WINTER 2021
ISSUE 14

GLAHOLT BOWLES
CONSTRUCTION LAWYERS

BUILDING INSIGHT

GLAHOLT BOWLES LLP NEWSLETTER

IN THIS ISSUE

Good Faith for the 2020s, Part 1: *C.M. Callow Inc. v. Zollinger*

The seminal case of *Bhasin v. Hyrnew*, 2014 SCC 71, redefined contract law in Canada last decade. The unanimous decision of the Supreme Court, authored by Justice Thomas Cromwell, cemented the "organizing principle" of good faith underpinning contractual relations, and recognized specifically the common law duty of honest performance borne by parties to a contract towards each other. While good faith had percolated before, *Bhasin* opened the valve – some might say the floodgates – and has led us all to wonder how far it goes now and may go in the future.

In late 2019, a substantially revamped Supreme Court (featuring only 3 justices who took part in the Court's decision in *Bhasin*), heard two appeals concerning the parameters of good faith as an organizing principle. The decision in the case of *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 – on appeal from the British Columbia Court of Appeal – was just released in February 2021. Expect Part 2 of this series to cover that decision, on the good faith exercise of contractual discretion, in the near future.

Alongside *Wastech*, the Supreme Court heard the case of *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, on appeal from the Ontario Court of Appeal (2018 ONCA 896). *Callow* is a case about deception, and the Supreme Court decision released late last year has now made it profoundly clear that actively deceiving or knowingly misleading a counterparty concerning exercise of contractual rights is a breach of contract and will entitle the deceived party to damages.

Facts

In 2010, a group of ten condo corporations in Ottawa (collectively "Baycrest") managed by Condominium Management Group ("CMG"), entered into its first two-year winter maintenance agreement with C.M. Callow Inc. ("Callow"), owned and operated by Christopher Callow. Baycrest's Joint Use Committee ("JUC") was responsible for making decisions regarding shared assets, based on reporting and recommendations from CMG. CMG and the JUC oversaw the work by Callow, and in 2012 Baycrest entered into two new two-year agreements with Callow: a renewal of the winter maintenance contract (November 2012 to April 2014) and a separate summer maintenance contract (for 2013 and 2014). The key term in the winter maintenance agreement was Clause 9, which allowed termination without cause by Baycrest on just 10 days' notice in writing.

Complaints arose regarding Callow's 2012-2013 winter maintenance performance, but – as found by the trial judge – Callow's performance was not below the required standard and the complaints were primarily caused by individual owners and tenants, and nevertheless were addressed by Callow including at a January 2013 JUC meeting. The evidence reflected Baycrest's overall satisfaction with Callow's performance. However, in Spring 2013, Baycrest/CMG appointed a new property manager, Tammy Zollinger, who immediately advised the JUC to terminate the winter maintenance agreement. In March or April 2013, the Baycrest JUC voted to terminate the winter maintenance agreement, but Baycrest decided not to disclose its decision to terminate at the time.

As Callow performed the summer maintenance agreement in 2013, it also pursued a further renewal of the winter maintenance agreement. Callow discussed potential renewal with several JUC members, and from those conversations came to the view that a further renewal of the winter agreement was likely. Callow did work "above and beyond" what was required under the summer maintenance agreement, described as "freebie" work, including the improvement of two condo gardens. In July 2013, JUC members corresponded about this work by Callow, acknowledging that it was being performed based on Callow's expectation that he would be continuing the winter work. Baycrest still did not correct Callow's misapprehension, hoping to keep Callow performing as a "back pocket option", and Callow did not seek alternative contracts for the upcoming winter of 2013-2014.

On September 12, 2013, Baycrest finally communicated its notice of termination of the winter maintenance agreement, providing 10 days' notice in accordance with Clause 9. Callow commenced an action against the Baycrest corporations, CMG, and Zollinger, claiming $81,383.68 for breach of contract, intentional interference with contractual relations, and negligent misrepresentation.

Lower Courts

At trial, Justice O'Bonsawin found Callow's evidence credible, and found that the Baycrest witnesses "provided many exaggerations, over-statements" and "comments contrary to the written evidence". Justice O'Bonsawin considered the specific conclusion in *Bhasin* that the duty of honest performance did not include a freestanding "duty to disclose" but did draw a distinction for what she referred to as "active deception" by Baycrest. She found that Baycrest did not meet a "minimum standard of honesty", and intentionally withheld the information about its decision to terminate in bad faith. Justice O'Bonsawin awarded damages to Baycrest in the amount of $80,742.10, primarily comprised of an amount equal to the value of the winter maintenance agreement for one year.

