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NEWSLETTER

IN THIS ISSUE

Joining Lien and Trust Claims – Impossible Again?

The former *Construction Lien Act* contained a provision prohibiting the joinder of trust claims with lien claims. Section 50(2) provided that "a trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction".

However, nothing in the Act stated that a lien action and trust action could not be heard at the same time or one immediately after the other. As a result, parties often requested and obtained a "connecting order" from a master or judge to procedurally connect lien and trust actions, with common discoveries, pre-trial conferences and settlement meetings.

As pointed out in *Conduct of Lien, Trust and Adjudication Proceedings*, the trust action could be referred to a master under Rule 54 and heard by the same master as on-going referred lien actions; or the lien actions could be "un-referred", by order of a judge, and the two actions heard at the same time, or one after the other, by the same judge. In Toronto, masters used the jurisdiction granted by s. 67(3) of the former *Construction Lien Act* and Rule 6.01 of the *Rules of Civil Procedure* to fashion connecting orders.

Since all of that seemed somewhat contrived and counterproductive, Bruce Reynolds and Sharon Vogel, in their *Expert Review of Ontario's Construction Lien Act* (the "Report"), recommended the repeal of section 50(2):

> The removal of the prohibition against joinder of lien and trust claims would make the Act consistent with legislation from the other provinces, where such a prohibition does not exist. It is particularly concerning because the prohibition of joinder can be circumvented by a court order for a trial together or one after another, resulting in unnecessary costs and delays. The very problem this provision seeks to address is

exacerbated by the duplication of proceedings it can cause, contributing to the courts' backlog and costs to the parties. The provision has been heavily criticized by stakeholders, most of whom have suggested its removal, and none of whom proposed its retention. In keeping with the summary procedure provisions of the Act, parties should be able to join lien and trust claims without leave of the court, subject to a motion by any party that opposes the joinder on grounds that the joinder would cause undue prejudice to other lien claimants or parties.

That recommendation was followed by the legislature and section 50(2) was not carried forward into the *Construction Act*, so that many commenters, including the author of *Conduct of Lien, Trust and Adjudication Proceedings* were of the view that there was nothing preventing parties from bringing forward claims under Part II of the Act in a lien action under the new Act.

However, it has now been held that subsequent legislative developments effectively reinstated the prohibition.

Associate Justice Wiebe, in *6628842 Canada Inc. v. Topyurek*, 2022 ONSC 253, pointed out that the old Act also provided in s. 55(1) that "a plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract." That provision was originally also omitted from the new Act, but was added again *verbatim* later, in 2019, to O. Reg. 302/18 as s. 3(2). That, according to the Associate Justice, indicated that the Legislature appeared to have had a change of mind and decided to resurrect the joinder limitation on trust claims by reintroducing the old section 55(1). The decision not to carry forward the old s. 50(2) did not change that result in His Honour's analysis.

The intention of former section 55(1) was generally held to be precluding a personal injury or unrelated tort claim from being advanced in a lien claim, since lien proceedings were intended to be summary in nature: see, for example, Master Albert's decision in *Juddav Designs Inc. v. Cosgriffe*, 2010 ONSC 6597. There seems to be no case in which section 55(1) was held to have precluded a joinder of a trust claim, which in light of the express prohibition in s. 50(2) is not surprising.

More importantly, it is respectfully submitted that if the effect of s. 3(2) of O. Reg. 302/18 on its own were to prohibit the joinder of trust claims, then the former s. 50(2) would have been superfluous, and a legislative interpretation which renders any provision of an Act meaningless or superfluous is to be avoided: see *Wormell v. Insurance Corp. of British Columbia*, 2011 BCCA 166; R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 159 and 162.

It is not entirely clear whether notwithstanding the recommendations in the Report, the legislature indeed intended to reinstate the restriction on trust claims by reintroducing section 55(1) into the regulations, or whether the reintroduction of former s. 55(1) without addressing former s. 50(2) was on oversight on the part of the legislature.

For the time being, however, joining a trust claim with a lien claim will be subject to challenge based on this decision. Addressing this issue and carrying out the intention of the Report, if this was indeed the intention of the legislature, will require either analysis of this issue by a higher court or further act of the legislature.

