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GLAHOLT BOWLES
CONSTRUCTION LAWYERS

BUILDING INSIGHT

GLAHOLT BOWLES LLP NEWSLETTER

IN THIS ISSUE

SRK Woodworking – Joining Lien and Trust Claims

Does the new *Construction Act* allow a party to join a lien claim with a breach of trust claim? This is the question recently considered by the Ontario Superior Court of Justice in *SRK Woodworking Inc. v. Devlan Construction Ltd.*, 2022 ONSC 1038 ("*SRK Woodworking*"), which held that the longstanding statutory prohibition on joining such claims may no longer apply.

Background - Amendments to the *Construction Lien Act*

The old (pre-July 2018) *Construction Lien Act* did not allow for the joinder of lien and trust claims.

Section 50(2) of that statute provided:

> A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction. R.S.O. 1990, c. C.30, s. 50 (2).

This prohibition was removed when the Ontario legislature updated the provisions of the *Construction Act* in 2017.

What was not removed was another joinder provision. The old *Construction Lien Act* contained a provision in section 55(1) allowing a claim for breach of contract to be joined with a lien claim:

> A plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract.

Thus, under the old *Construction Lien Act*, lien claims could not be joined with breach of trust claims, but could be joined with a breach of contract claim. The oft-expressed rationale for this discrepancy was that claims in contract were amenable to being heard alongside lien claims, but trust claims were more complex and so would unduly slow down the lien action.

Interestingly, when the first amendments to the *Construction Lien Act* occurred in 2017, the breach of

contract joinder provision was also completely deleted from the statute. However, in 2019, after further amendments, the language in the old s. 55(1) was reintroduced, but this time as a Regulation (O. Reg. 302/18) rather than into the main body of the statute.

Thus, when the Court heard the issues in *SRK Woodworking*, the situation was that section 50(2) prohibiting joinder of trust claims had been completely deleted, but the language in section 55(1) permitting joinder of contract claims had been reintroduced in the Regulations. The effect of this latter change was particularly important to the Court's reasoning, as discussed below.

The *SRK Woodworking* Decision

The removal of section 50(2) in the *Construction Act*, and the "re-assignment" of section 55(1) to the Regulations, has presented Ontario courts with the opportunity to opine on the permissibility of the joinder of lien claims with breach of trust claims.

This issue came before The Honourable Justice R. J. Harper on January 26, 2022. Justice Harper's decision focused primarily on two key questions:

1. Can a breach of trust claim be brought along with a lien claim under the *Construction Act* when the old prohibition in bringing such a claim was removed from the *Construction Act*?

2. The former permissive section of the *Construction Lien Act* allowing for breach of contract actions to be joined with lien claims (section 55(1)) was moved in the new *Construction Act* to its regulations. What is the impact of a former section of an Act being replaced by a regulation with the same wording?

Justice Harper's analysis was based on principles of statutory interpretation, the stakeholder recommendations outlined in *Striking the Balance*, and the Hansard debates. Together, they led him to conclude that the joinder of lien claims with breach of trust claims was proper. In coming to this conclusion, Justice Harper adopted the view of the Ministry of the Attorney General's recommendations that the removal of the prohibition of the joinder of lien and trust claims was indicative of the intention to expressly permit such claims to be joined.

For one, *Striking the Balance* considered the additional burdens faced by courts by adjudicating separate claims which nevertheless have similar parties and factual circumstances. Justice Harper found that a joinder of lien and breach of trust claims would reduce the burden faced by courts by permitting actions which have similar facts and parties to be heard together as opposed to separate hearings.

There was further support for permitting joinder from the legislature. Justice Harper considered as persuasive the record (Hansard) of the meeting of the Standing Committee, which included the Advocates' Society recommendation that "the removal of the prohibition on breach of trust claims being heard together with lien actions were agreed to be well overdue". Stakeholders and industry specialists agreed that the joinder of lien and breach of trust claims was a long overdue change that was deemed acceptable, and even ideal, and Justice Harper adopted their logic.

Lastly, Justice Harper noted that the counter-argument that joinder of lien claims with trust claims was inconsistent with the intention of the *Construction Act* would be more persuasive if the prompt payment and prompt adjudication sections of the statute were applicable to the matter before him. However, they did not apply and as such there was no inconsistency with the intention of the *Construction Act*.

Does *SRK Woodworking* Overrule Prior Case Law?

Justice Harper's ruling in *SRK Woodworking* appears to overrule prior case law from Associate Justice Wiebe in *Damasio Drywall v. 2444825 Ontario Limited*, 2021 ONSC 8398 and *6628842 Canada Inc. v. Topyurek*, 2022 ONSC 253 on this issue.

