensco, section 11(1) of the *CLA* allows the contractor to retain, to the extent of that payment, trust funds payable to it under the judgment.

The court held that there was no evidence that the contractor used

non-trust funds to pay Webdensco and section 11(1) was not triggered. The money payable to the contractor in respect of Webdensco's assigned lien was money payable "on account of the contract price" between owner and contractor, and therefore trust funds for the benefit of subcontractors, including Great Northern. The court noted that if Sutherland Law's argument was correct, contractors could settle lien claims for less than 100%, shield the discount on the settlement from trust claims, and retain trust funds without paying outstanding trust claims, which would be contrary to the decision of *Minneapolis-Honeywell v. Empire Brass*, [1955] SCR 694.

Sutherland Law argued that section 8 of the *CLA* creates "separate trusts with separate and distinct beneficiaries" and that a successful trust claim requires the claimant to prove it is the beneficiary of a specific trust. Justice Corbett rejected this argument:

> *This argument is wrong. Section 8 creates one trust fund for a contractor under its contract with owner in respect to all of its subcontractors under that contract. There is one trust, and all of the unpaid subcontractors and suppliers in "privity of trust" with the contractor are beneficiaries of that trust. All are entitled to assert their trust claims against the entirety of trust proceeds until their trust claims have been paid in full or until trust funds are exhausted.*

Sutherland Law's argument that it should have priority because it was only through its efforts that the funds were available for distribution was also rejected by the court. Providing legal services to the contractor does not mean Sutherland Law could avail itself of monies impressed with a *CLA* trust.

The court also clarified that interest on trust funds is impressed with the same trust as the trust funds themselves. While the *CLA* is silent on this, basic principles of trust law provide that earnings on trust property are trust property and are payable in accordance with the terms of the trust.

In this case, the total amount owed to Great Northern was $54,809.76, of which $51,065.39 was the interest calculated in accordance with the subcontract. The court noted that there may be circumstances where the interest owed to a contractor may be greater than interest that accrues on trust funds owing to a contractor. However, this does not create an anomaly.

Conclusion

The court allowed the appeal and varied the trial judge's decision to provide that Great Northern's trust claim had priority over Sutherland Law's charging order. Great Northern's trust claim exceeded the trust funds available and all available trust funds were ordered to be paid to Great Northern.

This well reasoned decision by Justice Corbett is a rarely seen application of the trust remedy as well as the wide ranging implications of the trust regime under the *CLA*.

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Case Comment: *University Plumbing & Heating Ltd. v. Solstice Two Limited*

Seldom are opposing parties to an action in agreement on the factual background giving rise to litigation, much less on the quantum in issue. This rare occurrence arose in *University Plumbing & Heating Ltd. v. Solstice Two Limited*, 2019 ONSC 2242, a case which turned on the question of whether the action was statute-barred.

University Plumbing & Heating Ltd., the plaintiff, was engaged by the defendant, Solstice Two Limited, for work issued by Solstice's related company and other corporate defendant, Davies Smith Developments Inc. ("DSD"). The personal defendants, Graham Chalmers and Ian Smith, were directors and officers of Solstice and DSD. The plaintiff invoiced $6,996,027.21 for work performed, but was paid only $6,892.979.73, leaving $103,047.48 owing under a contract which set interest at bank prime rate plus 6 percent per year. The facts were admitted by the defendants in a request to admit. At the time of judgment, the interest that had accumulated on the invoice amounted to $345,175.83. Morgan J. explored the allegations, and noting that the defendants did not take issue with any of the material facts, came to the ultimate conclusion that the only real defence available to the defendants was the limitation argument, which ultimately failed.

Trust claims

Before delving into the limitation question, Morgan J. found that the plaintiff proved the existence of trusts under ss. 7 and 9 of the *Construction Lien Act* ("*CLA*"). Once that was proven, the onus shifted to the defendants to prove that they adhered to the terms the statutory trusts. Given that the defendants had not taken any issues with the facts presented by the plaintiffs and solely relied on the limitations defence, they had failed to meet that onus. The personal defendants, as directors and officers, and overall directing minds of the corporate defendants, were personally liable for the corporate breaches of trusts both under common law and under the *CLA*.