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Standard of Review: Setting Aside an International Arbitral Award

Arbitration offers a multitude of benefits that make it an appealing forum to settle commercial disputes. It allows parties to resolve their disputes in a manner that is intended to be fair, final, expeditious, and most importantly, private.

Despite these benefits, there is often a price to pay (pun intended). One such limitation is that arbitral awards are subject to very limited judicial oversight. An example of this limitation came to the fore in the recent decision by the British Columbia Court of Appeal in *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428.

In this case, lululemon athletica canada inc. ("lululemon") appealed the chambers judge's dismissal of its application to set aside an award made by an arbitrator in favor of a former service provider, Industrial Color Productions Inc. ("ICP").

Background

In 2017, lululemon and ICP entered a services agreement, whereby ICP would provide photography production services to lululemon under various statements of work, and lululemon was obliged to pay ICP per product.

The statement of work in question had an initial term which started on February 1, 2019, for a period of six months until July 31, 2019.

Two clauses in the relevant statement of work were applicable to termination:

1. Under s. 12, the initial term was to automatically extend for consecutive 90-day terms unless either party provided written notice of termination prior to 75 days before the end of the initial term or the end of any extension.

2. Under s. 13, after the initial term, either party could terminate the statements of work, without cause, on 75 days' written notice.

On May 13, 2019, lululemon gave written notice to ICP purporting to terminate the services agreement effective August 1, 2019, "pursuant to Section 13" of the statement of work. When the parties couldn't agree whether amounts were owing by lululemon to ICP because of the termination, ICP commenced an arbitration with the International Centre for Dispute Resolution, in accordance with the services agreement.

In the arbitration, ICP argued that the notice of termination sent by lululemon was of no force and effect, as the initial terms of the statement of work ran until July 31, 2019, and s. 13 of the statement of work (pursuant to which termination was given), expressly provided that notice could only be given by either party, "… after the initial term." The arbitrator agreed with this analysis, issuing an arbitral award to the effect that lululemon's notice of termination purported to end the services agreement "within", rather than "after" the initial term, and awarded ICP damages of US $1,081,967 due to this premature termination.

lululemon applied under s. 34(2)(a)(iv) of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 ("ICAA") to set aside the arbitrator's award on the basis that it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."

The primary basis for this argument was that lululemon believed that ICP had not properly pleaded a claim for damages in the form it was awarded by the arbitrator, and accordingly the arbitrator exceeded his authority to make such an award.

Chambers Judge

The chambers judge began a lengthy analysis of the appropriate standard of review by acknowledging that the interpretation of the ICAA is guided by international considerations. The judge gave three main reasons for concluding the standard of review to be applied to applications under s. 34(2) (a)(iv) of the ICAA is "reasonableness" and in doing so, distinguished the present case from the decision in *Mexico v. Cargill, Inc.*, 2011 ONCA 622, where the appropriate standard of review was found to be "correctness".

Appeal Court

Justice Marchand, in his judgment, was unable to agree with the chambers judge's conclusion on the standard of review. In his view, *Cargill* remains determinative on the standard of review for applications to set aside awards under s. 34(2)(a)(iv) of the ICAA (the wording of which is identical to its Ontario counterpart under which Cargill was decided). That standard of review is correctness.

In his analysis of *Cargill*, Justice Marchand recognized the challenge of navigating "the tension between the discouragement to courts to intervene on the one hand, and on the other, the court's statutory mandate to review for jurisdictional excess, ensuring that the tribunal correctly identified the limits of its decision-making authority." By adopting the more deferential reasonableness standard of review

"would effectively nullify the purpose and intent of the review authority of the court" and inevitably draw the reviewing court into a review of the merits of the dispute.

As support for this analysis, Justice Marchand held that, "it is the legislation itself that significantly limits the scope for judicial intervention. The ICAA does not permit appeals from or judicial review of arbitral awards. Rather, it restricts judicial intervention to matters specifically identified in the legislation." There was nothing in either s. 16 or s. 34 of the ICAA that required a reasonableness standard, on the contrary, the wording of these sections implied a *de novo* hearing be conducted by the reviewing judge, and therefore the correctness standard was to be applied.

Finally, no analysis on the requisite standard of review would be complete without considering the seminal cases of *Sattva* and *Vavilov*.

