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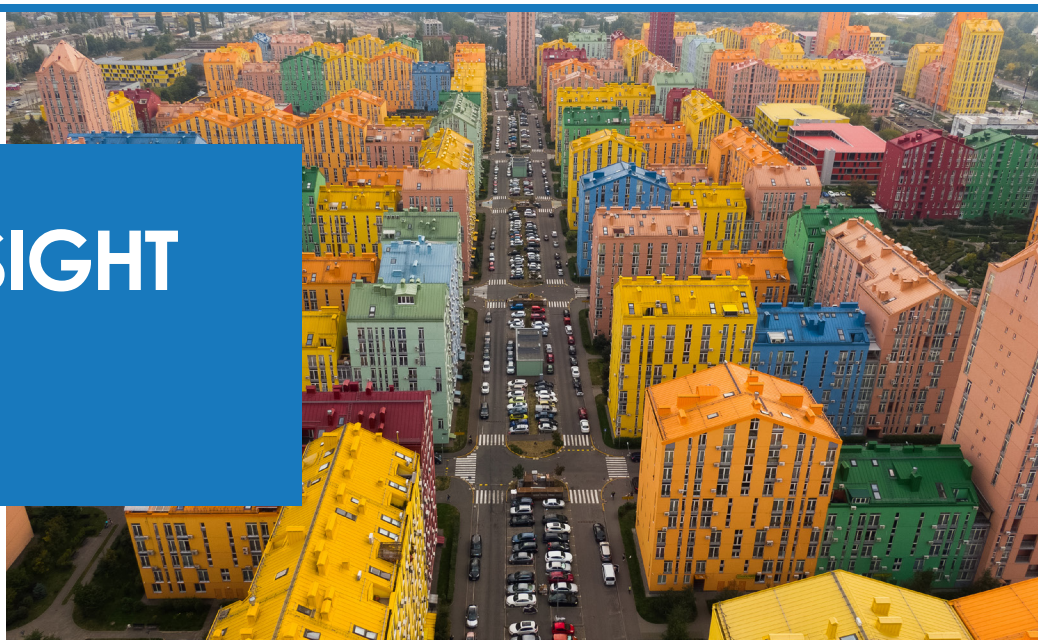

BUILDING INSIGHT

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NEWSLETTER

IN THIS ISSUE

Supreme Discretion – A Case Comment on *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*

Overview

Following the landmark decision *Bhasin v, Hrynew* in 2014, the Supreme Court of Canada heard two cases with respect to the duty of good faith in late 2020. One of those cases was *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, for which the Supreme Court released its decision in February 2021.

Facts

Wastech Services Ltd. ("Wastech") had a contract with Greater Vancouver Sewerage and Drainage District (the "City") to remove and transport waste to three disposal facilities (the "Contract"). The Contract was entered into in 1996, after 18 months of negotiations.

Pursuant to the Contract, Wastech was to be paid a different rate depending on which facility the City directed the waste to – the further away the facility, the more profit Wastech would earn. The Contract did not guarantee Wastech a certain profit, although it did contain an 11% profit "target". Importantly, the Contract gave the City "absolute discretion" to direct and allocate waste between the three facilities.

In 2011, about 15 years after the Contract was entered into, the City unilaterally reallocated the distribution of waste between the three facilities. This resulted in Wastech earning 4% profit, which was significantly less than the 11% profit "target".

Arbitration

Wastech referred the dispute to arbitration. Wastech alleged that the City breached the Contract by allocating waste in a manner that deprived Wastech of the possibility of achieving the 11% profit "target". Wastech sought $2,888,162, which was the additional amount Wastech would have earned if the waste had not been reallocated.

In an award issued in February 2015, the Arbitrator ruled in favour of Wastech. The Arbitrator found that the duty of good faith applied, and the City breached that duty. Specifically, the Arbitrator held that since the Contract was a long term, relational agreement, good faith required the City to have appropriate regard for the legitimate contractual interests of Wastech. The Arbitrator noted that Wastech had a legitimate contractual expectation that the City would not use its "power" to deprive Wastech of the opportunity to achieve the 11% profit "target".

The British Columbia Supreme Court

Following the City's successful petition for leave to appeal, the Supreme Court of British Columbia set aside the Arbitrator's decision.

The Court decided that imposing a duty to have regard for another party's interests should be based on the Contract itself. In this case, the parties did not include a clause limiting the City's absolute discretion to reallocate waste. Also, given the circumstances in which the Contract was negotiated and developed, the Court did not see how the principle of good faith could be applied.

Court of Appeal

Wastech appealed the decision from the British Columbia Supreme Court.

The Court of Appeal dismissed Wastech's appeal, after finding four errors in the Arbitrator's decision:

1. The Arbitrator applied the wrong legal test for determining whether the City nullified Wastech's benefits under the contract;

2. The Arbitrator erred by concluding that his rejection of Wastech's proposed implied term did not "add anything" to his good faith analysis, when his rejection actually substantially took away from Wastech's arguments for a breach of a duty of good faith;

3. The Arbitrator erred in holding that he did not need to decide whether the City's conduct nullified or eviscerated the contract to conclude whether the City breached its duty of good faith; and

4. The Arbitrator erred in holding that dishonesty included exercising contractual rights in a way that is at odds with the legitimate contractual expectations of the other party to the contract.

Decision from the Supreme Court

The Supreme Court was tasked with deciding what constraints the duty to exercise contractual discretion in good faith imposes on parties.

The Supreme Court outlined in detail the duty to exercise discretion in good faith, which the Court categorized as a general doctrine of contract law. This duty applies to all contracts, no matter the intentions of the parties or the language of the contract. Parties who provide for discretionary power in a contract cannot "contract out" of the implied undertaking that the discretion will be exercised in good faith, in accordance with the purpose for which it was given.

The exercise of discretionary power must be done in good faith. Thus, discretionary power pursuant to a contract is constrained by good faith; to exercise discretionary power arbitrarily or capriciously is a breach of contract.

Importantly, the Supreme Court stated the duty to exercise contractual discretion in good faith requires the party to exercise discretion in a manner consistent with the purpose for which the discretion was given in the contract. When this is done, the "bargain" between the parties is being followed.

The Court therefore needs to ask "was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion?". If yes, the party has not exercised the contractual discretion in good faith. The Court needs not ask if the discretion was exercised in a moral or savvy way.

To complete this analysis, the Court must look to the purpose for which the discretion was created. When the discretion is exercised in accordance with that purpose, the exercise may be reasonable according to the bargain between the parties.

Whether the duty has been breached is highly fact specific. The Court will look to the discretionary clause and then the contract as a whole to make this determination.

Wastech argued that the City's discretion amounted to a nullification or evisceration of Wastech's benefits under the contract, particularly given that the Arbitrator found that the City's allocation of waste made it impossible for Wastech to achieve its profit "target".

The Court stated that nullification or evisceration is not the measure for concluding that a party breached the duty to exercise discretionary power in good faith. The fact that a party

may lose some or all of its benefit under a contract is not determinative, although it could be relevant to show that the discretion was exercised in a way that was unconnected to the relevant contractual purposes.

The duty is breached only where the discretion is exercised unreasonably, in a manner not connected to the underlying purpose for which the discretion was granted.

When a party exercises discretion, a range of outcomes can follow. Good faith limits the range of legitimate ways the discretion can be exercised, in light of the relevant purpose for which the discretion was granted.

Application to the Facts

It is important to note that Wastech did not claim that it was lied to or deceived. Wastech argued that a breach of good faith could still be proven, even in the absence of dishonesty. Wastech submitted that honesty is not the only constraint that the duty of good faith imposes.

The Supreme Court ultimately found that the City's decision was reasonable, given the purpose of their discretion in the Contract. The purpose of the discretion in the Contract was to give the City flexibility to maximize efficiency and minimize cost. The City's discretion to reallocate the waste distribution was guided by the objectives of maximizing efficiency and minimizing cost. Thus, the City's choice was within the range of permitted choices under the Contract.