On appeal to the ONCA, Baycrest argued that Justice O'Bonsawin (1) improperly expanded the duty of honest performance, and (2) erred in assessing damages. In a unanimous decision, the Court of Appeal panel of Justices Lauwers, Huscroft, and Trotter allowed the appeal. The ONCA highlighted Cromwell's own characterization of the *Bhasin* decision as a "modest, incremental step". The ONCA found "no unilateral duty to disclose information relevant to termination". With Callow having admitted Clause 9 did not require more than 10 days' notice to terminate, the ONCA found no breach of contract by Baycrest. In any event, the ONCA decided, the summer 2013 communications by JUC members to Callow related to a new potential contract under negotiation (an extension following the winter of 2013-2014), and not the existing one being performed.

Supreme Court – Majority Decision

The majority opinion of the Court was authored by its newest member, Justice Nicholas Kasirer, and for it he was joined by Chief Justice Wagner and Justices Abella and Karakatsanis (the three of *Bhasin* experience), along with fellow newcomer Justice Martin. The majority disagreed with the ONCA's analysis and found in favour of Callow. As Justice Kasirer wrote, the ONCA was incorrect in finding that the misleading communications by Baycrest concerned only negotiation for an extension. In framing this inquiry Justice Kasirer stated:

> In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly.

At trial Justice O'Bonsawin found the dishonesty was related to the termination of the agreement then in-effect, not negotiation for an extension (but more on this below). Unlike the ONCA, the Supreme Court relied heavily on this determination, and Justice Kasirer found no error in the trial judge's findings.

Justice Kasirer found Baycrest's conduct amounted to a breach of the duty of honest performance – Baycrest had an obligation to refrain from misleading Callow in exercise of the termination clause and had "an obligation to correct the false impression created through its own actions". Justice Kasirer repeated the finding at trial that this amounted to "active deception" and found that Baycrest "knowingly misled" Callow in the manner in which it exercised Clause 9. Considering Baycrest's conduct as a whole, they were aware of Callow's misapprehension and should have corrected it.

In *obiter*, Justice Kasirer noted:

- Baycrest was entitled to end the contract as and when it did (there was no argument of unconscionability), but the dishonesty surrounding the exercise of that right was the breach entitling Callow to damages;
- The duty of honest performance remains distinct from civil fraud and estoppel, and does not require an intention that the representation or false statement be relied upon; and
- It is "useful" to consider Quebec case law surrounding good faith and other commentary in applying the common law duty of honest performance recognized under *Bhasin*.

The majority awarded Callow its expectation damages, as flowing from a breach of contract.

Concurring and Dissenting Opinions

Justice Brown wrote a concurring opinion, joined by Justices Moldaver and Rowe, which agreed in the finding of a breach of the duty of honest performance, but disagreed in two notable respects with the majority opinion. First, there was disagreement with Justice Kasirer's discussion of the doctrine of abuse of right under Quebec law, finding that doing so "will only inject uncertainty and confusion" into understanding and applying the common law duty. Second, the concurring justices found that "the justification for awarding expectation damages does not apply to breach of the duty of honest performance" as the wrong in this case, like *Bhasin*, was extra-contractual misrepresentations upon which the plaintiff relied, and therefore reliance damages should be the proper measure.

In her dissenting opinion, Justice Côté also criticized the majority's and Justice Kasirer's observations on the role of external legal concepts: "an unnecessary comparative exercise … under the pretext of dialogue". The seed of Justice Côté's substantive disagreement was that, in her view, *Bhasin* found that all obligations flowing from the duty of honest performance are negative, not positive. Justice Côté explained: "silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak." In her view, there was no obligation to correct a counterparty's mistaken belief unless the party "materially contributed to it". She would have found that neither Baycrest's vague comments relating to potential renewal nor its purported satisfaction with services materially contributed to Callow's mistaken belief that the winter maintenance agreement would continue.

Where do we go from here?

The implications of the *Callow* decision are significant. While the Supreme Court stressed – like in *Bhasin* – that the duty of honest performance does not imply a duty of loyalty or to forgo advantages, and nor does it revise the contractual bargain to imply additional notice requirements for termination, the decision does clearly stand for the proposition that an undisclosed decision to exercise a contractual right can amount to a breach in certain circumstances. The rights of a party to take particular actions at particular times of its choosing might traditionally have been considered to be an unfettered

discretion, but that is now clearly not the case and exercise of contractual rights in the face of "active deception" or having "knowingly misled" a counterparty is a breach of the duty of honesty and will entitle a counterparty to damages.