Justice Marchand ultimately found that neither case was helpful in determining the appropriate standard of review - *Sattva* establishes a reasonableness standard in an appeal from a domestic commercial arbitration but does not address the standard of review on applications to set aside domestic or international arbitral awards on jurisdictional grounds. Post-*Sattva*, the appropriate standard of review for such applications has been held to be correctness in both the domestic and international context. While *Vavilov* is the leading case on the standard of review in administrative law, it does not address the field of arbitration.

Conclusion

Although the Appeal Court disagreed with the chambers judge's determination that a reasonableness standard should apply, when a correctness standard was applied, it reached the same conclusion and found that the arbitrator did not stray outside "the scope of the submission to arbitration". Accordingly, the chambers judge was correct to have dismissed lululemon's application to set aside the arbitrator's award.

This case confirms *Cargill* as the leading case for determining the appropriate standard of review when it comes to setting aside an international arbitral award on jurisdictional grounds. Except in these rare instances where true jurisdictional questions are raised and a "correctness" standard is applied, the decision of *Sattva* (at least for the time being) prescribes a more deferential approach by using the "reasonableness" standard.

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Priority Disputes: The Ontario Court of Appeal Weighs in on Section 78

On December 2, 2021, the Ontario Court of Appeal released its decision in *Bianco v. Deem Management Services Limited*, 2021 ONCA 859. The underlying issue was a priority dispute between lien claimants and a mortgagee of a registered third mortgage over the proceeds of sale from a receivership process. The receiver had paid out the first and second mortgages, but continued to hold over $5.4 million in trust from the proceeds of sale due to the competing priority claims.

In the lower court, the motion judge found that the lien claimants had priority over the registered mortgagee. (To read about the lower court's decision and analysis, you can find our previous article here)

The registered mortgagee went on to appeal the lower court's decision. The Ontario Court of Appeal dismissed the appeal. In effect, the Court's ruling is a further reminder that the *Construction Act* is generally drafted to protect the rights of lien claimants. Section 78 is particularly designed to give lien claimants general priority over other secured interests, subject to certain exceptions. Mortgagees who want to usurp a lien claimant's priority bear the onus of satisfying the court why a particular exception to this general rule applies. In this case, the registered mortgagee was unable to do so.

Background

The underlying project over which the dispute arose involved the redevelopment of a property as a seniors' retirement residence. At some point, the general contractor ceased construction, and various parties registered construction liens against title to the project lands. The project went

into receivership, and, in the summer of 2018, the receiver sold the land and applied the proceeds of sale to pay back the first and second mortgages on the property. A dispute ensued between the lien claimants and a third mortgagee, Dal Bianco, over the remaining proceeds of sale.

As a result of competing priority claims between the lien claimants and Mr. Dal Bianco, the receiver had not been able to distribute these remaining funds. The receiver brought a motion asking the court to declare who had priority between the registered lien claimants and the subsequently registered third mortgage.

The Lower Court Decision

The motion judge relied on an agreed statement of facts between the parties. The parties agreed that the third mortgage given to Mr. Dal Bianco was registered on title after the first construction lien arose and years *after* the advances being secured by the third mortgage were made. That is, the funds under the third mortgage were advanced between 2012 and 2015, however, the mortgage was only taken and registered on title in February 2018. It was also agreed that the advances secured by the third mortgage were intended to, and did, finance the improvement.

The motion judge focused the bulk of her analysis on section 78 of the *Construction Act*. In doing so, she opined that the general intention of section 78 is to give priority to lien claimants over mortgages, subject to certain defined exceptions, and held that the onus is on the mortgagee to prove that its mortgage falls within one of those exceptions to gain priority over the lien claimants.

In the result, the motion judge dismissed the arguments put forth by the third registered mortgagee, Mr. Dal Bianco. Specifically, the motion judge denied that the mortgage had priority over the lien claimants because it was a building mortgage under section 78(2) or a subsequent mortgage under section 78(6). (As discussed below, the Court of Appeal agreed with the motion judge's reasoning).

In reaching her conclusion, the motion judge also explained that the mortgagee's position, if accepted, would be contrary to the proper functioning of the *Construction Act*. The motion judge said, at para. 42 of her decision:

> If mortgagees are entitled to "lie in the weeds" while advancing funds for the project and then attempt to gain priority later by registering mortgages after liens arise, this would be unfair to lien claimants and contrary to the overall protection intended by the Act.

A Procedural Aside

After the mortgagee appealed, the receiver brought a motion for directions as to the proper venue for the appeal.