Through the appeal, Wastech was seeking a benefit that it did not bargain for in the Contract. There was no guarantee that Wastech would achieve the "target" profit in a given year.

The duty of good faith did not require the City to subordinate its interests to those of Wastech. It also did not give Wastech a benefit that it did not bargain for. There is no fiduciary relationship between the parties. Any "loyalty" the City was required to follow was loyalty to the bargain between the parties, not to Wastech or its interests.

Application to Construction Contracts

The Supreme Court's explanation of the duty to exercise discretion in good faith provides helpful guidance to parties with contracts containing discretion. Construction contracts are replete with these clauses. Clauses for suspension, termination, payment certification, and inspection all include some element of discretion.

The case raises questions about what conduct might breach the duty to exercise discretion in good faith. Luckily, additional commentary from the Court helps answer this question.

As a general guide, the Court noted that where the matter to be decided is readily susceptible to objective measurement, the range of reasonable outcomes will be relatively smaller. This may include discretion with respect to operative fitness, structural completion, mechanical utility, or marketability. Where the matter to be decided is not susceptible to objective measurement, the range of reasonable outcomes will be relatively larger. This may include discretion with respect to taste, sensibility, or judgement.

Given that the duty to exercise discretion in good faith is highly contextual and fact specific, each case must be assessed on its own merits.

Practice Tip

As a practical point, when entering into a contract, parties should perform a risk assessment and identify key contractual issues. Where one party has any discretion with respect to these key issues, it is important to explore the potential consequences of the exercise of such discretion and negotiate the appropriate limitations. Generally, the Court will not "save" a party from a bad bargain, so it is critical to draft contracts precisely.

AUTHOR:

The Downfall of Deference?

In Canada, deference to arbitrators on appeal was seemingly well established, but recent developments suggest Canada may be undergoing an abrupt course reversal. Many arbitration agreements preclude appeal rights, favouring finality in arbitration, but where appeals are allowed, they have traditionally been reviewed for reasonableness, not correctness. That deferential approach is consistent with international practice on arbitral appeals, but Canada's Supreme Court appears to have taken a step back from international norms in the recent *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 decision.

In 2014, the Supreme Court of Canada, in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, established that the standard of review for arbitration awards was reasonableness, except in rare matters of true jurisdiction. The Supreme Court subsequently affirmed that standard in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 and *Attorney General of Quebec v. Ronald Guérin*, 2017 2 SCR 3.

In an abrupt reversal to the consistent, historical trajectory of law in this area, Justices Browne and Rowe, in a concurring opinion in *Wastech*, suggested that arbitral appeals should be subject to the same correctness standard of review as administrative tribunals, as recently determined in the *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

In *Wastech*, the Court dealt with an appeal from an arbitral award, in which Wastech disputed an arbitrator's ruling that Metro Vancouver had breached its duty of good faith. The arbitrator found that Metro Vancouver exercised its contractually afforded discretion in a manner that deprived Wastech the chance to earn the intended benefit of the contract, which was to meet certain target profit ratios throughout the course of the contract.

The Supreme Court dismissed the appeal, but the majority of the court refrained from clarifying the applicable standard of review for arbitral awards. In their concurring minority decision, Justices Brown and Rowe held that the correct framework for reviewing arbitral awards was the standard of correctness, as outlined in *Vavilov*.

The seismic shift in the standard of review created by *Vavilov* was expressed well by the minority concurring opinion in that case:[1]

> Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-C.U.P.E. era. In other words, instead of reforming this generation's evolutionary approach to administrative law, the majority reverses it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

Thus, the concurring opinion in Wastech represents a similarly significant change to the standard of review of arbitral awards, based on a prior administrative law case that never even mentions arbitration awards. As Justices Abella and Karakatsanis put it in *Vavilov*, the "reasons are an encomium for correctness and a eulogy for deference."

Does the minority decision in *Wastech* represent the same for arbitral appeals?

In *Sattva*, the Supreme Court of Canada dealt with an appeal under the *Arbitration Act*[2] of British Columbia and clarified that, aside from limited exceptions, questions of law are to be reviewed on a standard of reasonableness:[3]

> In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

The reasonableness standard was traditionally applied to administrative rulings, and the court in *Sattva* found arbitration was sufficiently analogous to apply a reasonableness standard.
In *Teal Cedar*, the Supreme Court reversed a decision of the BC Court of Appeal that found that questions of

1. *Vavilov*, at para. 199.

2. SBC 2020, c 2.

3. Sattva, at para. 106.

law, such as statutory interpretation, necessarily attract a correctness standard of review. Instead, the Supreme Court found that the reasonableness standard applied even to arbitrator's decisions in matters of law, affirming deference to privately appointed decision makers.

There has always been a nexus between administrative tribunals and arbitration, and their treatments have often gone together by review courts. But, in 2019, the Supreme Court of Canada released a trio of decisions dealing with the judicial review of administrative decision-makers that seemed to reverse the trend toward deference in administrative appeals.

In *Vavilov*, the Court clarified the law applicable to the judicial review of administrative decisions and confirmed that, subject to limited exceptions, the standard of review analysis first begins with a presumption of reasonableness, which can be rebutted in two instances.

1. First, where the legislature intends that a different standard should apply. In these cases, for example where a legislature has provided a statutory appeal mechanism, the Court reasoned that the word "appeal" is an intent by the legislature to subject the administrative regime to appellate oversight thereby subjecting administrative decisions to increased scrutiny. According to the Court, that would militate in favour of a correctness standard. *Vavilov* established that questions of law in such cases were subject to a correctness standard while questions of fact and mixed fact and law are to be approached on a reasonableness standard.

2. Second, where the rule of law requires that the standard of correctness to be applied. For example, certain categories of legal questions, like constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. Beyond these limited exceptions, there would rarely be situations where the correctness standard of review should be implemented.

Vavilov was also notable for holding that the expertise of a decision maker was not a relevant consideration in determining the applicable standard of review, a shift from *Sattva* and *Dunsmuir v. New Brunswick*, 2008 SCC 9. Significantly, though, the Court in *Vavilov* did not consider the commercial arbitration context. In fact, *Vavilov* never mentions arbitration, and many practitioners assumed that the shift in the standard of review was limited to administrative decisions, though decisions in lower courts reflected confusion and uncertainty. Subsequent arbitral appeal decisions also broke in different directions; some followed *Vavilov*[4] and others followed *Sattva* and *Teal*.[5]

The Supreme Court's decision in *Vavilov* represented a significant departure from its own precedents. Justices Abella and Karatsanis, for the minority in that decision, found the majority's disregard for precedent and *stare decisis* to have "the greatest potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law." In *Wastech*, Justices Browne and Rowe extended the application of *Vavilov* to arbitral awards on the basis that where a legislature provides a statutory right of appeal, their intention is to provide for increased scrutiny of first instance decisions.

Justices Brown and Rowe's concurring decision seems overly focussed on statutory interpretation, without sufficient regard for the unique differences between commercial arbitration and administrative decision-making – factors justifying deference under *Sattva* and *Teal*.

Perhaps most obvious is that in the arbitration context, parties have affirmatively chosen to remove their disputes from the public justice system, in favour of private, specialized decision makers. Reviewing arbitral awards for correctness undermines the right of individuals to contract out of that system. Maintaining some limited right to appeal in arbitration agreements, was previously seen as a final, but highly limited, check against abuse or egregious mistakes. That may no longer be so.

Additionally, the statute being construed was not recently changed, requiring a fresh interpretation of the legislature's intent. Had British Columbia, in this case, or any other jurisdiction desired to modify their Arbitration Acts to address the standard of review issue in the face of the clear trajectory of appeals in Canada, they could have done so.

Finally, in Ontario, Justices Browne and Rowe's decision creates a fundamental inconsistency between domestic arbitrations under the *Arbitration Act, 1991*, S.O. 1991, c 17 and international arbitrations under the *International*

4. See: *Buffalo Point First Nation v. Cottage Owners Association*, 2020 MBQB 20; *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1; *Clark v. Unterschultz*, 2020 ABQB 338; *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board) et al.*, 2020 MBCA 60 (Man. C.A.).

