

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

LUC #153 [2019]

Primary Topic:
V Payment of Contractors
and Subcontractors

Secondary Topic:
IX Construction and
Builders' Liens

Jurisdiction:
Ontario

Author:
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CanLII Reference:
[2019 ONSC 3671](#)

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

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

Facts

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

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

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

Issue on appeal

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

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

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

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11(1) of the *CLA* allows the contractor to retain, to the extent of that payment, trust funds payable to it under the judgement.

The court held that there was no evidence that contractor used non-trust funds to pay Webdensco and section 11(1) is not triggered. The money payable to the contractor on account of Webdensco's assigned lien was money payable "on account of the contract price" between owner and contractor, and therefore trust funds for the benefit of subcontractors, including Great Northern. The court noted that if Sutherland Law's argument was correct, contractors could settle lien claims for less than 100%, shield the discount on the settlement from trust claims, and retain trust funds without paying outstanding trust claims, which would be contrary to the decision of *Minneapolis-Honeywell v. Empire Brass*, [1955] SCR 694.

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

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

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

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

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

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Conclusion

The court allowed the appeal and varied the trial judge's decision to provide that Great Northern's trust claim had priority over Sutherland Law's charging order. Great Northern's trust claim exceeded the trust funds available and all available trust funds were ordered to be paid to Great Northern. This well reasoned decision by Justice Corbett is a rarely seen application of the trust remedy as well as the wide ranging implications of the trust regime under the CLA.