The inquiry of whether the dishonesty is connected to performance of the contract is fact-specific, but did the facts in this case support the outcome? It is obvious from Justice O'Bonsawin's trial decision that she preferred Callow's evidence to that of the defendants' witnesses. The written evidence was similarly favourable to Callow concerning the quality of his performance but was curiously thin on the arguably central question of whether Baycrest contributed to Callow's misapprehension about future years of winter maintenance work. The determination boiled down to emails between two board members, Mr. Peixoto and Mr. Campbell, on July 17, 2013. Those emails acknowledged that the "freebie" work was being performed by Callow as an incentive for Baycrest to renew the winter maintenance contract, but they do not appear to go so far as to suggest Baycrest confirmed renewal or continuation of the contract was likely as a result. Is awareness of a misapprehension sufficient cause to require disclosure to correct that misapprehension, even if a party did not contribute to it? The Supreme Court appears to have decided yes.

It remains to be seen how significantly the decisions in *Callow* and *Wastech* will impact honesty in contractual performance and good faith exercise of contractual discretion going forward. Based on *Callow* specifically, parties to contracts should be mindful of misapprehension by their counterparties, and absolutely avoid any active deception surrounding performance of their contracts. The extent of a party's duty or obligation to disclose may hinge on the specific facts of the case, but perhaps the old adage will again become the appropriate advice: "honesty is the best policy."

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The New CCDC 2 - 2020 Contract

The Canadian Construction Documents Committee released a new version of its CCDC 2 Stipulated Price Contract in December. There will be a one-year overlap period in which the former version will remain available to allow parties to familiarize themselves with the new contract. The major changes compared to the previous 2008 version concern the following areas:

- A new Ready-for-Takeover Milestone;
- Early Occupancy by the Owner;
- Prompt Payment Legislation;
- Reimbursable Costs for Change Directives;
- Insurance;
- Indemnity and Waiver of Claims; and
- Relocation of clauses to Division 01.

Ready-for-Takeover Milestone

GC 12.1 introduces a new milestone into the contract. This was thought necessary to address a misalignment between substantial performance and the owner's requirements for using the project.

Owners had been concerned that substantial performance triggered warranty periods, when they still lacked things like operations manuals without which they could not operate a plant, for example. The new GC 12.1 clarifies that all documents necessary for operation must be handed over before Ready-for-Takeover is achieved. This does not add extra work to contractors, who always had to deliver those things, it simply moves the dates for the achievement of contract milestones.

GC 12.1.1 lists the prerequisites for achieving Ready-for-Takeover:

12.1.1 The prerequisites to attaining Ready-for-Takeover of the Work are limited to the following:

.1 The Consultant has certified or verified the Substantial Performance of the Work.

.2 Evidence of compliance with the requirements for occupancy or occupancy permit as prescribed by the authorities having jurisdiction.

.3 Final cleaning and waste removal at the time of applying for Ready-for-Takeover, as required by the Contract Documents.

.4 The delivery to the Owner of such operations and maintenance documents reasonably necessary for immediate operation

and maintenance, as required by the Contract Documents.

.5 Make available a copy of the as-built drawings completed to date on site.

.6 Startup, testing required for immediate occupancy, as required by the Contract Documents.

.7 Ability to secure access to the Work has been provided to the Owner, if required by the Contract Documents.

.8 Demonstration and training, as required by the Contract Documents, is scheduled by the Contractor acting reasonably.

Ready-for-takeover will become the trigger for things like delay claims, indemnity, warranty and waiver, but will not replace substantial performance as a trigger for release of holdback.

From now on, consultants will have to both certify substantial completion and confirm that ready-for-takeover has been achieved.

GC 12.1 clarifies that ready-for-takeover will not be delayed for reasons beyond the contractor's control. The contractor must deliver a comprehensive list of items to be completed or corrected to the Consultant and to the Owner, together with a written application for ready-for-takeover for review. The consultant then has 10 days to decide whether the work is ready-for-takeover or not. The contractor and consultant will then establish a date for final completion.

As mentioned, holdback release is still triggered by substantial performance as per GC 5.4. The Consultant must review the Work to verify the validity of the application for Substantial Performance of the Work and no later than 20 calendar days after receipt of the Contractor's application make a decision on whether substantial performance was achieved or not. Where the holdback amount required by the applicable lien legislation has not been placed in a separate lien holdback account, the Owner must, no later than 10 calendar days prior to the expiry of the holdback period stipulated in the lien legislation, place the holdback amount in a bank account in the joint names of the Owner and the Contractor.

Subject to prompt payment requirements, all holdback amount prescribed by the applicable lien legislation for the Work become due and payable to the Contractor no later than 10 Working Days following the expiration of the holdback period stipulated in the Act.

Early Occupancy by the Owner

The owner may take early occupancy of the work if the contractor agrees and the authorities approve. If the owner takes occupancy of a part of the Work before ready-for-takeover has been attained, that part of the Work which is occupied is deemed to have been taken over by the Owner as from the date on which it is occupied. The Contractor is then no longer liable for the care of such part as from this date, when responsibility shall pass to the Owner. Finally, the warranty period for that part of the Work shall start from the date on which it is occupied.