To provide some context: in *Damasio Drywall*, Associate Justice Wiebe also considered whether lien claims could be joined with breach of trust claims. In his view, despite the statutory amendments, joinder was not possible given that "[i]f the legislature intended to allow trust claims to be joined with lien claims, it should have stated so explicitly, given this mandate and the nature and complexity of a trust claim. It did not."

Further, Associate Justice Wiebe opined that a trust claim is an entirely different cause of action than a claim for breach of contract. The fact that the language permitting joinder of contract claims was assigned to the Regulations under the new *Construction Act* led him to find that the Legislature "appears to have had a change of mind and decided to resurrect the joinder limitation of the old section 55(1)". In other words, he concluded that by reintroducing and permitting joinder of contract claims in 2019, the legislation once more and implicitly disallowed joinder of trust claims.

Associate Justice Wiebe's ruling in *Damasio* was *obiter dicta*, but in the *Topyurek* case His Honour adopted the comments made in Damasio.

In his opinion in *SRK Woodworking*, Justice Harper acknowledged these two prior rulings but explained his reasoning for reaching a different result.

First, with respect to the reasoning that there was no express language in

the new *Construction Act* permitting joinder, Justice Harper did not agree and reasoned that the deletion of the previous section 50(2) in the new Act was an overt indication that the legislature did not intend to prohibit such a joinder any longer.

Second, Justice Harper had to determine whether, by introducing the language of s. 55(1) which permitted joinder of contract claims into O. Reg 302/18, this meant the Legislature intended to continue the prohibition on joinder of trust claims. This required considering whether a section of a statute which is removed from the statute and moved to a regulation can have the same force and effect.

On this second point, Justice Harper determined that moving this language to the Regulation had a significant effect: in making such a change, the Legislature did not consider section 88 of the *Construction Act*, which enables regulations to be passed. He found that there was nothing in section 88 which "gives the authority to pass by regulation a provision that dictates what actions may be brought". In other words, O. Reg. 302/18 was not determinative of what kinds of actions could be brought – and joined, including lien actions with breach of trust actions.

Accordingly, it is in these respects that Justice Harper diverged from Associate Justice Wiebe's interpretation, ultimately allowing the joinder of a lien claim with a breach of trust claim on the facts in *SRK Woodworking*.

Conclusion

The decision in *SRK Woodworking* suggests that the era in which joining lien claims was prohibited is now at an end. However, there remains some uncertainty.

For one, while stopping short of declaring the new breach of contract joinder provisions in O. Reg. 302/18 invalid (since he was not asked to determine that), Justice Harper opined that the effect of moving any joinder language to a Regulation, possibly invalid, means there is no longer a permissive joinder section of the statute allowing either a breach of contract claim or a trust claim to be brought. However, His Honour ultimately did not rule on this point – but it potentially leaves open the door to a creative argument that the new *Construction Act* prohibits any joinder whatsoever.

Second, the decision in *SRK Woodworking* may be read to argue that in cases where the prompt payment or adjudication provisions in the new *Construction Act* apply to a matter, then it may not be appropriate to join lien claims with breach of trust claims. This, too, was not fully determined in the decision.

In light of the potential uncertainty, it may be prudent to follow the tried and tested approach of commencing separate lien and breach of trust actions. It is also useful to note that Justice Harper's interpretation of the Act permitting joinder suggests it continues to be permissive, and not mandatory. Even if it is possible to join lien and trust claims in one proceeding, it was never intended to be required. There may be circumstances where separate proceedings are appropriate, even preferable, so as to not burden multi-party lien proceedings with breach of trust claims and *vice versa*.

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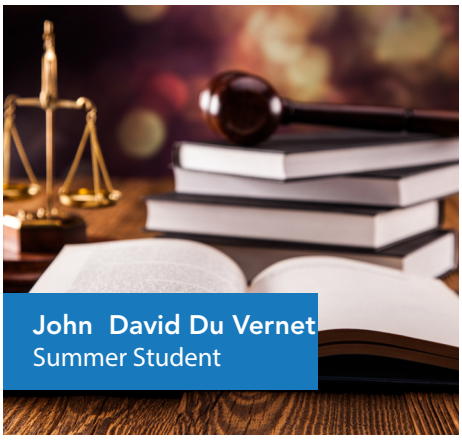

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Notice *Actually* Means Notice: *Crosslinx v. Ontario Infrastructure*

The recent Ontario Court of Appeal decision in *Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)*, 2022 ONCA 187 ("***Crosslinx v. Ontario***"), has served as an important reminder that in order to obtain relief for an alleged breach of contract, proper notice pursuant to the contractual requirements must be provided. In *Crosslinx v. Ontario*, despite the complex project agreement and party structure, the decision turned on the simple contractual provision of notice.