Normally, an appeal from an order made under the *Construction Act* lies to the Divisional Court under section 71(1) of the Act. However, because of the underlying receivership process, the court ruled that the appeal lay to the Ontario Court of Appeal because the impugned order was granted, at least partly, in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. The court held that the operative question to determine the appeal route in this case is "whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable."

The construction lien claimants responded by bringing their own motion to quash the appeal on the basis that the mortgagee failed to seek leave to appeal and for other irregularities with the appeal.

The Ontario Court of Appeal's Decision

The court first granted leave for the mortgagee's appeal and in turn dismissed the construction lien claimants' motion to quash the appeal. Ultimately, the mortgagee's appeal was dismissed. In dismissing the appeal, the court considered the mortgagee's arguments in the same order as the motion judge.

Beginning with subsection 78(6) of the *Construction Act*, the third mortgagee argued that his mortgage was a "subsequent mortgage" and therefore the mortgage had priority over any

lien claims, subject to any deficiency in holdback. Subsection 78(6) reads as follows:

> (6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,
>
> (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
>
> (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

This argument failed because the mortgage in question was taken by Mr. Dal Bianco and registered in 2018, more than three years after the last advance was made in 2015. The court held that subsection 78(6) granted priority to mortgagees over "any advance made in respect of that … mortgage". Here, because the funds were advanced first, and then secured years later by the taking and registering of a mortgage, the funds were not made "in respect of" the mortgage.

The third mortgagee's further argument relying on section 78(2) of the *Construction Act* also failed. Section 78(2) reads as follows:

> (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

The court found that the mortgagee could not rely on this subsection for the very same reason he could not rely on subsection 78(6): the wording of subsection 78(2) is such that for a mortgagee to bring themselves within this exception, they need to first take the mortgage and then lend funds to finance the improvement. This subsection does not contemplate granting priority to mortgagees over lien claimants by allowing the mortgagee to first finance the improvement and then take a mortgage thereafter. Mortgagees are not entitled to "lie in the weeds", wait until lien claims surface and then move to take a mortgage and register their mortgage on title to assert priority over the lien claims.

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Scaffidi-Argentina v. Tega Homes Developments

In *Scaffidi-Argentina v. Tega Homes Developments*, 2021 ONCA 738, Tega Homes Developments Inc. (the "Owner") engaged Goodeve Manhire Inc. and Goodeve Manhire Partners Inc. (collectively, "Goodeve") to provide engineering consulting and construction services to the Owner's residential condominium project in Ottawa, Ontario. Following construction, some adjacent properties suffered significant damage due to the project's excavation works. The owners of the affected adjacent properties named the Owner, Goodeve and other project participants as co-defendants in an action for damages pleading negligence and nuisance. The Owner settled the claims of the adjacent property owners, the payment for which was made by the Owner's insurer under the Owner's wrap-up liability policy for the project (the "Policy"). The Policy included, as additional insureds, "all contractors, subcontractors, engineering and architectural consultants." Accordingly, the Owner's co-defendant, Goodeve, was an additional insured under the Policy. Importantly, the Policy included a waiver of subrogation clause that provided that "the Insurer shall have no

right of subrogation against any Insured under this policy." Notwithstanding this waiver of subrogation clause, the Owner's statement of defence and crossclaim in the action "sought contribution and indemnity [from Goodeve] in respect of any amounts [the Owner] might be found liable to pay to the plaintiffs." Goodeve sought and was granted a motion for summary judgment to dismiss the Owner's crossclaim against Goodeve on the ground that, as an additional insured under the Policy, Goodeve was entitled to the waiver of subrogation provided therein.[1] The Owner appealed.

(i) Scope of the Waiver of Subrogation

On appeal, the Owner argued that "the [P]olicy does not bar it from asserting a subrogated claim for indemnity against [Goodeve] because they are not covered under the [P]olicy for the professional services claims brought by the property owners." The Owner's position was that the Policy specifically excluded coverage for professional liability losses, and as such, their crossclaim was not precluded by the waiver of subrogation clause in respect of those losses. Summarily, the issue was whether coverage exclusions under the Policy had the effect of limiting the scope of the waiver of subrogation clause to applying only to losses covered thereunder. The Court of Appeal, applying the "clear language" principle set out at paragraph 22 of *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, rejected the Owner's position and found that the Owner had "contracted out of any right of subrogation against all insureds (including additional insureds) under the [P]olicy." In other words, the waiver of subrogation clause effectively precluded all subrogated claims as against the insureds generally, including losses for which the Policy specifically excluded coverage. The Court of Appeal endorsed the motion judge's finding that:

> it would have been open to the [Owner] to have changed the wording of the policy, perhaps by altering the scope of the subrogation waiver or the definition of additional insured, to reflect the professional services coverage exclusion.