5. See: *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516; *Freedman v. Freedman Holdings Inc.*, 2020 ONSC 2692, [2020] O.J. No. 2346 (Ont. S.C.J.); *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106; *Allstate Insurance Co. v. Ontario (Minister of Finance)*, 2020 ONSC 830.

Commercial Arbitration Act, 2017, S.O. 2017, c 2, Sch 5 ("ICAA"). The domestic Act allows for appeals, with leave, while there are no appeals as of right under the ICAA. In principle, the Browne and Rowe approach would result in arbitral appeals under the domestic Act being reviewed for correctness, while those under the ICAA are reviewed for reasonableness. There is no sensible justification for this distinction.

Since *Sattva* and *Teal*, there is nothing to suggest that Canada's commercial arbitration community wants or needs an increased level of judicial oversight and scrutiny. *Wastech* may well undermine the finality of future arbitration decisions.

Ultimately, the minority decision in *Wastech* is not binding on lower courts, so its impact is uncertain at this time. Still, for those parties seeking finality in their arbitration disputes, it would be prudent to circumscribe any rights of appeal in future arbitration agreements.

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Crosslinx v. Ontario Infrastructure, 2021 ONSC 3567

The Covid-19 pandemic has been a time of global crisis. The restrictions and measures arising in response to the pandemic have caused significant interference in all aspects of our society. Construction projects are among those significantly affected by these measures. Social distancing and other public health measures have caused many challenges and delays within those projects and it had not been clear whose responsibility it is to bear the consequences. However, in February 2021, the Ontario Superior Court of Justice heard the case of *Crosslinx v. Ontario Infrastructure*, 2021 ONSC 3567, and released its decision in May 2021. This is the first time an Ontario court has dealt with the impact of the Covid-19 pandemic on a construction project. While the case may appear to be mostly about interpreting a provision of the contract, it has important implications on the duties and responsibilities of both owners and contractors and is a clear message regarding the position of the court when it comes to owners seeking to abdicate themselves of all risk and responsibility from the pandemic.

Factual Background

This case concerns the Eglinton Cross Light Rapid Transit line (ECLRT). The Ontario Infrastructure and Lands Corporation and Metrolinx (Owners) entered into an agreement with Crosslinx Transit Solutions General Partnership, which represents a consortium of four of Canada's largest construction companies (Project Co) to build the ECLRT.

This agreement required the project to be completed by the substantial completion date with significant penalties applied if Project Co was unable to do so. There was also a provision in the contract that allowed the owners to require Project co to implement "additional or overriding procedures" in the event of an Emergency. If the owners called for such procedures, Project Co could start what the contract called a Variation Enquiry to determine whether the implementation of these measures should lead to an extension of the Substantial Completion date.

The main dispute between the parties was whether Project Co was entitled to a Variation Enquiry following them implementing social distancing measures that slowed down the project.

In March 2020, the Government of Ontario declared a state of emergency. In light of that, Project Co wrote to the owners asking them to declare an emergency and direct Project Co to take "additional and overriding measures", which Project Co had proposed itself, to ensure health and safety at the project site. The owners replied indicating that they were waiting for the Ministry of Labour's construction protocols and that they expected Project Co to implement them. Later the owners also wrote to inform Project Co that they

had not declared an emergency. On March 29th, the construction protocols mentioned above were released and mostly overlapped with the measures proposed initially by Project Co. The owners wrote in April and May 2020, taking the position that they would not declare an emergency and they had not required any measures to be implemented. The owners also took the position that Project Co was already required to implement these measures to comply with all their obligations under the *Occupational Health and Safety Act* as well as adhering to local laws and government measures. Therefore, the owners refused to grant Project Co a Variation Enquiry to potentially extend the Substantial Completion Date.

As a result, Project Co commenced an action seeking declarations that (i) the Covid-19 Pandemic was an emergency under the project agreement; (ii) the owners required compliance with additional and overriding measures to protect public health; (iii) Project Co was entitled to a Variation Enquiry under the project agreement.

Ontario Superior Court

Motion to Stay

The court initially dealt with a motion to stay brought by the owners. This motion was based on the reasons that: (i) There was a contractual provision to stay all litigation until after substantial completion; (ii) Project Co had failed to comply with the process leading to a Variation Enquiry.

The court found that while there was a valid dispute resolution provision requiring a stay of litigation, the project agreement also included an exception for when waiting until after Substantial Completion Date to resolve a dispute would cause irreparable harm to a party. The court also referred to a different provision that expressly created a process for Project Co to vary the Substantial Completion Date. It would make no sense to require that disputes

about extensions to the Substantial Completion Date be deferred until Substantial Completion had been achieved. The court also found that deferring this dispute until Substantial Completion would subject Project Co to adverse consequences and irreparable harm in the manner of liquidated damages, loss of financing, termination of the contract, insolvency, and loss of reputation.

With regard to their second reason, the Owners had alleged that Project Co had failed to comply with the process leading to a Variation Enquiry. The court found that Project Co had followed the procedure and it was in fact the owners that were trying to frustrate the process. Project Co had served the proper notices and had followed all the required steps leading to a Variation Enquiry. However, the owners had attempted to slow down the process by refusing to have the senior officers meet and discuss the dispute, which was a required step in pursuing a Variation Enquiry, unless Project Co had provided the excessive amount of documentation that the owners had requested. The court was not satisfied that even if Project Co had provided this information, it would have helped the dispute discussions. The court considered evidence of an offer to settle by the owners, finding that if they had enough information to offer a settlement, they did not require additional information to consider Project Co's claims.

Having rejected both reasons, the court dismissed the motion and proceeded with the contractual dispute.

Interpreting the Contract

To be granted a Variation Enquiry, Project Co had to show that there was an emergency as defined by the contract and that the owners requested "additional and overriding measures".

The core of the dispute between the parties was whether the Owners asked, or should have asked, Project Co to implement additional or overriding measures. The owners argued that they did not require Project Co to implement any measures, since Project Co was already under obligation to follow Construction Protocols and public health measures as they were applicable laws. Any direction from the owners would have been a reiteration of Project Co's existing obligation. Furthermore, the owners argued that the contract allocated all health and safety risks to Project Co and referred to Project Co's Emergency Response Plan to support that emergencies are their responsibility.

The Court found that the Covid-19 Pandemic was an Emergency under the terms of the contract that defined an Emergency as requiring "additional and overriding measures". The court also found that while Project Co certainly had obligations under the *Occupational Health and Safety Act*, this did not mean Project Co had accepted all the risks of the pandemic when they entered into the agreement. The mere presence of a mechanism to extend the Substantial Completion Date because of an emergency suggested that Project Co was not expected to take on all the risk. Interpreting the

contract in this way went against the purpose of the contract and having a substantial completion date. Imposing penalties for pandemic caused delays beyond the contractor's control, even if they were working with great efficiency considering the circumstances, only incentivized them to cut corners and imperil public health. The court went on to say:

> The [owners'] interpretation of the contract would reduce that ostensible concern about worker safety to nothing but window dressing. The safety of workers would be a priority only insofar as it did not delay the project or otherwise inconvenience the [owners]. If there were any inconvenience to be borne, it would have to be borne by [Project Co]. In my view, that is neither a fair nor responsible approach to take to the issue. While professing to be concerned about worker safety, the [owners] would be incentivizing [Project Co] to ignore worker safety by threatening to punish them for the delays that a concern about worker safety would entail.

Furthermore, the court found that the existence of a requirement for Project Co to have an emergency response plan did not suggest that risks of emergencies were allocated to Project Co under the agreement. The provision requiring an emergency response plan expressly contemplated that the "additional and overriding measures" required in the event of an emergency might overlap with the contents of the emergency response plan, meaning those measures applied even if some of them were contained in the plan.