Prompt Payment

The "proper invoice" under the Act corresponds to the "payment application" of CCDC 2. Under GC 5.3.1, the consultant has 10 days after the payment application to make a decision, which provides for a buffer of another four days to meet the 14-day period under s. 6.4(2) of the Act. The new GC 8.2 provides that nothing in the contract is deemed to affect the parties' rights to resolve disputes by way of adjudication. Article A-5 states that the owner's payment obligations are subject to prompt payment legislation. Applications for payment must be submitted to the owner and the consultant simultaneously (GC 5.2.1), and must be based on the schedule of values that complies with the payment legislation (GC 5.2.6).

If the consultant certifies a different amount or nothing at all, the owner must issue a written notice to the contractor giving reasons. As per the Act, of course, certification is not a prerequisite to a payment obligation.

Part 5 of the contract clarifies that progress payments, release of holdback and final payment will all be subject to prompt payment legislation.

Reimbursable Costs for Change Directives

A new GC 6.3.7 clarifies what costs are recoverable when performing work attributable to a Change Directive. Such costs are now limited to the actual cost of a long list of items such as labour, products, equipment, subcontracts etc. inasmuch as those costs contribute directly to the implementation of the Change Directive.

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Insurance

GC 11 and CCDC 41 were changed to make reference to the new ready-for-takeover date. Limits for general liability insurance, automobile and aircraft were increased from $5m to $10m per occurrence.

There a new insurance requirements for drones as well as contractors' pollution liability with a $5m limit.

Indemnification and Waiver

GC 13.1 and 13.2 were changed to have ready-for-takeover as the trigger date. Under GC 13.1.2.3, neither party is liable to the other for indirect, consequential, punitive or exemplary damages.

Provisions Moved to Div. 01

A number of provisions were moved from CCDC 2 to Div. 01. This is more of a housekeeping change. The provisions moved are the definition of "provide"; GC 3.9 (documents at the site); part of GC 3.10 (shop drawings); GC 3.11 (use of the work); part of GC 3.12 (cutting and remedial work); part of GC 3.13 (clean-up) and GC 11.2 (contract security).

In Force Date

CCDC 2 – 2020 was released in December, but there will be a one-year overlap period in which the current version will remain available to allow parties to familiarize themselves with the new contract.

Other CCDC Documents

CCDC working groups are currently working on amending the construction management documents (5A and 5B) and the Design-Build contract (14) to reflect the changes made to CCDC 2. Those revised contracts, as well as CCDC 2MA – 2016 (Master Agreement between Owner and Contractor), are expected to be released later this year.

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IPD Gone Wrong: *Graham Design Builders LP v. Black & McDonald Ltd.*

Introduction

On any given construction project, the owner is a deciding force of how that project gets built and at what cost. An owner is often responsible for selecting a delivery model that best suits their appetite for risk as well as their intention to be directly involved in the contracting and coordination of trades. The choice of project delivery model lays the foundation for the contractual relationships among project stakeholders.

In light of some of the pitfalls associated with traditional project delivery models, integrated project delivery, or integrated lean project delivery ("IPD") is a unique project delivery model, in that it places a greater emphasis on cooperation and risk sharing than traditional project delivery models, such as Design-Build and CM-at risk to name a few. The ultimate goal of IPD is to build projects cheaper, faster and with less disputes. However, as *Graham Design Builders LP v. Black & McDonald Ltd.*, 2019 SKQB 161 demonstrates, implementing IPD is not a panacea, and without parties' complete commitment to fostering a teamwork-oriented atmosphere onsite, there is a strong chance that projects are delayed, budgets are exceeded and disputes arise.

Overview of Dispute and Facts

Graham is one of Canada's only publicly available cases centred around a construction dispute arising out of an IPD project. The dispute in Graham arose out of the construction of the Dr. F.H. Wigmore Regional Hospital in Moose Jaw, Saskatchewan. Graham Design Builders LP ("Graham") was the construction manager and general contractor on the project and Black & McDonald Ltd. ("BML") was a subcontractor. The parties entered into IPD contracts with the intention of facilitating an open and collaborative approach to construction. However, despite the use of IPD, the project

surpassed its schedule and exceeded its budget. BML claimed that it incurred extra expenses and Graham refused to pay BML for its extra costs. The parties arbitrated in accordance with their contracts' arbitration agreement and BML sought payment from Graham for its cost to complete its work plus profit and interest. The arbitrator awarded BML $11,996,964.84 for its cost to complete the work, $1,439,872.29 for profit, and interest on both amounts.

Graham sought leave to appeal two parts of the arbitrator's decision: 1) the dates the arbitrator granted interest from and 2) the profit award.