(ii) De facto Subrogation

The Owner contended that its "crossclaim never became a subrogated claim because its insurer made no payments pursuant to a [P]olicy obligation" in respect of the claims made against Goodeve in the action since they fell within the professional services exclusion. Accordingly, and notwithstanding the overarching settlement payment made by the Owner's insurer, the Owner argued that its crossclaim against Goodeve simply was not a subrogated claim. The Court of Appeal held that that the Owner's crossclaim was precluded by the waiver of subrogation, even though it was not pleaded specifically as a subrogated claim, as "[t]he act of seeking indemnity from a third party such as the respondents for payments is, by definition, subrogation." In finding that the crossclaim was effectively a *de facto* subrogated claim, the Court stated that "the [Owner's] insurer made payment to the plaintiffs after damages were assessed at the damages trial" and it was "self-evident that any recovery on the crossclaim would have been paid to the [Owner's] insurer to cover the settlement amount". The Court additionally noted that the fact an insurer has not yet made a payment out under an insurance policy "does not change the [subrogated] nature of [a] claim".

Conclusion

The *Tega Homes* decision includes at least two important findings regarding a waiver of subrogation in insurance contracts: (1) absent express limiting language to the contrary, the Court will not limit the applicability of a broad waiver of subrogation clause to claims for insured losses only, and (2) the Court may be willing to look past technicalities to find a *de facto* subrogated claim. Accordingly, parties to insurance contracts should ensure that the language of any subrogation clause clearly reflects their intentions.

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1. See *Scaffidi-Argentina et al. v. Tega Homes Developments et al.*, 2020 ONSC 6656.

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Good Faith in Tendering: *Stericycle ULC v. HealthPRO Procurement*

In the last few years, the Supreme Court of Canada has described two existing doctrines as manifestations of the principle of good faith in *Bhasin v. Hrynew*, 2014 SCC 71, *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 and *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*, 2021 SCC 7: the duty to exercise a contractual discretion in good faith and the duty of honest performance of a contract.

Both of these doctrines were at the heart of an appeal recently heard by the Ontario Court of Appeal in *Stericycle ULC v. HealthPRO Procurement*, 2021 ONCA 878, in a public tendering context.

In 2019, HealthPRO, a group contracting organization that manages procurement and contracts on behalf of its member hospitals and health authorities across Canada, issued a request for qualification (an "RFQ") for a new national contract for biological waste management services. The purpose of the RFQ was to qualify potential suppliers for the forthcoming public tendering process (the "RFP").

One of HealthPro's members on whose behalf the procurement process was conducted was British Columbia's Provincial Health Services Authority ("PHSA").

The plaintiff Stericycle responded to the RFQ and qualified to bid. So did Daniels, a competitor. Both Stericycle and Daniels also responded to the RFP.

Six years earlier, in 2013, HealthPRO had awarded Stericycle a contract for those services. As extended, the 2013 Contract had an expiry date of May 31, 2020 and contained the following provision referred to as the "Six Month Provision":

> AWARDED SUPPLIER: Agrees to hold the then current contract pricing firm for committed members up to a period of six (6) months beyond the expiry date (or any option years exercised) to allow, if required, for the implementation of a new contract to a different supplier.

Unlike the 2013 Contract, which contemplated a single supplier, the RFP contemplated the award of 2020 Contracts to multiple eligible suppliers from which a HealthPRO member would select a "primary supplier" and could also designate a "secondary supplier" if more than one 2020 Contract was awarded by HealthPRO. A primary supplier would receive a committed volume of at least 80% of the business of the selecting HealthPRO member; a secondary supplier would be obligated to provide up to 20% of the business but had no guarantee of any volume of business.

At the time of tender, Daniels did not have established waste management facilities in British Columbia, but its RFQ included a statement to the effect that it would be fully committed and able to meet and exceed the service capabilities required for the HealthPRO membership by the 2020 start date of this contract.