Additionally, the court found that the Ministry of Labour's construction protocols were not applicable laws which Project Co were required to follow under the agreement. This was simply because the protocol document expressly stated that it was not a legal document and therefore had no legal force. Therefore, when the owners wanted Project Co to comply with the new construction "protocols" that had not yet been published, they were requiring them to implement "additional and overriding measures" and not reiterating their currently existing obligations under OHSA or applicable laws. Even if the protocols had been legally binding, the court would have found the owners to have failed to comply as the protocols required the owners and contractors to "collaborate to ensure there is a clear understanding of how production will be impacted."

Lastly, the court completely rejected the argument that the owners did not require Project Co to implement anything new because they had already implemented health and safety measures. Even if the owners had not requested anything, finding otherwise would in effect allow the owners to take a free ride on the Project Co's sense of responsibility, as Project Co could have done nothing and waited for instructions from the owners to require measures, potentially risking public health further in the process. The court also noted that Project Co did not get a "free ride" if granted a Variation Enquiry, since they still had to demonstrate within that procedure that the delays they claimed were attributable to the new construction requirements arising out of the pandemic.

Having rejected all the arguments advanced by the owners, the court granted all the declarations Project Co had requested.

What are the Implications?

There are several key takeaways from this case. First, owners and contractors should act in good faith, be fair and reasonable, and collaborate in reaching a solution. The court will not tolerate attempts to frustrate, stall or avoid contractual obligations to negotiate changes or proceed through dispute resolution provisions. Further, contractors should give as early notice as possible and follow applicable contractual procedures, rather than waiting until the end of the project to raise claims related to the pandemic. Contractors also will not get automatic relief from their obligations solely by relying on the fact that Covid-19 occurred. They still need to maintain good, clear records and provide the information required when seeking to attribute delays to the pandemic.

Finally, and most significantly, a significant part of the court's reasoning was concerned with the owners' proposition that all healthy and safety risks, including the pandemic, were allocated to Project Co. The court refused to allow such a narrow reading of the project agreement. The Covid-19 pandemic caught the world by surprise and any public health measures arising in response cannot be said to have been already contemplated within the *Occupational Health and Safety Act*. The court was strongly against shifting all the risk of the pandemic to the contractor and even admonished the owners in this case for attempting to take advantage of the contractor's responsibility. Public health and safety are the responsibility of everyone. It is the collective responsibility of owners and contractors to keep workers and the project site safe.

Given the latest developments, it is important to note that Infrastructure Ontario and Metrolinx have since launched an appeal of this decision.

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Key Changes in the 2021 ICC Arbitration Rules

The International Chamber of Commerce (the "ICC") Arbitration Rules are used internationally to resolve contractual disputes. On January 1, 2021, the new ICC Arbitration Rules came into force (the "2021 Rules"). The 2021 Rules apply to arbitrations registered with the ICC from January 1, 2021 onwards, unless the parties agree to submit to an earlier version of the Rules as in force on the date of their arbitration agreement. The ICC has also updated its "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration" (the "2021 Note") to assist parties and arbitral tribunals with the application of the Rules.

The revisions to the 2017 edition of the Rules are intended to "mark a further step towards greater efficiency, flexibility and transparency."[1] They provide useful guidance and enhanced clarity for both parties and arbitral tribunals. The 2021 Rules were published on December 1, 2020, after the COVID-19 pandemic had begun, and they take into account the changing needs of arbitration users as a result of the pandemic and in general.

Conflicts of Interest

The avoidance of conflicts of interest is a paramount concern for arbitrators, and it is relevant to construction arbitrators, given the likelihood of repeat appointments. As such, the 2021 Rules carry forward certain items from the 2017 edition of the Rules (the "2017 Rules"). One such item is Article 11(1), which requires arbitrators to be and remain impartial and independent of the parties involved in the arbitration. The disclosure requirements under Articles 11(2) and 11(3) of the 2017 Rules have also carried forward. Article 11(2) requires that, prior to an appointment or confirmation, an arbitrator shall sign a statement of acceptance, availability, impartiality and independence and shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. Article 11(3) requires an arbitrator to immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

One significant addition in the 2021 Rules is Article 11(7), which helps to ensure that arbitrators are able to maintain their impartiality and shall sign a statement of acceptance, availability, impartiality and independence and shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. Article 11(3) requires an arbitrator to immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

One significant addition in the 2021 Rules is Article 11(7), which helps to ensure that arbitrators are able to maintain their impartiality and independence under Articles 11(1) to 11(3). The new Article 11(7) requires any party entering into an arrangement for the funding of claims or defences with a non-party economically interested in the outcome of the arbitration to disclose the existence and identity of that non-party to the Secretariat, the tribunal and other relevant parties.

Article 17 was titled "Proof" in the 2017 Rules. The 2021 Rules have changed the title of this section to "Party Representation" and added Articles 17(1) and 17(2). Article 17(1) requires parties to an arbitration to promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation and Article 17(2) gives the tribunal the authority to take any measure necessary to avoid a conflict of interest arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings. It also imposes a new duty on the parties to keep the tribunal and the other party informed of any changes in their legal representation, which will assist the tribunal to avoid conflicts of interest. The 2021 Note stipulates that parties should refrain from introducing counsel "if a relationship exists between that representative and one or more of the arbitrators that affects the arbitrator's independence and impartiality".[2] This raises a question of whether this note of guidance extends to experts, who may have appeared before tribunal members in other, unrelated proceedings, and who are introduced later on in the proceedings. In any event, the guidance pertaining to counsel may help to avoid the strategic maneuvering, procedural disruption and delay that sometimes occurs when

1. As described by the ICC Court of Arbitration President Alexis Mourre (https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/).

2. 2021 Note, para. 13.

counsel is introduced late in arbitral proceedings.

Joinder

The previous ICC Rules did not allow joinder of additional parties after the confirmation and appointment of an arbitrator, unless all existing parties to the proceedings and the additional party to be joined consented.[3] That baseline remains, but Article 7(5) of the 2021 Rules introduces a carve-out to the general rule by introducing the possibility of a third party being joined to an arbitration after the appointment of an arbitrator, provided the additional party accepts the constitution of the tribunal and agrees to the Terms of Reference (where applicable).

A party wishing to join an additional party to the arbitration must submit a request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat is deemed to be the commencement of the arbitration against the additional party. In deciding whether to join a party, the tribunal is required to take into account all relevant circumstances, which may include:[4]

- whether the arbitral tribunal has *prima facie* jurisdiction over the additional party
- the timing of the Request for Joinder
- possible conflicts of interest
- the impact of the joinder on the arbitral procedure

Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party. So long as all parties, including the additional party to be joined, consent, joinder shall be allowed. If other existing parties do not consent to the joinder, the tribunal may still determine that the additional party should be joined. Previously, the consent of all parties was required. Now, greater reliance is placed on the tribunal's application of the guidance set out in Article 7(5).

Consolidation

One of the most significant changes in the 2021 Rules are the changes to the consolidation provisions (Article 10). Pursuant to the 2017 Rules, the consolidation of arbitrations was possible in three situations:

1. where all parties agreed to the consolidation;
2. where all claims in the arbitrations were made under a single arbitration agreement (even if there was no party common to the different sets of proceedings); or
3. where claims were made across different, but compatible arbitration agreements and by the same parties in respect of the same legal relationship.

Absent the agreement of all parties, these provisions excluded the possibility of the consolidation of two sets of proceedings if one party was not common to both sets of proceedings or where the two agreements involved two different legal relationships between the same parties.

Article 10 was revised to address this gap. Subject to the provisions of Articles 6(3) to 6(7) and 23(4), the Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration on agreement, where:

a) the parties have agreed to consolidation; or

b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or

c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

Consolidation may now be employed in a far larger set of circumstances, thus allowing for greater efficiency and improved cost effectiveness. The broader reach of consolidation under the 2021 Rules makes it more important for parties to ensure that the relevant arbitration agreements are compatible.