The Test for Leave to Appeal

Graham applied to the courts under section 45 of Saskatchewan's *The Arbitration Act, 1992* (the "Act"),[1] for leave to appeal two parts of the arbitrator's award. The contracts between Graham and BML did not provide an automatic right of appeal and therefore the court referred to subsection 45(2) of the Act which provides recourse for parties to appeal in situations where arbitration agreements are silent on appeal rights. Citing the decision in *Graham Building Services AJV v. Saskatoon (City)*, 2018 SKQB 336 (Sask. Q.B.) at paragraph 7, the court clarified that when granting leave to appeal under section 45(2) of the Act, the court must be satisfied that:

1. the question is a question of law;
2. the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
3. determination of the question of law at issue will significantly affect the rights of the parties.

1. SS 1992, c A-24.1.

For clarification, legal questions are concerned with what the correct legal test is, factual questions are questions "about what actually took place between the parties" and mixed questions are questions about "whether the facts satisfy the legal tests", and otherwise involve an application of a legal standard or test to a set of facts.[2]

Did the Grounds for Appeal Amount to Questions of Law?

In denying Graham leave to appeal, the court was satisfied that the arbitrator's interpretation of the contracts amounted to a question of mixed fact and law, and not a question of law alone.

In granting the award, the arbitrator placed great emphasis on the deterioration of the co-operative and team-oriented approach that the IPD contracts were intended to facilitate. Graham and BML's relationship devolved to the point where Graham's conduct was not grounded in the processes specified in the contract. The court noted that in light of the fact that the contractual provisions were often not followed nor completely understood by Graham and BML, the arbitrator could not rely on a strict interpretation of the contracts given that the parties largely departed from their terms. To give effect to the intention of the parties and their understanding of the contract, the arbitrator was forced to consider the "factual matrix", or the parties' conduct throughout the project. The court ruled that the arbitrator's reliance on the "factual matrix" properly shifted the question on appeal into the mixed fact and law territory rendering it outside the scope of a properly appealable question under section 45(2).

2. *Graham Building Services AJV v. Saskatoon (City)*, 2018 SKQB 336 (Sask. Q.B.) at para. 8.

Graham argued that the arbitrator placed too great a reliance on the "factual matrix", and that the arbitrator's analysis "went too far" and "overwhelmed" the words of the contract. However, the court disagreed.

Importance and Significant Effect

Section 45(2) of the Act requires that leave to appeal be granted only where the applicant establishes that the question of law is a matter of importance to the parties and is one that significantly affects the rights of the parties. In turning to the second and third branches of the test, the court ruled that the interest and profit questions were neither important nor significant. The amount of profit awarded was marginally higher than $1 million and the amount of interest awarded ranged between $30,000 to $40,000. These amounts were insignificant in the context of a $16 million arbitral award, a $41 million subcontract and a $110 million project.

Graham also argued that, aside from monetary value, the appeal is important and significant in that this case might be the first in Canada to address IPD contracts and that construction industry stakeholders will refer to this case to learn how these contracts are interpreted by Canadian courts. Although this argument had merit, the interpretation of the IPD contracts in this case required and depended upon a consideration of the unique set of circumstances in which the parties neglected to follow the contracts' terms. The interpretation of the IPD contracts here were case-specific and offered little to no precedential value for the public. More importantly, section 45(2) of the Act's requirements of importance and significance only pertain to what is important or significant to the parties and not to strangers to the contracts.

Conclusion

Graham is one of the first cases in Canada to consider IPD contracts. The uniqueness of these contracts in Canada's construction landscape was evident in the court's decision and cited portions of the arbitrator's decision. Even with the arbitrator's 40-plus years of construction bona fides, coupled with lengthy submissions by experienced counsel, the arbitrator was unable to comprehend the IPD contracts in great detail. This made it difficult to interpret the contracts in any strict manner and necessitated a consideration of the facts and circumstances, or "factual matrix", to give effect to the contracts' provisions.

Graham is not an indictment of the IPD model. Rather, *Graham* is a lesson that a successful IPD project requires a shift in party values and a sincere commitment to cooperation. Without this commitment, parties will resort to their traditional style of dealing, regardless of whether the parties enter into IPD contracts or not.

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Terranata, the Standard Release and Implied Indemnity

After initial blows have been exchanged in most litigated disputes, opponents often resolve their differences with a negotiated settlement agreement. To preserve the ceasefire, a key term included in many settlements is the exchange of a "release".

Releases, however, may take many forms. If the release's key terms are left undefined in the settlement agreement, a major difference of opinions may threaten the viability of the settlement. The recent case *Terranata Winston Churchill Inc. v. Teti Transport Ltd., et al.*, 2020 ONSC 7577 ("*Terranata*") proves that the opposite may also be true: parties' failure to agree on a release may lead to the court imposing one.

Terranata explores the meaning of a "standard" release in the context of multi-party and multi-action construction disputes. This decision also serves as a warning to settling parties— unconditionally agreeing to an undefined release may have unintended consequences.

