Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #148

May 19, 2018

INSIDE THIS ISSUE:

Triumph Aluminum Sheet Metal Inc. v. Gregory Dimitriou, 2018 ONSC 2008 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

Canlii References
2018 ONSC 2008 (Div. Ct.)
2017 ONSC 2784 (CanLII)

Divisional Court Affirms Breach of Trust Actions Limitation Barred on Discoverability Principle

In April, 2018 the Ontario Divisional Court at Toronto affirmed a master's decision which, among other things, applied the Divisional Court decision in *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.* (2008), 71 C.L.R. (3d) 54 (Ont. S.C.J.) in holding that the trust claim limitations clock runs from when the default entitling a party to lien a project is discovered.

To say the matter was factually and legally complex would be an understatement. The master's underlying reasons for decision consisted of 233 paragraphs, running 58 pages in length (including appendices), and required the court to review a myriad of issues contained in extensive motion materials filed by the parties, which in paper form the master estimated reached approximately 4 ½ feet in height. The master's decision is nevertheless essential reading, at least for Ontario practitioners, for its discussion of everything from the trust provisions of the *Construction Lien Act*, the intersection of these statutory provisions with insolvency law and the *Limitations Act, 2002*, to the proper conduct of counsel on out of court cross-examinations on affidavits.

The Divisional Court, although confronted with eight separate issues on appeal, was able to distill some of this complexity down to a single dispositive issue of an expired limitation period. The decision confirms that plaintiffs wishing to assert the statutory breach of trust remedy are well advised to do so at the same time or shortly after the point where sufficient information is at hand to pursue the lien remedy itself.

A good starting point for any discussion on Ontario limitations law is section 5 of the *Limitations Act, 2002* which stipulates when "discovery" of a cause of action is deemed to occur. Moreover, Ontario Court of Appeal authority establishes that section 5 and its principles of discoverability apply to claims under the *Construction Lien Act*, see *Sunview Doors Ltd. v. Pappas*, 2010 ONCA 198. Not only must the plaintiff know that loss or damage has occurred and that it was caused by an act or omission of the defendant, the plaintiff must be aware that a legal proceeding would be an appropriate means to seek a remedy. In other words, you discover your cause of action only when you know you should sue. This is an objective standard, however, and not based on actual subjective knowledge of the plaintiff. It is worth quoting from s. 5 (1) (b) just as the Divisional Court did (emphasis added by the Court):

Divisional Court Affirms Breach of Trust Actions Limitation Barred on Discoverability Principle

Triumph Aluminum Sheet Metal Inc. v. Gregory Dimitriou, 2018 ONSC 2008 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

Canlii References
2018 ONSC 2008 (Div. Ct.)
2017 ONSC 2784 (CanLII)

ONTARIO

> (b) the day on which a reasonable person with the abilities and in the circumstances of the persons with the claim first ought to have known of the matters referred to in clause (a).

In *Triumph*, both the master and the Divisional Court relied heavily in finding the actions limitations barred on the fact the plaintiffs entered into a settlement agreement of their existing lien actions in June, 2009 but did not toll or otherwise preserve breach of trust claims. When recovery for the plaintiffs under the terms of settlement later proved impossible, the three plaintiffs started breach of trust actions, two actions being issued in 2012 and the third in 2013. However, both levels of court were satisfied that the actions were too late. The master found, and the Divisional Court affirmed, that the plaintiffs had all of the information they needed to start breach of trust actions before they entered into the settlement agreement.

The elements of a cause of action for breach of trust were all present and ought to have been known by a reasonable person in the circumstances of the plaintiffs as of June, 2009. For example, it was established on cross-examination that the plaintiffs were aware when they entered the settlement agreement that the defendants had already received some $24 million in financing for the project. The plaintiffs obviously knew they were unpaid, and had already pursued lien claims. The settlement agreements attempted to secure recovery on what was due by substituting the lien claims for a “trade mortgage” that ranked only behind the project lenders. Significantly, in respect of the objective standard of knowledge required by section 5 (b) of the *Limitation Act, 2002*, although the plaintiffs complained of insufficient disclosure of project accounting by the defendants, the plaintiffs had not taken steps they had been entitled to take under the *Construction Lien Act* as of right to secure project accounting information in a timely way. The breach of trust actions were subject to the basic two year limitation period, and having been started more than 2 years after the plaintiffs entered the settlement agreement, the point when it could be objectively said that their cause of action ought to have been discovered, their breach of trust actions were found to be, and affirmed to be, limitation barred and dismissed.