Background

In 2015, Ontario Infrastructure and Lands Corporation ("**Owner**") selected Crosslinx Transit Solutions General Partnership ("**Project Co**") to deliver the Eglinton Crosstown Light Rapid Transit Line ("**Crosstown LRT**"), a large-scale infrastructure project located in Toronto. Pursuant to the Project Agreement, Project Co's scope included the design, construction, finance, maintenance and rehabilitation of the Crosstown LRT. It was during the course of construction that the dispute arose, following the onset of the COVID-19 pandemic and the delays associated with the implementation of the Ontario Ministry of Labour public health and safety measures (the "**COVID-19 Protocols**").

At issue was whether Project Co was entitled to a Variation Enquiry, which if granted, could permit an extension of the Substantial Completion Date. It is worth noting, however, that at the time of the dispute, and prior to the COVID-19 pandemic, the Crosstown LRT was already about a year behind schedule. The Variation Enquiry provision, s. 62.1(c), of the Project Agreement stated:

> If, in respect of any Emergency, HMQ Entities notify Project Co that they require compliance with any additional or overriding procedures as may be determined by HMQ Entities or any other statutory body, then Project Co shall, subject to Schedule 22 - Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures.

For the Variation Enquiry provision to be triggered, there were two requirements. First, the Owner had to state that the pandemic constituted an Emergency. Second, notice of "additional and overriding procedures" had to be delivered to Project Co. The Owner failed to do both, and it was their failure to do so that led Project Co to commence an application for a declaration regarding substantial completion.

Motion to Stay

The Owner brought a motion to stay the application, citing the Project Agreement dispute resolution provisions, which required litigation to be stayed until Substantial Completion. These provisions were subject to exceptions which included the ability for either party to apply to the court for interim protection, per s. 13.2 of Schedule 27 to the Project Agreement. The motion judge relied on this exception, found that staying the application could cause irreparable harm and therefore allowed the application to proceed.

Decision of the Lower Court

In the application, Project Co alleged that the pandemic was an Emergency, which required the implementation of "additional and overriding procedures", being the COVID-19 Protocols that resulted in delays to construction. The Owner's view was that the Provincial Government's declaration of a State of Emergency on March 17, 2020 precluded the need to declare an Emergency under the Project Agreement. Further, the Owner asserted that the health and safety obligations of the contract required Project Co to comply with the government's construction industry COVID-19 Protocols which fell squarely within Project Co's obligation to remain in compliance with Applicable Laws.

Justice Koehnen, as application judge, disagreed with the Owner's arguments; he held that "(i) the COVID-19 pandemic is an Emergency under the Project Agreement … (ii) the appellants had required compliance with additional or overriding procedures … and (iii) the appellants had a contractual obligation to provide a Variation Enquiry under the Project Agreement." In assessing the notice requirement under s. 62.1(c), Justice Koehnen found that the Owner's email dated March 25, 2020 was sufficient notice to trigger the Variation Enquiry. Justice Koehnen also held that the construction COVID-19 Protocols issued by the Government were not legally binding and could not be deemed to be Applicable Law, and thus did become Project Co's obligation or risk per the Project Agreement's health and safety requirements. The Owner appealed this decision. (To read more about the lower court's decision and analysis, you can find our previous article here)

Court of Appeal Decision

On appeal, the Owner asserted that the application judge made a "palpable and overriding error" as it related to the March 25, 2020 email, stating it did not, and could not, satisfy the notice requirements of s. 62.1(c) of the Project Agreement because it was an internal email. Additionally, the Owner

argued that the application judge erred in his interpretation of the Project Agreement and the allocation of risk of the COVID-19 health and safety protocols by not requiring Project Co to fulfil their obligation to comply with same, pursuant to the Applicable Laws.

The Court of Appeal narrowed their focus on the issue of whether proper notice, pursuant to the Project Agreement had been delivered. The appellate court held that it was only necessary to consider whether a "palpable and overriding error" occurred with respect to the application judge's decision that the Variation Enquiry had been triggered. To determine whether the application judge made a palpable and overriding error, the Court of Appeal applied the standard articulated in the Supreme Court of Canada's decision, *R. v. Clark,* 2005 SCC 2. This standard does not allow Appellate court interference with an application judges' findings of fact "unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable".

The Court of Appeal concluded that a palpable and overriding error had occurred. The March 25, 2020, email was internal and was never delivered to Project Co. Therefore, no notice was provided to satisfy the requirements of s. 62.1(c). As a result, the Variation Enquiry could not have been triggered.

In its submission, Project Co argued that, even if the March 25, 2020 email did not satisfy the notice requirements, a letter dated April 21, 2020, was sufficient notice to trigger the provision. The Court of Appeal held that this was also not the case. The letter was too vague and could not be interpreted to serve as notice. Notably, the Court of Appeal's decision highlighted that Project Co never communicated to the Owner that any of the forgoing communication served as the trigger to the Variation Enquiry, but only that they *should have triggered* the Variation Enquiry.