3. Article 7(1), ICC Rules 2017.

4. Article 7(5), ICC Rules 2021.

Transparency

It is not uncommon for parties, particularly when unsuccessful in their procedural motions, to point to the lack of transparency surrounding unreasoned decisions made by the ICC Court. The 2021 Rules now give parties the possibility of getting access to the reasoning of the ICC Court in respect of decisions relating to the prima facie existence of arbitration agreement, consolidation of arbitrations, appointment of arbitrators, challenges to arbitrators and replacement of arbitrators. This is not a right and the ICC Court may decline to provide reasons in "exceptional circumstances".[5] It is important to note that any request for reasoning must be made prior to the decisions whose reasoning is sought is rendered.[6]

Fairness in constituting tribunals

Along with increased transparency, the 2021 Rules bring with them an increased emphasis on due process principles. Article 12(8) carries forward from the 2017 Rules to the 2021 Rules and stipulates that, absent any joint nomination or agreement between the parties regarding the constitution of a three-member tribunal, the Court may appoint each arbitrator and designate the president.[7] This provision applies only where the dispute involves multiple claimants or respondents or where an additional party has been joined.[8] The 2021 Rules build on Article 12(8) by allowing the Court to disregard "unconscionable arbitration agreements" and appoint the arbitral tribunal in any arbitration.[9]

Under the new Article 12(9), in exceptional circumstances and notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, the ICC may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award. The ICC may exercise this discretion if, for example, one party has contractual authority under the arbitration agreement to unilaterally appoint all members of the tribunal. This change is in line with public policy considerations regarding unequal bargaining power between parties and may help to preserve the enforceability of awards.

That being said, one of the well-recognized benefits of arbitration is that parties can select their own arbitrator(s). It remains to be seen how this limitation on the right of the parties to select their own arbitrator(s) will be received.

Cost-effective resolution of claims and expedited procedures

One significant change to the provisions of Article 22(2) is that the word "may" has been changed to "shall", meaning the tribunal now has a positive duty to use case management techniques to move the arbitration forwards:

> (2) In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV.

In addition, case management technique (h) now requires arbitrators to encourage settlement, rather than simply informing parties of the option to settle. This is reflective of an increasing emphasis in the justice sector at large on improving cost-effectiveness and the speed at which claims are resolved.

Another way in which these objectives are met is through the Expedited Procedure provisions (Article 30 and Appendix IX), which were introduced in the 2017 version of the Rules. The 2021 Rules expand the scope of the application of the Expedited Procedure provisions by raising the opt-out threshold from $2 million (USD) to $3 million (USD). By the end of 2019, 146 cases were filed under the Expedited Procedure.[10]

Electronic submissions and virtual hearings

The COVID-19 pandemic has necessitated the swift adoption of virtual hearings across the justice sector. Arbitration is more flexible than litigation by design and has generally adapted well to the recent changes. In April 2020, the ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (the "Guidance Note").[11] The Guidance Note contains a checklist for a Protocol on virtual hearings (Annex I), as well as Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organization of Virtual Hearings (Annex II), which parties and arbitrators may wish to consult. The 2021 Rules were then published in December 2020, just over a year after the pandemic began and they contain a number of changes which formalize and enhance the tribunal's power to hold hearings remotely.

5. Article 5(3), Appendix II, ICC Rules, 2021.

6. Article 5(2), Appendix II, ICC Rules 2021.

7. Article 12(8), 2017 ICC Arbitration Rules.

8. Articles 12(6) and 12(7), 2017 ICC Arbitration Rules.

9. https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/

10. 2019 ICC Dispute Resolution Statistics, p. 16.

11. https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf

In line with these changes, Article 25(2) no longer mandates that the tribunal shall hear the parties together in person if any of them so requests. It now states that the arbitral tribunal may decide to hear witnesses and experts in person. Although parties can no longer insist on an in-person hearing, in deciding whether to hold a hearing in person or virtually, the tribunal will confer with the parties and make a determination on the basis of the relevant facts and circumstances of the case. In the Guidance Note, the ICC confirmed that the paramount purpose of article 25(2) was to ensure "live adversarial exchange", which was considered satisfied if the hearings were to be held "by virtual means".[12]

12. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, Section III, para. 23.

Further, Article 26 has been bolstered to expressly allow for remote hearings and the presumption of the requirement for hard-copy filings has been removed. Parties are now only entitled to a hard copy if requested.[13]

Given that construction arbitrations often take place once a project is complete, one or more parties are no longer on the project and/or witnesses have moved on to other projects in places other than where the arbitration is being conducted, remote hearings are likely to be embraced moving forwards.

Conclusion

The changes in the 2021 Rules are not as groundbreaking as those in the 2011 and 2017 Rules, such as the emergency arbitrator provisions and the expediated arbitration provisions, respectively. Certain changes are simply codifications of recent arbitral practices. However, the 2021 Rules provide welcome guidance and improvements in terms of efficiency, effectiveness, transparency, and modernization of the ICC arbitral process.

13. Article 3(2), 4(4)(b), 5(3), ICC Rules 2021.

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SAC Releases 2021 Bond Forms

The Surety Association of Canada (SAC) recently released its SAC 2021 Bond Forms for Bid Bonds, Performance Bonds, and L&M Payment Bonds. According to SAC, the changes incorporated were being contemplated by the Canadian Construction Documents Committee (CCDC) as part of their efforts to update the standard CCDC bond forms. There is currently no anticipated release date for the CCDC bond forms but it is expected that the updated CCDC bond forms will be similar to the SAC bond forms.

Performance Bond

The SAC 2021 Performance Bond is meant to be used in all of Canada but is based on Form 32 that is prescribed by Ontario's Construction Act. For example, the SAC Performance Bond includes provisions allowing for a Pre-Notice Meeting within a specific timeframe and strict timelines for the surety to respond to a Notice of Claim.

In addition, the SAC 2021 Performance Bond addresses the concern raised by the 2019 case of *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2019 ABCA 443. The Alberta Court of Appeal's decision cast doubt on the principle that a surety's liability only arises from the liability of the principal. In the HOOPP case, The court held that, depending on the language of the bond, it was possible for the surety to have independent obligations under the performance bond. The language relied on by the court, that the liability to pay is "joint and several" by the surety and the principal, is currently found in the standard CCDC bond form and Ontario's Form 32.

The SAC 2021 Performance Bond has amended the recitals portion of the bond to strengthen the joint and several nature of the obligation. In addition, new language has been added at section 10.2 to expressly limit the surety's obligation, as follows:

> 10.2 The Surety's responsibility to the Obligee under this Bond in respect of any Surety Option or Obligee's Direct Expenses shall be secondary to, and not greater than, that of the Principal under the Contract. The Surety shall not be obligated to pay any sums

> which the Principal is not obligated to pay the Obligee or for which the Obligee's remedy against the Principal is barred.

Labour & Material Payment Bond

The SAC 2021 Labour & Material Payment Bond was also based on the form prescribed by Ontario's Construction Act. Similar to the Performance Bond, the SAC 2021 Labour & Material Payment Bond also includes strict timelines for a surety to deliver a response to a Claim. The response must include details on any amounts that are in dispute and reasons for that dispute.

Whereas Ontario's Form 31 extends some protection to second-tier subcontractors and suppliers, for amounts the "Contractor would have been obligated to pay the Sub-subcontractor under the Construction Act", made possible because of the lien and holdback provisions of Ontario's *Construction Act*, the SAC 2021 Labour & Material Payment Bond limits coverage to first-tier claimants only. This was done as the SAC bond is meant to be used in every province, many of which have different approaches to lien/holdback rights.

The SAC 2021 Labour & Material Payment Bond also addresses the Supreme Court of Canada's 2018 case of *Valard Construction LTD v. Bird Construction Company*, 2018 SCC 8. In *Valard*, the SCC found that under a trustee labour & material payment bond form, the trustee would assume all the responsibilities of a traditional trustee. The SAC bond form has added a new paragraph to nullify the impact from this decision, as follows:

> 4. The Bond or the trust under Section 0 does not impose on the Obligee any legal, equitable or other obligations or duties to any Claimant, including but not limited to any obligation to notify any Claimant of the existence of the

This language directly addresses the issue and fact pattern of *Valard* in specifying that the bond does not impose on the obligee the responsibilities of a traditional trustee, including the obligation to notify any claimant of the existence of the bond.