Limitation defence

The defendants' only "real defence" was that the plaintiff commenced its action some three years and two months after it issued its last invoice. Morgan J. held that the fact that the defendants made part payments after the last invoice and also acknowledged that amounts remained owing after that invoice, brought the debt well within two years of commencing the action. The written acknowledgements were in the form of email correspondence from the personal defendants to the plaintiff, on four separate occasions, confirming that a debt remained owing and reiterating an intent to pay. Pursuant to section 13(6) of the *Limitations Act*, the acknowledgments of the personal defendants were also acknowledgements of corporate defendants.

The personal defendants only advised the plaintiff of their inability to pay on June 26, 2015. It was then that it became appropriate for the plaintiff to commence its action. In line with several authorities, the plaintiff was not penalised for having held off commencing the action in return for the defendants agreeing to collect money. The court held that while creditors are under a duty to do due diligence and cannot rely on their own tardiness or inaction in forbearing from commencing an action, the defendants' promise effectively induced the plaintiff to forbear from commencing the action and thereby prevented the running of the limitation period.

As a matter of fact, Morgan J. found that had the plaintiff commenced an action prior to the June 26, 2015 email, the plaintiff would have effectively "rushed to litigation" and the debt would not have formally crystallised under the *Limitations Act*.

Costs

Given his findings with respect to the limitation question, Morgan J. awarded substantial indemnity costs in the amount of $70,000 in respect of the motion, and another $70,000 in respect of the action. In a judgment entirely against the defendants, the plaintiff obtained an order for the principal debt, the full interest, and post-judgment interest at contract rate.

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Changes to the CCDC 40 - Rules for Mediation and Arbitration of Construction Industry Disputes

The latest version of the CCDC 40, Rules for Mediation and Arbitration of Construction Industry Disputes, was recently released and brought several changes to the previous version released in 2005.

The CCDC 40 is intended to be a stand-alone document, which can be incorporated by reference into any contract. If incorporated into a contract, the terms of the CCDC 40 are triggered by the main contract. Once triggered, all rules for mediation or arbitration are contained in the CCDC 40.

The CCDC 40 now has express rules for the joinder of additional parties to a mediation or arbitration, on consent of all parties already involved and the additional party. For example, an owner and contractor may want to add the consultant to the dispute resolution process, given that the consultant has an interest in the outcome of the dispute resolution process. Other than expressly mentioning joinder, it is not immediately clear how this amounts to much of a change, since any party could have presumably been joined under the 2005 version as well, as long as all parties involved agreed.

The drafters have included helpful flowcharts which outline the revised mediation and arbitration processes and timelines. For arbitrations, some timelines were lengthened while others were shortened. A first procedural meeting is to be held 10 working days after the arbitrator is appointed, as opposed to the previous 5 days outlined in the 2005 version. For the exchange of statements, the claimant provides its statement within 15 working days of the first procedural meeting, the respondent can respond within 15 working days, and the claimant can respond to any counterclaim within 15 working days. The 2005 version allowed for 14 working days for each of these steps. For hearings and meetings, an arbitrator must give 5 working days notice. The 2005 version required 7 days notice. In the new version, an arbitrator must make a final award not later than 20 working days after final submissions, while the 2005 version provided for a period of 30 days.

An arbitration under the new CCDC 40 Rules will have three arbitrators if stipulated by the agreement to arbitrate. For reference, the 2005 version states that an arbitration will have three arbitrators if the amount in dispute is more than $250,000, or a party gives a written request for three arbitrators within 15 days following the start of the arbitration.

For mediations, if there is an agreement on the mediator, then the mediator must be appointed within 10 working days. If the parties are unable to agree on a mediator, either party can apply to the Superior Court of the applicable jurisdiction to appoint a mediator. All other mediation steps, including setting a date, time and place for mediation, exchanging mediation briefs, and the mediation itself is to happen "as soon as possible." The 2005 version did not specify when a mediator must be appointed.

If you intend to use the new CCDC 40 as a stand-alone document or in conjunction with another contract, it is advisable to carefully review the recent changes.

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Notable Case Law

***Riddell Kurczaba Architecture Engineering Interior Design Ltd v University of Calgary,* 2019 ABCA 195**

The architect argued that its fees under the Agreement were to be based on a percentage of the overall construction costs of the building, while the University submitted that it was a fixed-fee contract. The trial judge concluded that, despite some ambiguity, the contract provided for fixed-fee compensation based on the originally contemplated cost of construction with provision for additional compensation through approved change orders. The parties had intended that work completed through approved change orders would fall within the ambit of the appellant's basic fees for its services, which were compensable through an adjustment of the fixed-fee provisions of the Agreement.