The Court of Appeal allowed the appeal but declined to dismiss the application. Rather, the Court remitted the application for a rehearing. In so doing, they recited the application judge's reasoning that "[t]he nub of the issue between the parties is whether [the appellants] asked or should have asked [the respondents] to implement additional or overriding procedures with respect to the project" (emphasis in original).

Although the Court overturned the application judge's finding that the appellants asked the respondents to implement additional or overriding procedures, it was not in a position to engage in fact finding or a credibility analysis to determine whether the appellants should have asked the respondents to implement additional or overriding procedures. The application judge did not complete any analysis relating to whether the previously mentioned communication had triggered or should have been deemed to have triggered s. 62.1(c). For lack of factual findings, the application was sent back to the Superior Court for rehearing.

Key Takeaway

This decision serves as a reminder of the importance of proper notice pursuant to the contract. As seen in *Crosslinx v. Ontario*, despite the complexity or length of an agreement, failure to adequately provide notice pursuant to the Project Agreement can prohibit a party from seeking relief under the contract. The Court of Appeal is clear: notice *actually* means notice.

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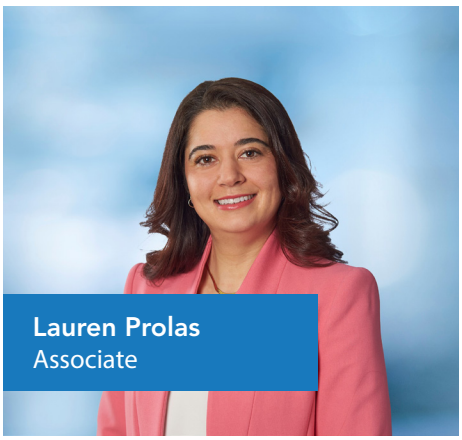

Summary of ICC Commission Report: Leveraging Technology in International Arbitration Proceedings

Our world has changed as a result of COVID-19; so has dispute resolution. In response to the onset of the COVID-19 pandemic, the ICC Commission on Arbitration and ADR established a Working Group to update the 2017 edition of its Report on Information Technology (IT) in International Arbitration. The report identifies issues to be considered when using digital solutions and processes in conducting arbitration proceedings. However, as a result of the sudden uptick in the use of technology in international arbitrations resulting from the pandemic, rather than updating its 2017 report, the ICC produced an entirely new report entitled titled ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (the "Report"). The Report was released on February 18, 2022.

The scope of the Report is: (i) to identify the technologies being used most frequently in the arbitral process, (ii) to provide insight into the features and functionality that may enhance the arbitral process, and (iii) to discuss

useful procedural practices and pitfalls to be avoided. The Report includes sample procedural language relating to technology tools and solutions, checklists for virtual hearings, items to consider when choosing an online case management platform and a template procedural order for the conduct of evidentiary hearings via teleconferencing.

In preparing the report, the ICC surveyed over 500 international arbitration community members on their experiences with, and opinions of, technology tools and solutions for international arbitration. The survey results indicated that the use of technology in international arbitration will increase in the future. Like the changes in the court system which resulted from COVID-19, the survey predicts that hard copy filings will not be the default in the future of international arbitration and that other items, such as e-briefs and hyperlinked exhibits, will be used much more frequently.

93% of respondents believe technology has transformed arbitration by helping streamline processes and improve the cost-effectiveness of the process. This is reflected at our firm, which was engaged in multiple international arbitrations throughout the early stages of the COVID-19 pandemic and to date. Rather than parties having to fly in to testify and incur the costs of staying at a hotel, parties could simply videoconference into the arbitration on an as-needed basis.

One of the key takeaways from the report is that the use of technology should be considered, and parties should examine their assumptions about how hearings will unfold at the outset of an arbitration. Arbitrators and parties should ask themselves how they can make better use of technology, without compromising fairness or efficiency. Most respondents to the survey said that they believed that there should be no presumption in favour of physical, hybrid or virtual hearings. Rather, tribunals should decide which method is appropriate based on the circumstances of the case to be heard. For example, parties with fewer resources or in rural areas may not have readily available access to reliable internet or possess the required technological competency for a virtual hearing. This may tip the balance in favour of a hybrid or in-person hearing, again depending on the circumstances of the case.

Another interesting point which arises out of the report is that in the ethical codes of some jurisdictions and arbitration bodies, it is now explicit that tribunals and arbitrators have a responsibility to possess basic technological competence, which includes keeping up to date with new developments. One of the reasons for this is that arbitrations are particularly at risk for cybersecurity and data privacy issues due to the sensitive nature of the information involved. Thus, all parties involved in the arbitration must be competent in technology in order to preserve the integrity of the process at large.
Below are key takeaways from the Report with respect to utilizing technology for international arbitrations, as well as issues to consider with respect to technology use.