What conclusion should counsel draw when advising potential trust claimants? A careful review of the authorities cited by the master, which include *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.*, 2016 ONSC 4230; and *Carmen Drywall Ltd. v. BCC Interiors Inc.*, [2013] O.J. No. 3245; in addition to the aforementioned *Cast-Con*, reveal that the cases do not establish a bright-line test. There is no hard and fast rule that the cause of action for statutory breach of trust is always discovered at the point in time where an invoice falls due and is unpaid or when the plaintiff registers a lien. Rather, each court has been careful in its reasons for decision to say that the discoverability of a cause of action for

Divisional Court Affirms Breach of Trust Actions Limitation Barred on Discoverability Principle

Triumph Aluminum Sheet Metal Inc. v. Gregory Dimitriou, 2018 ONSC 2008 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

Canlii References
2018 ONSC 2008 (Div. Ct.)
2017 ONSC 2784 (CanLII)

ONTARIO

breach of trust is driven by specific facts. Nevertheless, in the result, courts have tended to find that a cause of action for breach of the *Construction Lien Act* trust provisions is established when the plaintiff knows they have not been paid, knows the defendant has received trust funds, and knows that a legal proceeding is an appropriate remedy. The commencement of a lien action can be evidence of knowledge of the necessity of a breach of trust proceeding, thereby satisfying the objective standard.

In *Cast-Con* and *Triumph* the plaintiffs essentially argued that in the absence of a full accounting of what the defendant had actually done with the trust funds it could not be said that they had actually discovered their cause of action, or at least had not done so more than 2 years before starting their actions. These arguments are superficially attractive; how is a plaintiff to know they should sue for breach of trust if they do not actually know that the defendant has disbursed the trust funds in a manner inconsistent with the *Construction Lien Act*? The answer, it is submitted, is to be found in the objective standard established by s. 5 (1) (b) as emphasized by the Divisional Court. It is not the plaintiff's subjective discovery of the facts underlying the breach of trust allegation that matter, but the objective standard of what a "reasonable person with the abilities and in the circumstances of the persons with the claim first ought to have known of the matters" that will determine when the cause of action was discovered.

So, what went wrong for the breach of trust plaintiffs in these cases? In terms of the objective standard of discoverability being applied against them, it was a failure to exercise proper due diligence in pursuing a full project accounting. The master placed particular emphasis on the plaintiffs' failure to have exercised their rights under section 39 of the *Construction Lien Act*, including seeking the assistance of the Court in enforcing that right to information. At paragraph 89 of the master's reasons, the court observed:

> "It seems strange that no timely motions were brought under the *CLA* seeking production of the data claimed. Given the amounts in issue and the expertise of the lawyers working on the file, unless sufficient knowledge had in fact already been obtained, it seems surprising that no Orders were sought or obtained utilizing these rights. In my view "due diligence" would require such efforts if there was to be a delay in the start of the tow year period established under the *Limitations Act, 2002*."

In addition to the lack of section 39 due diligence, the court also emphasized the lack of a tolling agreement for any breach of trust remedies.

The following practical considerations emerge for lawyers advising potential trust claimants:

Divisional Court Affirms Breach of Trust Actions Limitation Barred on Discoverability Principle

Triumph Aluminum Sheet Metal Inc. v. Gregory Dimitriou, 2018 ONSC 2008 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

Canlii References
2018 ONSC 2008 (Div. Ct.)
2017 ONSC 2784 (CanLII)

ONTARIO

a) Be very conservative in determining when a breach of trust action should be started. It seems to be enough to know that the defendant was paid, your client was not paid, and that a legal proceeding is an appropriate remedy;

b) If you have in fact started a lien action or a breach of contract action, it appears highly likely that courts will also find, absent proof to the contrary, that the cause of action for breach of trust has been discovered;

c) Do not just sit back and wait for project accounting information to come to you. Make an early section 39 demand on all relevant parties and do not take "no" or incomplete information for an answer. Move for the court's assistance in requiring production of the accounting information required to be provided under the *Construction Lien Act*; and

d) If not starting an action due to settlement discussions or to allow for a settlement process such as mediation, obtain an express tolling agreement. In *Triumph* the absence of a tolling agreement was fatal to the breach of trust claims, given the court's conclusion that the plaintiffs had all necessary information to have known they ought to have started a trust action before signing the settlement agreement, and their lawsuits were only started more than two years later.