Background

Terranata was decided in the context of a construction lien action related to the Eglinton Crosstown Light Rail Transit project in Toronto. The plaintiff, Terranata, was subcontracted by Teti Transport to receive "mining spoils" from the excavation. A dispute emerged over amounts allegedly due to Terranata from Teti for the spoil disposal.

On March 13, 2019, Terranata commenced an action against Teti, a group of defendants referred to as the "Crosslinx Defendants," and the owner, Metrolinx, advanced a claim for lien and breach of contract. In the same action, Terranata made a contaminated soil claim against certain defendants. Terranata's lien was vacated.

Teti had two other actions from the same dispute against certain defendants common to the Terranata lien action. The Teti actions had previously been referred to arbitration.

On April 1, 2019, a group of defendants referred to as the "Crosslinx Defendants" served a Request to Inspect and Demand for Particulars on Terranata related to the contaminated soil claim. The Crosslinx Defendants also communicated their intention to cross examine Terranata on its lien pursuant to section 40 of the *Construction Act*. Neither Teti nor the owner, Metrolinx, had delivered defences at the time.

The Settlement Agreement

On April 16, 2019, the Crosslinx Defendants served an offer to settle on a without costs basis requiring, among other things, "a full release in favour of the Crosslinx Defendants in a form acceptable to counsel for the Crosslinx Defendants, acting reasonably." No form of release was attached to the offer. The deadline for acceptance of the offer to settle without costs was April 23, 2019.

The reported decision states that the parties had without prejudice communications before the offer to settle was ultimately accepted. Terranata was invited to send the Crosslinx Defendants a list of specific issues it wanted addressed regarding the release. No list was ever provided.

On April 23, 2019, Terranata accepted the settlement offer unconditionally, before Metrolinx or Teti had defended the actions.

The Crosslinx Defendants provided their form of release to Terranata. Terranata tried to mark up the release, but its changes were not accepted. The parties reached an impasse.

The major terms in dispute related to the requirements that Terranata had to:

1. release the Crosslinx Defendants from all claims, not just the claim for lien;
2. release the Crosslinx Defendants from all past and future events related to the litigation "or that relate to a claim of contamination or pollution of the Lands";
3. indemnify and hold the Crosslinx Defendants harmless in the event they were sued by anyone in relation to the matters being released; and
4. avoid starting or continuing any proceeding against any party or non-party that could claim contribution or indemnity from the Crosslinx Defendants arising from the released matters.

In addition to broadly releasing the Crosslinx Defendants from future causes of action outside Terranata's knowledge, the release would have had a detrimental impact on its continuing claims against the non-settling defendants, Metrolinx and Teti.

The Crosslinx Defendants brought a motion pursuant to Rule 49.09 to enforce the settlement agreement. Terranata agreed there was a binding settlement but refused to agree on the broad scope of release sought by the Crosslinx Defendants.

The Motion to Strike

At the start of the motion, Terranata asked the court to strike portions of the Crosslinx Defendants' supporting affidavit for disclosing without prejudice communications prior to reaching a settlement.

The court refused to strike the evidence, relying on the Supreme Court of Canada's decision *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35: "A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement." Terranata's motion to strike was dismissed.

The Motion to Enforce the Settlement Agreement

The court began by closely reading the express terms of the settlement. Terranata advanced several arguments to encourage a restrictive interpretation of the release. The fact that there were no express carve-outs agreed upon in the terms of settlement ultimately proved fatal.

Terranata first argued for a restrictive interpretation of the release on the basis it was referred to by the parties as a "full" release rather than a "full and final." The court gave little weight to the missing words, instead noting that there were no terms in the settlement agreement narrowed the release. The court maintained the presumption that a "release" as a term of settlement is intended to be broad, does not depend on a reference to being "final," and requires explicit language to limit its application.

Terranata also attempted to preserve the ability to pursue the Crosslinx Defendants for other unpleaded causes of action, on the basis that the settlement agreement only referred to settlement of "this proceeding". This argument was also rejected by the court. "This proceeding" was held to mean the entire Action, not any individual part of it. If preserving causes of action against the Crosslinx Defendants was Terranata's objective, then the carve-out had to be explicit.

A different case reviewed by the court in this case provided an example qualifier that may be used to limit a release only to pleaded causes of action. In *Betser-Zilevitch v. Nexen Inc.*, 2018 FC 735, aff'd 2019 FCA 230 ("*Betser*"), the release in question was limited to "asserted" claims, and a party's attempt to expand the wording to include "assertable" claims was rejected.