Case Management

One of the main technologies discussed in the Report is an online case management platform, which enables parties to track and store files in a centralized location. A secure case management platform administered by an arbitral institution allows parties to upload, share and store all documents for a case in a single location and helps avoid the need to prepare hard copies of pleadings and evidence. It can also result in time and cost savings and may help to streamline the document management process. The ICC is designing a secure digital platform and is expecting to launch phase 1 by June 2022.

Cybersecurity and Data Privacy

The Report explores how cybersecurity and data privacy have become important concerns in international arbitration. One of the main reasons parties choose arbitration is that, unlike traditional commercial litigation, it allows parties to resolve their disputes confidentially. International arbitrations often involve commercially sensitive and/or confidential information that is not publicly available. Arbitral proceedings are prime targets for cyberattacks given that the parties are often governments, large corporations, multinational groups, state entities or public figures. The implementation of proper cybersecurity protocols is critical to maintaining public trust in the arbitration process.

As such, arbitral institutions including the ICC now commonly expect that arbitral participants will take reasonable measures to prevent digital intrusions into the arbitral process and may require that the matter of cybersecurity be considered by no later than the first case management conference. The ICC also recommends that parties and tribunals have a written record of the technical measures that will apply during the arbitration.

Data Integrity

Another potential risk of using technology for arbitrations is the risk that parties can alter or otherwise tamper with virtual documents and evidence. To ensure information is not altered after it has been produced, parties should produce information in a format which makes it more difficult to alter, such as Bates-numbered PDFs.

It may also be helpful for the parties to have access to metadata when the authenticity of a document is questioned. Metadata is data embedded within the document that can be used to show the date a document was most recently altered, among other things. It is also important to allow parties the right to inspect the originals of any documents where their authenticity is questioned.

Costs

The implementation of various technology and security measures may be costly and the question of who will bear the costs could become a point of contention between parties. Further, the licensing costs of certain platforms may not be proportionate to the dispute and the benefit derived may not be equally shared by or accessible to the parties.

If the tribunal requires a certain technology be used, for example, an online case management platform, it should consider whether the reasonable costs incurred to comply with the tribunal's directions should be borne by one party or split between the parties and if such costs will be potentially recoverable by the successful as part of the costs of the arbitration. These kinds of cost issues can be determined and agreed upon as part of the initial case management conference.

Applicable Arbitration Rules and Mandatory Law

It is becoming increasingly common for parties in arbitrations to electronically sign and exchange documents, notifications and communications. In international arbitrations, it is important to keep in mind that some jurisdictions do not consider certain notifications, the service of documents or signatures, as valid where they are entirely or in part electronic. For example, in Nigeria there are express legal requirements for giving a hard copy notice of the commencement of an arbitration. Other countries have legislative requirements for an "original" or certified copy of an award.

There are now widely available e-signature applications, such as DocuSign, which people can use to create a signature and sign legal documents. However, some jurisdictions do not recognize electronic signatures or even scans of manual signatures and require a physical signature on hard copy paper. As such, it is important to comply with the laws which apply with respect to electronic documents and signatures in the jurisdiction of the arbitration.

In addition to familiarizing themselves with the laws which apply to the arbitration, the parties should clarify at the outset of the proceedings their preferred method of communication with respect to receiving documents and discuss whether any party or tribunal member is subject to technical restrictions on the size of email or attachments that can be received. Again, this is something that can be dealt with at the first case conference.

Virtual Hearings

During parts of the pandemic, in-person hearings were not possible. As a result, parties and arbitrators were forced to adapt and virtual hearings became much more common. In the beginning stages, many parties and arbitrators experienced a learning curve as they navigated this relatively new method of hearing, including videoconferencing technologies and real time, on-screen document sharing. Now, some parties prefer virtual hearings because of the potential savings they offer in terms of time, travel and costs. They can also be more conducive to arbitrations where parties are located different time zones. Others still prefer in-person hearings, or a mix of both (hybrid hearings).

Generally, the ICC supports the use of virtual hearings. It has prepared a document called "Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organization of Virtual Hearings" to assist parties and arbitrators participating in virtual hearings.

That being said, it is important to note that if a virtual hearing is convened despite the objection of a party or without the agreement of the parties, there is a risk that a party may challenge the validity and enforceability of the arbitral award. To ensure enforceability, the ICC has revised its rules to confirm the tribunal's authority to conduct virtual hearings. Further, in ICC cases, when tribunals have proceeded with virtual hearings by agreement of the parties, they have sometimes incorporated language in the procedural order whereby parties agree to waive their rights to object to the enforceability of the award by reason of the hearing taking place virtually.