While post-contract conduct was not properly considered to be part of the factual matrix bearing on the intention of the parties at the time a contract is entered into, such conduct could be considered in resolving an ambiguity in the contract. In this case, the consistent and unequivocal language employed in the change orders and agreed to by the parties during the course of the project was consistent with a fixed price contract.

***QH Renovation & Construction Corp. v. 2460500 Ontario Ltd.,* 2019 ONSC 3237 (Master)**

The Master declared a lien expired for failure to set down the action down for trial within the two-year period mandated by s. 37 of the *Construction Lien Act* even though the parties had agreed to a timetable order providing for a later date to set down the action. The Master held that there was no authority for the proposition that parties could, through mutual agreement or by a consent court order, agree to extend the mandatory time period set out in s. 37. Since ss. 37 and 46 are mandatory, the Master declared the lien expired and ordered its discharge.

***Smith v. Hudson's Bay Company,* 2019 ONSC 2348 (Master)**

A motion to dismiss for delay under *Rule* 27.01(1)(c) is inconsistent with the statutory scheme of the *Construction (Lien) Act*, particularly the statutorily prescribed timelines granted to a lien claimant to prevent expiry of its lien. Pursuant to s. 67(3) (now s. 50(2)), relief under *Rule* 27.01(1)(c) is not available in a lien action, as such relief is inconsistent with the *Act*.

***Blundell v. Frederick Fortune Operating as Home-Works,* 2019 ONSC 1722 (S.C.J.)**

A subcontractor installed exterior siding on a townhouse project. When a sub-subcontractor liened, the subcontractor paid the amount of the lien $30,143.91 in trust to the sub-subcontractor's lawyer, who then discharged the lien. After the time for the subcontractor to file a claim in relation to the sub-subcontractor's work had passed, the sub-subcontractor's lawyer brought an application for an order releasing the money to his client. The subcontractor argued that the payment into the trust account was for the purpose of discharging the lien only, and was the equivalent a payment under s. 44 and therefore in no way an admission that any money was owing to the sub-subcontractor. The sub-subcontractor argued that the money was for the benefit of the employees who worked on the project, and since no claim has been filed by the subcontractor within the limitation period, the funds should now be released to the sub-subcontractor.

The court held that the funds met the test for creating a trust under s. 8 of the *Act*. Since the contractor had neither brought a claim against the sub-subcontractor alleging any deficiencies justifying a set-off, nor had it attached conditions to its initial payment of funds to the lawyer in trust, the sub-subcontractor, as a beneficiary of the s. 8 trust, was entitled to the funds in the lawyer's trust account.

***Nigeco Contracting Ltd. v. Aizenstros,* 2019 ONSC 3364 (S.C.J.)**

Continuing discussions do not support a conclusion that a contract is abandoned. If the parties continue to discuss payment and the completion of the project, the contractor is maintaining its intention to return to complete a contract and the contract is not abandoned. Similarly, where a site visit and discussions regarding resolution take place after a purported letter of termination, that letter did not effectively terminate the contract.

***Rosas v. Toca,* 2018 BCCA 191**

When parties to a contract agree to vary its terms, the variation is enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns which would render an otherwise valid term

unenforceable. A variation supported by valid consideration continues to be enforceable for that reason, but a lack of fresh consideration is not determinative.

***Golden Triangle Construction Management Inc v. Nuwest Interior Systems Inc.*, 2019 ABQB 292**

In *McFarlane Oil Co. v. Sturgeon (Municipal District) No. 90*, 1990 ABCA 72, the Alberta Court of Appeal held that liens filed against reserve land are unenforceable and must be removed from title. In *Bogardus Wilson Ltd. v. Kawneer Co. Canada*, 1989 CarswellAlta 525, a master interpreted the Court of Appeal decision as no longer governing once security has been paid into court, because there is no longer any reason to be concerned about court's ability to sell land.

The master in *Golden Triangle* held that *Bogardus* was wrongly decided and that *McFarlane* should be interpreted so as to allow an owner or contractor to make a payment or post security without needing to abandon any argument as to the validity of the lien.

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