Terranata attempted to limit the application of the "claims over" clause in the Crosslinx Defendants' preferred release, on the basis that was not Terranata's intention. The disagreement over such a key term may have led to the settlement agreement being voided, as was the case in *Roberts v. Canada Trustco Mortgage Co.*, 1997 CanLII 12282 (ON SC), [1997] 35 O.R. (3d) 396 ("*Roberts*"). The court distinguished *Roberts* because both Terranata and the Crosslinx Defendants insisted in this case that there was a binding settlement. Presumably, without a binding settlement, Terranata may have lost its opportunity to settle on a without costs basis.

The court was forced to determine whether a "claims over" clause was a usual element of a standard release. It held that it was, stating that,

> In my view, claims over/contribution and indemnity clauses are usual elements of a standard general release. The court will therefore imply these types of provisions as terms of standard general releases, unless expressly carved out or narrowed by the parties prior to reaching a settlement. If there is to be any narrowing in scope of these types of provisions, it must be specifically negotiated, agreed upon and reflected in the settlement agreement. This conclusion is supported by the caselaw and informed by a purposive analysis of general releases.

This finding has potentially far-reaching consequences for parties settling multi-party disputes. By offering an unconditional "release," *Terranata* holds that releasors are automatically implied to be offering an indemnity to the released party for those matters.

Although indemnities and "claims over" clauses may very well be included in many releases, this decision causes practical problems for parties attempting to settle disputes in a cost-effective manner. The court's reference to *Brager v. Ontario (Minister of Natural Resources)*, 2017 ONSC 1759 ("*Brager*") indicates that a releasor may ultimately be ordered to indemnify a released party as part of a standard release, even if an indemnity was never explicitly agreed upon.

In *Terranata*, the court decided that the indemnities and "claims over" clauses were usual and standard in releases, and therefore, Terranata was held to have indemnified the Crosslinx Defendants for the claims made against them arising from the same facts, including the two separate Teti actions, despite the facts that: (1) it was obvious Terranata intended to continue its claims against the non-settling defendants; and (2) it was evident that Terranata had no intention of indemnifying the Crosslinx Defendants for allegations made in Teti's separate private arbitrations. The settlement agreement had no such carve-outs. The court held that the settlement had further-reaching consequences for Terranata than it anticipated. The Crosslinx Defendants' form of release was enforced with minimal amendments.

Notwithstanding the Crosslinx Defendants' success keeping in place the "claims over" and indemnity provisions resisted by Terranata, the court did hold that certain terms in the release were unreasonable. The court struck the release's requirement that Terranata indemnify the Crosslinx Defendants on a full indemnity scale, the expansive and vague requirement that Terranata release and indemnify the Crosslinx Defendants for claims that "relate to a claim of contamination or pollution of the Lands," and the requirement that Terranata release and indemnify the Crosslinx Defendants for future and unknown claims.

Insights

In this case, parties' insistence that there was a binding settlement agreement appears to have bound the court's hands. The court relied on the fact that a release had been promised, even if unparticularized, and Terranata was bound to provide a "standard" release. Had Terranata insisted that there was no meeting of the minds, the Crosslinx Defendants' release terms were not in its reasonable contemplation, and there was no settlement, it is uncertain whether the court would have enforced the settlement agreement.

Brager suggests that even in those circumstances, Terranata may have been forced to indemnify the Crosslinx Defendants. Respectfully, in the construction and complex commercial dispute context, *Brager* is impractical and smacks of unfairness. Too many rights were impacted in this case by the simple agreement to provide a release. The outcome of this case is that parties appear to be required to particularize release terms in painful detail during settlement negotiations. At a minimum, litigants are well advised to make settlement agreements conditional on approval of an acceptable release.

In practice, the precise form of release is not always agreed before a settlement offer is accepted, but that practice may need to change. When settling disputes, the stakes are high. Releases are essential terms of settlement and ought to be treated as such. In multi-party and multi-action disputes, it is critical that settling parties expressly carve-out claims they intend to survive the release.

Although the court in *Terranata* did set ceiling limits on what can be considered "standard" in a release, the floor remains expansive. Without a draft release included as a schedule to the settlement agreement being considered, parties ought to assume the "release" they are agreeing to provide is a broadly inclusive one, and that it may impact their rights against other parties outside of the immediate dispute.

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Notable Case Law

***Petrasso v. Fuller,* 2020 ONSC 7915 (Master)**

The plaintiff failed to serve his statement of claim within 90 days as required by s. 1(2) of O Reg 302/18 and moved for an order extending the time for service.

Given the scheme of the *Construction Act*, tolerance for delay and assessment of prejudice in a lien action are viewed through a different lens, having particular regard to the requirement in s. 50(3) that lien actions be as far as possible of a summary character. The lien is a special remedy afforded to contractors, subcontractors and workers, governed by strict statutory timelines. Notably, a lien expires and the lien remedy is lost if the lien is not preserved or perfected in accordance with the *Construction Act*, or if there has been no set down or order for trial in an action in which the lien may be enforced before the second anniversary of perfection.