Although there are undoubtedly benefits to virtual hearings, the objections raised in recent ICC cases raise some questions regarding whether it is preferable to conduct virtual or hybrid hearings. Some of the concerns raised are as follows:

- The potential violation of due process rights, including the right to present one's case;
- Technological limitations due to the participation from different locations and countries and older participants potentially being less technologically savvy;

- Confidentiality and time zone issues, limiting appropriate time slots;
- Additional costs involved;
- Difficulties in displaying or following evidence;
- Difficulties relating to witness preparation; and
- 'Screen fatigue' requiring shortened hearing days.

Arbitrators should consider these issues at the outset, when determining how the arbitration hearing will take place.

ICC Survey on Use of IT in International Arbitration

The ICC Commission on Arbitration and ADR conducted a survey to better understand the current state of technology in modern international arbitration practice and received 520 responses, mostly from those whose primary role in international arbitration proceedings is as counsel or arbitrator, or whose time is split between the two roles. Some key findings from the summary are as follows:

93% of respondents believe technology has transformed arbitration by helping streamline processes and improve the cost-effectiveness of the process;

- 83% agreed that technology has been underutilized in the arbitral process;
- 74% disagreed that technology has created or exacerbated concerns about fairness and/ or equa treatment of the parties, yet respondents were nearly evenly split as to whether technology has levelled the playing field between the parties, with 51% agreeing that it has and 49% responding that it has not;
- 95% of respondents believe that during the initial case management conference, tribunals should routinely discuss with the parties how IT may be used to increase the efficiency of, or otherwise enhance, the arbitral proceedings.

Some of the IT solutions the respondents stated that they would use 'more often' after the pandemic are:

- Videoconferencing for a case management or other procedural conference (83%);
- Online case management platform/ virtual data room for exchange of all or most communications and submissions (71%);
- Cloud file sharing site for the exchange of documents (68%); and
- Hyperlinked submissions/e-briefs or e-bundles (58%).

Asked about whether technological competence will be an important consideration going forward when selecting an arbitrator, 51% responded 'yes' and 40% responded 'it depends'.

Conclusion

Technology is becoming more entrenched in the legal system, including alternative dispute resolution methods. Although we are now seeing some return to in-person hearings, the legal system will not be returning to how it was before the pandemic. Further, as technology continues to advance and institutions such as the ICC continue to improve solutions to issues such as cybersecurity, technology will increasingly be used as a tool to facilitate access to justice by decreasing costs and time commitments.

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The Ontario Superior Court Sinks Its Teeth Into Whether Parties Must Comply With An Adjudicator's Determination Pending Judicial Review

Background

The decision in *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254 ["SOTA Dental"], reinforces the requirement on parties to comply with an adjudicator's determination within 10 days, even in circumstances where judicial review of the determination has been sought.

In this dispute, Andrid Group Ltd. ("Andrid") was a contractor retained by SOTA Dental Studio Inc. ("SOTA"), the owner, to build a dental clinic in Vaughn, Ontario. SOTA did not pay all invoices for work completed by Andrid for the construction of the clinic per the prompt payment provisions under the Construction Act (the "Act") and Andrid elected to adjudicate the dispute. At the adjudication, SOTA was ordered to pay Andrid $38,454.55. SOTA only made partial payment and then sought judicial review of the determination, but did not seek a stay of the determination in the process.

The sole legal issue in this case was whether SOTA was required to abide by the adjudicator's determination while seeking judicial review, despite not bringing a motion for a stay of the determination pending finalization of the judicial review.

Ruling

The Divisional Court found that SOTA's non-compliance with the adjudicator's determination coupled with the failure to seek a stay while pursuing a judicial review undercut the scheme of the prompt payment provisions in the Act.

To begin its analysis, the Court's reviewed the language at s. 13.18(7) of the Act which makes clear that an application for judicial review does not automatically stay an adjudicator's determination. A motion must be brought before the court will consider whether to grant such relief.

The Court reiterated that the purpose of the prompt payment provisions of the Act is to ensure that money continues to flow through the construction pyramid and avoid disruption and delay over payment disputes that will inevitably arise. Adjudication was instituted as an alternative dispute mechanism to ensure a speedy resolution is reached by an experienced construction professional in the role of adjudicator.

By flouting the adjudicator's determination, SOTA was disregarding the core intention of the legislative scheme and the Court simply could not allow this.

Furthermore, s. 13.19(2) of the Act makes clear that a party who is required to pay an amount pursuant to a determination, must do so no later than 10 days after the determination is communicated to all parties. SOTA refused to do this. The Court made it clear that in the absence of a judicially ordered stay, SOTA was under an obligation to make the payment awarded by the adjudicator within the 10 days prescribed by the Act.

At paragraph 12 of its ruling, the Court outlines key principles that all parties to an adjudication must bear in mind:

Prompt payment is integral to the scheme of the *Construction Act*.