Conclusion

SAC's release of the 2021 bond forms, along with the anticipated release of the new CCDC bond forms, sets a standard for the surety industry across Canada.

It should be noted that in Ontario, for public contracts with a price exceeding $500,000, a contractor is required to furnish the owner with a performance bond and labour and material payment in the prescribed forms, being Form 32 and 31, respectively. It will be interesting to see if Forms 31 and 32 will be amended in the future to reflect the recent case law developments, as has been done in the 2021 SAC bond forms.

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Pearls of Wisdom from the Bench

On April 29, 2021, Justice Sutherland, Master Wiebe, and Master Robinson shared pearls of wisdom with the Ontario Construction Bar during the webcast "An Evening with the Bench", hosted by the Ontario Bar Association. This year's rendition of the annual event covered the practice of construction law during the COVID-19 pandemic, motions in writing, References, virtual hearings, the effect of 2020 Suspension of Limitation Periods, issues under the *Construction Act*, expert witnesses, and important decisions. We thank Justice Sutherland, Master Wiebe, and Master Robinson for volunteering their time to share their helpful insights with the Bar.

General Practice Tips

Justice Sutherland, Master Wiebe, and Master Robinson offered a number of general practice tips based on their experiences on the Bench during the COVID-19 pandemic.

First and foremost, counsel must read and follow the Practice Directions issued by the Court. Treat the Practice Directions as if they were the *Rules of Civil Procedure*. Following the Practice Directions will make the Bench's job easier and will help to ensure you are being the most effective advocate for your client.

The Bench candidly noted that the quality of written submissions has declined "dramatically" in the past year.

They advised attendees to edit materials thoroughly and ensure everything is included before submitting.

It is also critical that counsel only file materials once. Filing materials multiple times or in multiple ways can result in more than one Judge or Master receiving your materials. This can, and has, resulted in conflicting decisions.

Motions in Writing

For motions in writing, counsel must take care to ensure all materials are included. Since counsel will not get an opportunity to appear before the Bench, it is key to anticipate questions from the Bench and address them in the written materials.

Justice Sutherland, Master Wiebe, and Master Robinson stressed that counsel must know and lead evidence with respect to the legal test for the relief they are seeking. This includes being conscious of leave requirements in the *Construction Act*, where applicable.

The Bench reminded counsel to ensure all materials are bookmarked and hyperlinked. This will assist the Judge or Master with accessing the materials quickly and easily. If the written materials reference a pleading or previous Order, include it. Do not assume that the Judge or Master has the entire file at their fingertips, even the documents that have been filed at the courthouse.

For motions to vacate a lien by posting security under section 44 of the *Construction Act*, counsel should provide proof of the date of the relevant contract if the matter is governed by the *Construction Act* as it read before July 1, 2018 if they are seeking to post less security. The front page, signature page, and page showing the date of the contract is often sufficient, and counsel should avoid submitting lengthy contracts in full to the Master.

References

With respect to References, Master Wiebe and Master Robinson are doing everything possible to ensure that matters proceed swiftly toward trial. This is particularly true for smaller lien matters. Master Wiebe and Master Robinson endeavor to make Orders, even before counsel appear before the Master, to advance the matter to trial. In some cases, the trial will occur at what would have been the first pre-trial conference.

Counsel should include their availability with their materials for the Order for Trial. The Bench will not be sympathetic toward counsel asking for adjournments if they did not include their availability with the materials.

Virtual Hearings

Due to the ongoing COVID-19 pandemic, many matters are currently being heard by way of virtual hearing. This is expected to continue even when the pandemic is over. As such, it is crucial for counsel to familiarize themselves with the relevant technology. Master Wiebe, Master Robinson and Justice Sutherland provided some useful tips for virtual hearings, which are discussed below.

With the advent of virtual hearings, there are fewer opportunities for counsel to meet informally as they would if a matter were being heard in a courtroom. One suggestion was for counsel to take initiative to arrange a time to confer before a hearing, to narrow the issues and/or discuss the possibility of settlement.

During virtual hearings, it is important to remember that you are still in court. The same etiquette should be maintained as if you were physically before a Judge or Master. This includes refraining from the same things you would refrain from in court, such as eating and drinking beverages other than water. Even if counsel is not required to gown, proper business attire should be worn. Remain civil; do not argue or debate with opposing counsel. Do not talk to your off-screen colleagues or others in the room. Essentially, refrain from doing anything that could be distracting to the Judge or Master on the other side of your screen.

In addition to the same general considerations that apply to an in-person hearing, there are also unique considerations for virtual hearings that counsel should keep in mind. Be mindful of the positioning of your camera. In other words, think about what those on the other side of your camera are seeing. Maintain confidentiality, especially when working from home. A Judge or Master may ask you and/or your witness to move your camera around the room you are in, to make sure that no one is in the room who should not be. Master Wiebe recommends that witnesses attend virtual hearings from their lawyer's office, so that the lawyer can monitor the witness to ensure there is no interference during their testimony.

Be mindful of body language, your own and others. If you prefer to give submissions while standing, feel free to stand. However, do not pace in and out of the view of your camera. Generally, ensure you are comfortable, but not

too comfortable. As Master Robinson put it, "A touch of discomfort made me a better advocate." Use appropriate posture. If you are sitting down, sit up straight and do not slump in your chair. Remain alert. Be aware if a witness starts looking at a document when you have not shared any documents on the screen. If you have a second (or third) screen, make sure it is not behind you, so that you are not turning back to look at it. This is distracting and may cause sound issues.

As with all hearings, counsel should ensure they are adequately prepared. In the case of a virtual hearing, more planning may be required. Counsel should be prepared to quickly show documents using the screen sharing function of the program they are using. It is important for counsel to be as comfortable with their electronic materials as the would be with physical materials. Make sure you are giving page references so that they are accessible to the court and other parties. For example, if using CaseLines, use the CaseLines reference for materials. If you are using PDF, use the PDF page numbers (which may be different from the page numbers on the document itself). Use virtual bookmarks and hyperlinks where appropriate. If you do not appropriately reference pages, a Judge or Master may interrupt you during your submissions or cross-examinations.

The pandemic has been an interesting time for junior lawyers who are just starting to get oral advocacy experience. There are both pros and cons to starting out as a lawyer in a virtual world. One advantage is that, when giving submissions, juniors can basically read their arguments from their notes *verbatim*, by splitting their screen between the virtual hearing and their notes. One potential disadvantage is that there is no natural debrief with senior counsel on the walk back to the office from the courthouse. To ensure juniors are being properly trained, time should be set aside after hearings to virtually debrief and discuss.

Moving forwards, the Bar can expect directions from each jurisdiction on what to expect at virtual hearings. In the meantime, counsel are encouraged to agree to a preliminary set of questions to be put to witnesses, such as "Are you alone?", "Do you have any documents in front of you?" and "What applications do you have open on your computer?" Some Judges or Masters may develop their own preliminary questions to help set the ground rules of the hearing or trial. For example, Master Wiebe holds a Protocol Trial Management Conference before virtual trials, to deal with practical and procedural issues for the trial before the trial commences.

Question and Answer Period

During a question-and-answer period at the end of the event, counsel were given the opportunity to ask Master Wiebe, Master Robinson and Justice Sutherland questions.

Effect of 2020 Suspension of Limitation Periods

Several of the questions pertained to Ontario Regulation 73/20, which temporarily suspended limitation periods in 2020 in response to the COVID-19 pandemic, and its effect on the lien preservation and perfection deadlines under the *Construction Act*.[1] Under O. Reg. 73/20, limitation periods in civil matters were suspended from March 16, 2020 to September 13, 2020 inclusively, except those under the *Construction Act*. Limitation periods under the *Construction Act* were suspended on March 16, 2020, but O. Reg 73/20 was amended so that the suspension was lifted as of April 16, 2020.[2] This was a period of uncertainty for the construction bar, particularly regarding the effect of the suspension on the lien timelines under the *Construction Act*.