Having said that, the Act clearly provides for the possibility of extending the time for service, a delay of six weeks was not inordinate, and in the absence of any evidence of prejudice, the court granted the extension.

***Coco Paving Inc. v. Alexman Contracting Inc.*, 2020 ONSC 7423**

Coco Paving concerns an exclusion clause contained in an estimate, which was accepted by way of purchase order. Coco was the subcontractor, Alexman the general and the MTO was the owner. Coco's estimate contained the following clause:

> The company shall not be held liable for any financial penalties or liquidated damages of any kind whatsoever in relation to the performance of the work contained in this proposal. The company shall not be held liable for any delays that occur on the project whatsoever and howsoever arising.

The court made two findings with respect to that clause:

1. The clause did not shield Coco from delay claims caused by its own negligence.

2. There was no liquidated damages provision in the subcontract, and when the MTO assessed liquidated damages against the general contractor, those damages became a general damages claim with respect to the general contractor's contractual dispute with Coco.

***Shelly Morris Business Services Ltd. v. Syncor Solutions Limited*, 2020 BCSC 2038**

Where a project was suspended because of COVID-19 before the actual construction commenced, the court held that providing services and obtaining materials for planned renovations in the absence of physical alteration to the premises did not constitute an "improvement" for the purposes of the Act.

***Strada Aggregates Inc. v. YSL Residences Inc.*, 2020 ONSC 7034 (Master)**

There are two aspects of inconsistency between the procedures for default judgment in Rule 19 and the *Construction Act*. First, s. 63 affords "the court" with authority to grant a personal judgment "upon any ground relating to the claim" and "for any amount that may be due to the claimant and that the claimant might have recovered in a proceeding", which is authority to grant judgment for claims beyond the claims listed in Rule 19.04(1). That means a motion to a judge is not necessarily required to obtain personal judgment for such claims, even though only a judge or s. 58 referee has authority to declare a lien valid under the *Construction Act* (as distinct from the court's authority to declare a lien invalid pursuant to various provisions of the *Construction Act*). Second, default judgment is not properly granted for "any claim" advanced by a lien claimant, since the only additional claim properly joined with a lien claim in a lien action is a claim for breach of contract.

***Van Geel v. Pennha*, 2020 ONSC 6975**

Any contractor who fails to perfect its security under the *Construction Act* cannot tie up title to any subsequently purchased property by way of a CPL based on tracing the proceeds of sale on the second property. In *Rafat General Contractor Inc. v. 1015734 Ontario Ltd.*, 2005 CanLII 47733 (ON SC), the court made it clear that it would subvert the statutory requirements of the *Construction Act* to allow a contractor to register a CPL as a substitute for its lien rights under the *Construction Act*. Allowing the plaintiff to turn an unperfected statutory lien under the *Construction Act* into an interest in the defendant's subsequently acquired property would be even more subversive to the scheme of the Act.

***1140676 Ontario Inc. v. 2650997 Ontario Inc.*, 2021 ONSC 143**

The changes in s. 47 of the *Construction Act* did not expand the discretion of a motions judge on a section 47 motion to discharge a lien.

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Notable Case Law

***Sundance Development Corporation v. Islington Chauncey Residence Corp.*, 2021 ONSC 241 (Master)**

While the amendments to the former *Construction Lien Act* sought to address references to international conventions in letters of credit, and while the current *Construction Act* contemplates that a letter of credit containing reference to an international commercial convention may be acceptable security, such a letter of credit is only acceptable where the convention text is written into the terms of the credit and the letter of credit is unconditional and accepted by a bank listed in Schedule I to the *Bank Act* that is operating in Ontario.

The letter of credit in this case was subject to the ICC's Uniform Customs and Practice for Documentary Credits, but that document was not before the Master. Therefore, it was not clear to the Master from the language of the letter of credit that the UCP document contained no additional conditions available to the bank not reflected in the text of the letter of credit. He was therefore not satisfied that the letter of credit was truly unconditional and refused to vacate the lien.

***1140676 Ontario Inc. v. 2650997 Ontario Inc.*, 2020 ONSC 8176**

An agreement to extract aggregate and wood from land was not an agreement to improve the lands. The plaintiff therefore did not supply lienable services.

***Prasher Steel Ltd. v. Maystar General Contractors Ltd.*, 2020 ONSC 6598 (Div. Ct.)**

Where a master on a reference embodied his findings in a judgment rather than a report, the Ontario Divisional Court set aside the judgment and remitted the matter back to the master. The court held that the distinction between a Judgment and a report was important because it determined the routes by which the master's decision could be reviewed and appealed. Since this error materially affected review and appeal rights, it could not be allowed to stand.

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