Failure to pay in accordance with the prompt payment requirements of the Act may lead this court to refuse leave. Where leave is granted, an applicant must obtain a stay or must make payment, failing which this court may dismiss the application on a motion to quash or at the hearing of the application.

The Court therefore ruled in favour of Andrid and, for its troubles, Andrid was awarded $10,000 in costs.

SOTA Dental is a clear signal that despite the relatively new landscape of adjudication in Ontario, courts will defer to and enforce the decision of an adjudicator, particularly in cases where no stay has been sought pending judicial review. An adjudicator's determination should not be taken lightly, and courts will recognize and protect the legislative intent of the Act given the unique needs of the construction industry where prompt payment is central.

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Non-Payment of Invoices and Limitations - *Thermal Exchange Service Inc. v. Metropolitan Toronto Condominium Corporation No. 1289*

The Ontario Court of Appeal has released yet another decision on when a contractor who is not paid for its invoices should know that a proceeding is an appropriate means to seek to remedy the non-payment.

In *Thermal Exchange Service Inc. v. Metropolitan Toronto Condominium Corporation No. 1289*, 2022 ONCA 186, Thermal serviced the HVAC units in the Condo Corp.'s building for 13 years, from 2002 until 2015. It did so on the understanding that it had a contract with the Condo Corp. rather than the individual unit owners.

As it turned out, however, the Condo Corp.'s property manager was under the mistaken impression that the Condo Corp. was not ultimately liable for paying the invoices and was only obligated to pay if and when it was able to collect payment from the unit owners on whose behalf the work was done.

Thermal received work orders from the property manager, performed the work she requested, and invoiced the Condo Corp. While the invoices stated that payment was due within 30 days from the date of the invoice, the Condo Corp. typically made payment much later, in some in-stances up to 300 days later. Thermal continued to provide services on request and tender fresh invoices, but from 2008 forward, Thermal stopped sending individual invoices and began sending a single, semi-annual "batch invoice".

Thermal had several conversations with the property manager about the non-payment of invoices, and she would invariably tell them that she was terribly busy and unable to attend to the matter immediately, but was working on the invoices.

In October 2015, Thermal thought a demand letter from its lawyer might encourage the property manager to process the invoices. On November 4, 2015, she unexpectedly informed Ther-mal that the Condo Corp. was not responsible for payment.

On August 17, 2017, Thermal filed its statement of claim, seeking damages for services supplied, breach of agreement, and unjust enrichment.

The trial judge held that the claim was first discoverable as of the date of the demand letter in October 2015. She found that the nature of the commercial relationship between the parties was that there was a single running account, and whenever Thermal received funds from the Condo Corp, it was credited to that account. The trial judge accepted the evidence of Thermal's president that he sincerely believed the Condo Corp. had been dealing with him in good faith and that the property manager's statements that she was "working on it", meant that his in-voices would eventually be paid. He did not realize until her email of November 4, 2015 that she was, on behalf of the Condo Corp., taking the position that payment by Condo Corp. would be contingent on payment by the unit owner.

That trial judge's conclusion was based on the Court of Appeal decision in *Presley v. Van Dusen*, 2019 ONCA 66. The Condo Corp. appealed.

The principal argument was that the trial judge erred in relying on *Presley v. Van Dusen*, in which a plaintiff owner postponed bringing an action against a contractor because of assurances by the contractor, who had a superior understanding of the problem, that it could fix the mechanical problem at issue in that case. The Condo Corp. argued that this case was nothing like *Van Dusen*, given that Thermal was not relying on the Condo Corp. to fix a mechanical problem beyond the expertise of Thermal; the Condo Corp. never promised unequivocally to pay the invoices, but was simply stringing a creditor along; and Thermal waited substantially longer to begin a proceeding than the plaintiff in *Van Dusen* did.

The Court of Appeal disagreed:

> There is nothing in the reasoning in *Van Dusen* that would restrict its application to comparative expertise over mechanical problems. The salient aspect is that the defendant created a problem, the remedy for which was beyond the reach of the plaintiff's understanding, and led the plaintiff to rely on it for the remedy. Analogous to the situation in *Van Dusen*, the Condo Corp. created a barrier to Thermal Exchange receiv-ing payment (it would not pay unless it first received payment from the unit owners, and was not taking any steps to getting the unit owners to pay), prevented Thermal Exchange from understanding the nature of the problem, and led Thermal Exchange to believe that it would take care of the problem.

While the Court of Appeal agreed with the appellant that the trial judge was wrong in finding that the limitation period was triggered on the date Thermal sent the demand letter, that did not help the appellant, because the Court of Appeal found that the period commenced later than that, i.e. on the date the property manager advised Thermal that the unit owners rather than the Condo Corp. were liable for the invoices.