HealthPro ended up awarding a 2020 Contract to both Stericycle and Daniels. Both contracts had a start date of June 1, 2020. On June 2, 2020, HealthPRO advised Daniels that it had been selected as the primary supplier.

Given that Daniels was not operational in British Columbia on June 1, 2020, PHSA insisted that Stericycle continue to provide all services under the 2013 "Six Month Provision". Upon the expiration of the six months, Daniels commenced its work.

Before the application judge, Stericycle submitted that HealthPRO and PHSA had acted in bad faith and in breach of contract in awarding the primary supplier designation to Daniels. The application was dismissed.

The application judge held that the 2013 Contract was not spent on the award of the 2020 Contract, or on the start date of the 2020 Contracts, and that PHSA was entitled to insist that Stericycle continue to provide services for six months after June 1, 2020 under the 2013 Contract without such conduct amounting to selection of Stericycle as its primary supplier.

Second, the application judge held that the Daniels 2020 Contract did not require Daniels to commence the provision of services as of June 1, 2020.

The application judge then concluded that neither PHSA nor HealthPRO owed any duty of good faith to Stericycle in conducting the selection process or otherwise. She held that, in accordance with the analysis of contracts arising in respect of public tendering bids articulated in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, any duty owed by HealthPRO to Stericycle during the tendering process was extinguished on the award of the 2020 Contracts.

Stericycle appealed. In a unanimous decision, the Court of Appeal (Strathy C.J.O.; Zarnett J.A. and Wilton-Siegel J. (*ad hoc*)) dismissed the appeal. At the outset, the court dismissed Stericycle's argument that it was not obligated to maintain 2013 pricing in the present circumstances on the plain language of the Six Month Provision. The court held that while the provision was indeed plain in its

language, it was plain that it applied in the case of "implementation of a new contract to a different supplier". In this case, PHSA implemented a new contract, the Daniels 2020 Contract, and selected a new supplier, i.e. Daniels. In so finding, the Court also rejected Stericycle's argument that the standard of review was one of correctness based on the SCC decision in *Ledcor Construction Ltd. v. Northridge Indemnity Insurance Co.*, 2016 SCC 37, rather than the palpable and overriding error standard of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

With respect to good faith, the Court of Appeal addressed both the duty to exercise a contractual discretion in good faith and the duty of honest performance of a contract.

The duty to exercise a contractual discretion in good faith

With respect to Daniels' inability to commence work in June, 2020, Stericycle identified a number of alleged breaches of the obligation to exercise the contractual discretion to select a primary supplier reasonably:

1. a duty to hold suppliers to the commitments made in their RFQ and RFP responses, the breach of which Stericycle describes as allowing Daniels to "re-write" the start date and as permitting impermissible bid repair by Daniels;

2. a duty not to select a supplier known to be unable to commence the provision of services on the start date of the 2020 Contracts; and

3. a duty not to conscript Stericycle into helping Daniels buy time to allow Daniels to cure fundamental misrepresentations in the RFQ and RFP responses by which it won the Daniels 2020 Contract.

In essence, as summarized by the Court of Appeal, Stericycle's argument was that the application judge erred in failing to find that, in excusing Daniels from its obligation to commence providing services under the Daniels 2020 Contract on June 1, 2020, HealthPRO and PHSA breached a duty of good faith owed to Stericycle.

That argument was rejected for two reasons. First, since Stericycle was not a party to the Daniels 2020 Contract, it could not assert a breach of a duty of good faith in the performance of that contract. If HealthPRO and PHSA had waived any breach of Daniels' obligations in the Daniels 2020 Contract regarding the date of commencement of operations, that was a matter between them and Daniels. That decision was squarely in line with the Supreme Court decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3.

Alternatively, even if Stericycle had standing to raise the good faith issue, there was nothing wrong with the lower court's finding that there was no provision in either the RFQ or the RFP that imposed a mandatory date for the implementation of services, which precluded a finding of bad faith.

In summary, PHSA did not breach any obligation to Stericycle in refraining from requiring Daniels to begin providing service on June 1, 2020. Put positively, PHSA was entitled to select December 1, 2020 as the date of commencement of such services. PHSA did not breach any obligation to Stericycle in requiring it to continue to supply under the Six Month Provision until December 1, 2020.