During the event, a question was asked about whether Judges and Masters would demonstrate some leniency with respect to missed timelines for preserving and perfecting liens under the Act as a result of the uncertainty caused by COVID-19 and O. Reg. 73/20. The answer was a clear no – there is an abundance of case law that failure to meet the lien timelines is generally fatal to the lien claim (absent the existence of another validly perfected lien under which the lien can shelter). While the strict timelines under the *Construction Act* cannot be extended, even in extraordinary circumstances, an expired lien claim may be allowed to continue as a breach of contract and quantum meruit claim.

Various Lien Deadlines under the "New" Act

It is common for counsel to ask questions about issues that affect lien timing under the "new" C*onstruction Act* at the end of this event, and this year was no exception.

One interesting question raised by an attendee related to section 31(6) of the *Construction Act*, and the requirement for a notice of termination of contract to be published by the terminating party in a construction trade newspaper. Master Wiebe predicts that "zero" owners will do this and wondered how this will play out in practice, given the relationship between publication of the notice of termination and lien deadlines.

1. Under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17.

2. https://files.ontario.ca/solgen-oic-limitation-periods.pdf

Another useful tip provided by the Bench was that if a party is close to the two-year deadline in section 37 of the *Construction Act*, they may pass a trial record and then move for a judgment of reference (even in Toronto), thus helping to ensure that the action is not dismissed for not having been set down for trial within two years.

Expert Witnesses

An attendee asked the Bench how counsel can make the best use of expert witness testimony. The Bench provided the following tips with respect to expert witness testimony.

First, consider whether you need an expert. If you do, clearly define the scope of the expert's opinion and which area they should be qualified in. Counsel should consider putting into evidence the instructional letter given to the expert, along with the expert report itself. Remember that experts must be impartial and must only give opinion evidence (not fact evidence). Counsel must tender and prove the facts that experts rely on through the evidence of fact witnesses. Another helpful tip was that experts who see the weaknesses of their client's case are viewed as more credible by some members of the Bench. Always remember that an expert's purpose is to provide opinions that will assist the court. They should not make conclusions, as the trier of fact is the ultimate decision maker.

Notable Cases

Finally, there was a discussion of notable decisions that have been released since last year's Evening with the Bench event.

First, the Bench discussed *R&V Construction v. Baradaran*.[3] This decision was the culmination of years of litigation, and has widespread implications concerning the powers of a referee under the Construction Act, procedural fairness and lawyer's obligations when acting against self-represented litigants. In 2016, the owner moved under section 47 of the *Construction Act* for an Order "discharging [the Contractor's] lien and dismissing the action, or in the alternative, an order reducing lien security." This was the only motion before the Master. At the hearing, the Master characterized the motion as a motion for summary judgment and found that she had jurisdiction to use the so-called enhanced powers granted to judges on such a motion under Rule 20.04(2.1) of the *Rules of Civil Procedure*. The Master granted judgment in favour of the contractor, R&V Construction Management Inc., and found that there were no genuine issues for trial.

The owner moved to oppose the Master's Report and the Superior Court held that the Master had exceeded her jurisdiction by employing the enhanced powers. The contractor appealed this decision to the Divisional Court. The Divisional Court dismissed the appeal but disagreed with the motion judge's findings in respect of the powers available to a Master on reference under the *Construction Act*. To summarize, the Divisional Court noted that section 67 of the *Construction Act* makes clear that a construction lien referee's jurisdiction is not limited to "summary trials" but includes appropriate interlocutory proceedings. The Construction Act requires a summary process, not a summary trial. While summary trials may be a "good solution" in some cases, in others, disposition without a trial, such as by summary judgment, may be the more "summary", and thus appropriate, solution. Indeed, section 67 of the *Construction Act* accords a Master the power to consent to a summary judgment motion being brought under Rule 20 where such disposition without trial "would expedite the resolution of the issues in dispute". If the Master who gives such consent is a referee, the Master on reference has the powers given to him or her under

3. 2020 ONSC 3111. This is a modified, condensed version of a comment on this case, which was written by Myles Rosenthal. The full case comment can be found here: https://www.glaholt.com/resources/publications/publication/case-comment-r-v-construction-management-inc.-v.-baradaran.

section 58 of the *Construction Act*, which includes the Enhanced Powers. On the other hand, if the Master who consents to hearing a motion for summary judgment is not a referee, then the Master's powers are limited to those given to him or her under the *Rules of Civil Procedure*.

The Divisional Court held that motions Judge erred in holding that the Master, as a Master on reference, did not have jurisdiction to use the enhanced powers on a motion for summary judgment. Nevertheless, the Divisional Court held that the Master had denied the self-represented owner procedural fairness in granting judgment to the contractor.

The Divisional Court found that the Master incorrectly described the motion as a motion for summary judgment. A motion under section 47 of the Act is not a motion for summary judgment. It is always a defensive motion and "does not provide a means for the plaintiff to move for judgment." As such, the contractor's response to the owner's motion did not put the owner on notice that judgment could be granted against him, thus denying him procedural fairness when judgment was, in fact, granted against him. Indeed, the contractor was clear in stating its position that it was only seeking a trial, not judgment. In sum, the Divisional Court affirmed on the matter of general interest that a Master on reference may use the enhanced powers in disposing of a summary judgment motion. However, the Divisional Court dismissed the contractor's appeal on the basis that summary judgment had been granted without a motion by the contractor and with the owner having been deprived of procedural fairness on the unique facts of this case. The Court accordingly remanded the case back to another construction lien Master to proceed on its merits.

Second, *Prasher Steel Ltd v. Maystar General Contractors* was discussed, which was an appeal from a Master on a judgment granted on a motion to enforce a settlement under Rule 49 for summary judgment under Rule 20.[4] The takeaway from the decision is that any time a Master makes a factual finding in the context of a reference, the Master must issue a Master's Report, which is then subject to confirmation in the Superior Court, pursuant to the *Rules of Civil Procedure*. The Master's Report determines the routes by which the Master's decision may be reviewed and appealed. Because no Report was issued by the motions Master in this case, the case was remitted back to the Master to issue a Report in accordance with his findings on the motion, despite that fact that this would lead to delay and expense for the parties, because it is an important practice point for construction lien cases and the issuance of a Report affects the appropriate appeal routes.

Conclusion

An Evening with the Bench is always a highly anticipated and well-attended event. It is the one night a year where the construction bar can ask the Bench their questions directly. Traditionally, it is also a night where the construction Bar in Toronto and the surrounding areas gathers to mingle over dinner. This year may have looked a bit different, since the event had to take place virtually. However, there was no shortage of connection or valuable insight. In fact, it was easier than ever for construction lawyers outside of Toronto to join their colleagues and the Bench.

4. 2020 ONSC 6598.

AUTHOR:

AUTHOR:

Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc., 2021 ONSC 3396

This case involved the Eglington Crosstown LRT and focused on the effect and operation of the transition provisions in the *Construction Act*, specifically the effect of ss. 87.3(1) and (2) where a prime contract for an improvement was entered into before July 1, 2018 but a relevant subcontract was entered into after July 1, 2018.

Facts

On July 21, 2015, Crosslinx Transit Solutions General Partnership entered into a prime contract with Crosslinx Transit Solutions Constructors ("Crosslinx") for the design and construction of the LRT system.

In 2019, Crosslinx entered into two subcontracts with 10760919 Canada Inc. (o/a Harbels) for the supply of formwork and concrete to Avenue and Leaside stations in the LRT system. Harbels in turn entered into two sub-subcontracts with Form & Build Supply (Toronto) Inc. ("Form & Build").

On December 11, 2020, 56 days after Form & Build's last stated date of supply at both stations, Form & Build registered two claims for lien against title to the lands of the two stations. On January 14, 2021, both liens were vacated upon Crosslinx posting lien bond security into court.

Subsequently, Crosslinx sought orders declaring that the two liens Form & Build had preserved were already expired and returning the two lien bonds. Form & Build opposed such, requesting a declaration that its liens were in fact preserved in time.