The principle in *Van Dusen* has therefore been extended to any situation in which a defendant created a problem, the remedy for which was beyond the reach of the plaintiff's understanding, and assures the plaintiff that it will take care of the problem.

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Notable Case Law

***Maio v. Kapp Contracting Inc.*, 2022 ONCA 196**

The Court of Appeal explained the general rule that plaintiffs are entitled to recover one hundred percent of their damages from any tortfeasor who is found liable for damages, even if other tortfeasors are also responsible for the same damages. A tortfeasor can then avoid paying all damages by making crossclaims or third-party claims. The court explained that the effect of a *Pierringer Agreement* must be understood in the context of these principles.

Accordingly, a *Pierringer Agreement* that limits a plaintiff's ability to recover for the several liability of remaining defendants does not limit a plaintiff's recovery to only those damages directly attributable to the remaining defendants. Rather, unless the agreement is specifically worded otherwise, the effect of such an agreement is to ensure that the plaintiff does not recover any damages attributable to the defendant released in the Pierringer Agreement.

***Manitok Energy Inc. (Re)*, 2022 ABCA 117**

After an oil and gas well has been fully exploited, the licensee operating it must "abandon" the well, by sealing it off in an environmentally safe way. It must then "reclaim" the surface of the land, all of which is mandated by Regulation. The Alberta Court of Appeal held that those end-of-life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from a bankrupt's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

***Triplecrete Limited v. Pentad Construction Limited*, 2022 ONSC 1830 (S.C.J.)**

Claims in restitutionary *quantum meruit* by subcontractors against owners will generally not be allowed because to do so would circumvent and undermine the scheme established by the construction lien legislation.

***Pylon Paving (1996) Inc. v. Beaucon Building Services Inc.*, 2022 ONSC 3282 (Associate J.)**

Under the former *Construction Lien Act*, trust claims could not be joined with lien claims. Under s. 58(4) of the former Act, a master or case management master to whom a reference was directed had all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action. In this case, the associate judge held that that expanded authority arose in the context of a reference of a lien action under s. 58(1)(a) and was limited to those liens and lien actions that had been specifically referred to be determined by an associate judge and any other liens and lien actions that became subsumed in the reference by operation of the CLA. It went no further. Specifically, it could not be used for other related non-lien actions that have not been referred, including breach of trust claims.

The plaintiff sought default judgment under Rule 19.05 of the Rules. That rule expressly requires a motion to a judge. The Associate Judge had no jurisdiction to grant default judgment under it outside a lien reference.

Legislative Update

- Saskatchewan's new prompt payment and mandatory adjudication legislation is now in force. The legislation has some transition periods in place. If a contract between an owner and contractor was entered into prior to March 1, 2022, prompt payment will not apply to that contract or any resulting subcontracts. In addition, the new provisions do not apply to improvements made pursuant to a lease entered into before March 1, 2022.

- In New Brunswick, the requirement in the *Construction Remedies Act* for owners to establish holdback trust accounts took effect on April 1, 2022.

- The Alberta government has announced that Bill 37: The *Builders' Lien (Prompt Payment) Amendment Act, 2020* will come into force on August 29.

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Building Insight Podcasts

Episode 31: A Lawyer's Duty to the Court (Part 2): Updates on *Blake v. Blake*
October 2021

Katherine Thornton and Jackie van Leeuwen, associates, discuss a lawyer's duty to the court, particularly when it comes to bringing relevant case law to the court's attention, and cost consequences. This podcast provides updates on *Blake v. Blake* and lessons learned from this decision.

Episode 32: Bidding and Tendering: Recent Developments in the Law
December 2021

Neal Altman and Brandon Keshen, associates, discuss recent developments in the law of bidding and tendering. This podcast discusses the terms of tender calls, including discretion and reprisal clauses.

Episode 33: Sustainable Construction
January 2022

Michael Valo, partner, and Markus Rotterdam, Director of Research, discuss sustainability in construction and legal issues related to green building standards.

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Episode 34: Considerations and Best Practices when Entering into a Building Contract
March 2022

Associates, Patricia Joseph, Jackie van Leeuwen and Myles Rosenthal, reflect on construction contracts, including a discussion of some pragmatic considerations that are relevant before and during contract performance.

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Episode 35: Construction Prompt Payment and Adjudication in Canada
May 2022

John Paul Ventrella, Partner, and Matthew DiBerardino, Articling Student, discuss some key considerations regarding the conduct of a construction adjudication in Ontario and the status of prompt payment and adjudication legislation in other Canadian jurisdictions.

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Episode 36: 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings
June 2022

Partners, Brendan Bowles and Lena Wang, and Director of Research, Markus Rotterdam, discuss the 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings texts available from Thomson Reuters Canada Limited. Key updates to the books are discussed and commentary on their development is given.

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