The duty of honest performance of a contract

Stericycle's final ground of appeal was that the application judge erred in failing to find that HealthPRO and PHSA breached the duty of honest performance of its 2020 Contract.

Stericycle argued that HealthPRO acted dishonestly in providing information regarding the Six Month Provision to Daniels and in relying on the Six Month Provision to allow Daniels to delay its start date. Stericycle also alleged that PHSA acted dishonestly in not informing Stericycle much earlier than June 2, 2020 of its intended reliance on the Six Month Provision in its selection of Daniels as the primary supplier.

This final argument was also dismissed. The Court of Appeal held that none of those allegations involved lying or actively misleading Stericycle about a matter directly linked to performance of the Stericycle 2020 Contract or to the exercise of rights set forth therein.

The RFP did not prevent PHSA from obtaining the information that it required regarding proposed implementation of the 2020 Contracts by Daniels and Stericycle in order to make an informed selection of its primary supplier. HealthPRO was entitled to advise PHSA, as its member, of its rights under the 2013 Contract and, as discussed, PHSA was entitled to rely upon such rights. Nothing done here satisfied the test set out in *C.M. Callow* for demonstration of dishonest performance of the Stericycle 2020 Contract.

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Notable Case Law

***9727868 Canada Inc. (Plug & Play Solutions) v. Deltro Electric Ltd.*, 2021 ONSC 8182**

Where a company was formally dissolved at the time it preserved and perfected a lien, the court has no discretion in equity to permit the lien action to continue. The court was bound by the Divisional Court's ruling in *Glencoe Insulation Co. Limited v. 3170497 Canada Inc.*, 2003 CarswellOnt 6310 on this point and granted an order discharging the lien and dismissing the lien action.

***Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors*, 2022 ONCA 10**

There is no legal rule that a party's covenant to insure against a risk must mean it was intended that the party undertaking to insure assumed the risk of the harm insured against. The effect of the insurance covenant, like the effect of any term in a contract, depends on the objective intention of the parties determined by an examination of the contract as a whole and the consideration of individual terms within that broader context.

***GH Asset Management Services Inc. v. Lo*, 2022 ONSC 506 (Associate J.)**

The type of relief requested on a motion does not dictate the nature of the order made. Therefore, a motion for a final order is still an interlocutory step. An "interlocutory step" is any step taken in a lien action between the beginning and the end of the proceeding. While trials are not interlocutory since the action ends with a determination at trial, regardless of the outcome. The same is not necessarily true of a motion seeking a final order. Motions are inherently interlocutory in nature. A motion for summary judgment, for example, seeks a final determination in an action. If successful, the motion yields a final order. If unsuccessful, the motion may yield only an interlocutory order, with the action continuing to trial. Unlike a trial, there is no certainty that a summary judgment motion will dispose of an action until the motion has been decided. As a step in litigation, the motion for summary judgment is thereby interlocutory, even if the result of the motion may be a final order.

***Gowing Contractors Ltd. v. Walsh Construction Company Canada*, 2021 ONSC 7683 (Associate J.)**

It is now well-established law that the scope of proper cross-examination includes questions on matters raised in the affidavit by the deponent, regardless of relevance or materiality to the motion.

***FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465**

A forestry consultant which claimed that it had been placed on a blacklist by the Province and barred from future contracts after publicly voicing concerns about overcutting sought to have the court recognize "blacklisting" as a nominate tort. The British Columbia Court of Appeal refused to do so, holding that the proposed tort did not reflect an incremental development to an existing body of law. The court was not advised of any academic or other commentary that advocated or supported such a development. There was no readily apparent example of the proposed tort in the common law world.

***Reid v. Xiao*, 2021 ONSC 7468**

The *Rules of Civil Procedure* apply to lien actions, except to the extent that they are inconsistent with the *Construction Act*. Where leave for documentary discovery is granted, unless the court orders otherwise, the *Rules of Civil Procedure* require that a party disclose all relevant documents that are or were in its possession, control or power (Rule 30.03), with an ongoing obligation for production of relevant documents (Rule 30.07), and a range of sanctions and impacts from failing to disclose or produce relevant documents (Rule 30.08). Once leave for documentary discovery was granted, there was therefore an ongoing obligation on the plaintiff to produce all relevant documents that are or were in his possession, control, or power.

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