The Applicable Legislation

Section 87.3 of the *Construction Act*, RSO 1990, c C.30 contains the transition provisions which govern the continued applicability of the *Construction Lien Act*. Specifically, ss. 87.3(1) and (2) read as follows:

> 87.3 (1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,
>
> (a) a contract for the improvement was entered into before July 1, 2018;
>
> (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
>
> (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the Restoring Trust, Transparency and Accountability Act, 2018 came into force.
>
> Same
>
> (2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

Arguments of the Parties

Form & Build argued there was ambiguous wording in ss. 87.3(2) and its intent was focused on preventing contractors who had entered into a contract before July 1, 2018 from benefitting from the *Construction Act*. Thus, s. 87.3 should only apply to subcontracts entered into before July 1, 2018. As Form and Build's subcontracts with Harbels were entered into after July 1, 2018, Form and Build was entitled to the 60-day lien preservation period under the *Construction Act*.

Crosslinx disagreed, arguing there was no ambiguity in ss. 87.3(1) and (2). Further, Crosslinx cited Court decisions that interpreted s. 87.3 such that the *Construction Lien Act* continues to apply to an improvement (and liens and lien actions arising from it), where the construction contract was entered into before July 1, 2018. Thus, as the prime contract for this improvement was entered into on July 21, 2015, Form & Build was only entitled to the 45-day lien preservation period under the *Construction Lien Act*.

Master Robinson's Decision

The Master first reviewed the Court decisions cited by Crosslinx. The Master agreed with Form & Build that the cases were factually distinguishable (they did not involve a prime contract entered into before July 1, 2018 and a subcontract entered into after July 1, 2018, nor were the transition provisions an issue), but held that the general statements made regarding s. 87.3 remained accurate in this situation.

The Master then addressed Form & Build's argument of ambiguous wording in ss. 87.3(2). The Master found no genuine ambiguity when reading s. 87.3(2) in its grammatical and ordinary sense, in the context of both s. 87.3 and the *Construction Act* in their entirety. The Master held there is only one plausible meaning of ss. 87.3(2) and it is clear: ss. 87.3(1)(a) and (c) apply regardless of when a subcontract was entered into. Further, ss. 87.3(2) does not clarify or vary the preamble to ss. 87.3(1), which connects the applicable act and regulations to "an improvement", as opposed to a "contract" or "subcontract".

The Master emphasized that ss. 87.3(1)(b) must also be read harmoniously with the rest of s. 87.3 and the *Construction Act*. Form & Build was unable to adequately explain how ss. 87.3(1)(b) would operate if the Court accepted its argued interpretation (that the date a contract or subcontract was entered into governs which act and regulations applies), given the terms "contract" and "subcontract" are not used. Further, referencing "commencement of a procurement process prior to July 1, 2018" would then become superfluous when assessing which act applies – a statutory interpretation the court is to avoid.

Ultimately, Master Robinson stated:

> s. 87.3 provides that a single legislative scheme applies to the entirety of "an improvement". All rights, obligations and remedies of all persons involved in that improvement are governed commonly and consistently by the same version of the act and regulations. That consistent application of the act and regulations is reasonably achieved by reference to the date of the procurement process for the improvement, where there is one, or a prime contract.

This interpretation allows ss. 87.3(3) and (4) to be read harmoniously. It also eliminates conflicts in legislative operation, and consequent uncertainty and administrative burdens to all parties, which would ensue if variant versions of the act and regulations applied to different contractors and subcontractors in the same improvement (given the differences between the *Construction Lien Act* and *Construction Act*).

The Master further emphasized that because subcontract work, by definition, is a portion of the work to be performed under a prime contract, it logically follows that the same legislative scheme governs both the prime contract and any subcontracts. An interpretation of s. 87.3 that allows variant lien rights for different parties (i.e. contractors vs. subcontractors) in the same improvement would require clear legislative wording that is absent in the provision.

Application to the Facts

Per ss. 87.3(1)(a), as the prime contract was entered into before July 1, 2018, the *Construction Lien Act* continued to apply to the involved improvement. Thus, Form & Build had 45 days from its last stated date of supply to preserve its liens. As the liens were preserved after 56 days, both liens had expired when Form & Build registered its claims. Accordingly, Crosslinx was entitled to both of its sought orders.

Conclusion

The date a subcontract was entered into is not relevant in determining whether the current *Construction Act* or former *Construction Lien Act* applies to an improvement.

If you are representing a lien claimant and are still unsure of which act and regulations apply, following the shorter lien preservation and perfection timelines under the *Construction Lien Act* will help ensure your client's lien rights do not expire.

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Notable Case Law

***690 King Street Corp. v. Desco Plumbing and Heating Supply Inc.*, 2021 ONSC 1050 (Div. Ct.)**

The Divisional Court extended the time to commence an appeal from a summary judgment in a lien matter where the claimant's original counsel mistakenly believed that it had 30 days to appeal the matter to the Court of Appeal, while in fact, under s. 71 of the *Act*, it had 15 days to appeal to the Divisional Court.

Justice Kristjanson granted the extension, holding that the principles under Rule 3.02 for a general extension of time under the *Rules* apply equally to s. 71(2) of the *Act*. Therefore, following *Park Lane Circle v. Aiello*, 2019 ONCA 451 the factors to be considered in deciding whether to extend time to appeal are: (1) whether the proposed appellant had a bona fide intention to appeal within the prescribed period; (2) the length of and explanation for the appellant's delay; (3) any prejudice to the respondent from the granting of an extension of time; (4) the merits of the proposed appeal; and (5) whether the justice of the case requires an extension of time. At the stage of considering the justice of the case, the court must consider all of the preceding factors as well as any others that may be relevant and balance them.

On the facts of the case, 690 King formed an intention to appeal within the 15-day appeal period, the failure to do so was counsel's inadvertence, as soon as new counsel was retained, the notice of appeal was served, and there was no prejudice. As for the merits, Justice Kristjanson again cited Justice van Rensburg in the Court of Appeal for the proposition that motions to extend time to appeal should not devolve into a full argument on the merits of the appeal or the litigation as a whole, and that all that needs to be shown on a cursory review of the evidence is that the proposed appeal is not so completely devoid of merit that the appellant should be denied his important right of appeal.

***Young EnergyServe Inc. v. LR Ltd, LR Processing Partnership*, 2021 ABQB 101**

Alberta courts continue to draw a clear distinction between the work involved in the construction of an improvement as part of the construction process on a building site and the subsequent maintenance. The former is obviously related to 'making or constructing' while the latter, falling in the category of maintenance, clearly is not.

Thus, in this case, work done on a turnaround project involving cleaning, repairing and relining the interior of tanks and pressure vessels, and the replacement of worn or faulty piping and pressure valves, was not related to the construction or expansion of the plant in question and therefore did not constitute an "improvement" to the plant within the meaning of the Alberta Act. The court held that the contractor's reliance on Ontario case law was misplaced, since given the absence of the words "alter," "add," and "repair" in the Alberta Act, the term "improvement" was to be construed more narrowly than the same term in the Ontario Act.

***Sedia Inc. v. Athena Donair Distributors Ltd.*, 2021 ONSC 900**

A non-party in a lien action cannot be added by way of counterclaim. Since the *Construction Act* (now O. Reg. 302/18) prohibits such addition, the Rules cannot validate it. Nor did an argument that the non-party was a necessary party and that his inclusion would permit a summary determination of the matter allow the court to circumvent the provisions of the Act.

***Diamond Drywall Contracting Inc. v. Elderberry Enterprises Ltd.*, 2021 ONSC 1068 (Master)**

Despite a nine-month delay, the Master extended the time for serving a statement of claim in this lien action. Even though both the length of delay and the explanation for the delay were described as "borderline", the Master was mindful of the fact that we are in the middle of a pandemic and was prepared to be more forgiving than he otherwise might have been.

***Allard v. The University of British Columbia*, 2021 BCSC 60**

The "normal rule" in arbitrations is that the successful party is entitled to indemnification costs, i.e. actual reasonable costs, unless there are special circumstances that would warrant some other type of costs.

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October 2020

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