As of July 1, 2018 the new *Construction Act* will apply to construction contracts procured and entered into in Ontario after that date. If anything the amendments proposed for Part II, the Trust Provisions, and section 39, Right to Information, will heighten the stakes for trust beneficiaries in light of *Triumph*. A full review of these legislative reforms is beyond the scope of this case commentary, suffice it to say that new legislation will be more prescriptive and onerous for payers in terms of how they are required to account for trust funds and the level of detail they are required to produce upon receipt of a demand for information under section 39. The means of enforcement of these remedies remains the same. The statute therefore will provide ample means for trust beneficiaries to secure the information they need to pursue their claims, and as a result of *Triumph* due diligence will be the objective standard applied in determining whether these rights have been preserved. In terms of your client's rights and remedies under the either the *Construction Lien Act,* or increasingly over time as new projects fall under the new regime of the *Construction Act*, "use them or lose them" should always be your mantra.

Arbitration Preconditions can Suspend Commencement of a Limitation Period

PQ Licensing S.A. v. LPQ Central Canada Inc., 2018 ONCA 331

LUC #148 [2018]

Primary Topic: XIV Mediation and Arbitration
Secondary Topic: I General
Jurisdiction: Ontario
Authors: Tamryn Jacobson, Bradley Halfin and Rebecca Olscher, Goodmans LLP

Canlii Reference

ONTARIO

In *PQ Licensing S.A. v. LPQ Central Canada Inc.*, the Ontario Court of Appeal recently upheld an arbitrator's decision that the two-year limitation period commenced on the date the mediation requirement in the parties' contract was deemed to be fulfilled. In the result, the claim was not statute-barred by the *Limitations Act, 2002* (the "*Act*"), despite the claimant initiating arbitration four years after the claim was otherwise discoverable. Parties negotiating commercial agreements that include arbitration preconditions in dispute resolution provisions should be mindful of this decision and consider clarifying their intentions about the staging and timing of steps leading to arbitration.

Background and Decision

Many commercial agreements contain a staged dispute resolution process like the one in *PQ Licensing*. Often these mechanisms call for various levels of negotiation and then mediation as preconditions before a party can resort to arbitration or litigation. These mechanisms are intended to encourage early resolution of a dispute, but it is now clear they may also impact the calculation of a limitation period.

For most claims under Ontario law, including claims commenced by arbitration, the *Act* prohibits proceedings being brought more than two years after the claim was "discovered". The *Act* provides for a series of requirements to determine when a claim is "discovered", one of which – section 5(1)(a)(iv) – is the claimant's knowledge "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it". Before *PQ Licensing*, there had been no judicial consideration of section 5(1)(a)(iv) of the *Act* in the context of a dispute resolution mechanism that provided for mediation as a precondition to arbitration.

In *PQ Licensing*, the parties agreed that absent the requirement for mediation as a first step, the claim (relating to rescission of a franchise agreement) would otherwise have been discovered four years before the arbitration was commenced. The arbitrator determined on the facts before him that the mediation precondition served to suspend the limitation period, as arbitration was not an "appropriate means" to resolve the dispute (as required by section 5(1)(a)(iv) of the *Act*) until after the mediation condition of the parties' agreement had been fulfilled. Since the mediation condition had been fulfilled less than two years before the arbitration commenced, the arbitrator found the claim was not time-barred. Both the Ontario Superior Court and the Ontario Court of Appeal upheld this decision as reasonable.

Takeaways

While the logic is compelling to avoid the commencement of unnecessary

Arbitration Preconditions can Suspend Commencement of a Limitation Period

PQ Licensing S.A. v. LPQ Central Canada Inc., 2018 ONCA 331

LUC #148 [2018]

Primary Topic: XIV Mediation and Arbitration
Secondary Topic: I General
Jurisdiction: Ontario
Authors: Tamryn Jacobson, Bradley Halfin and Rebecca Olscher, Goodmans LLP

Canlii Reference

ONTARIO

proceedings and allow the parties to focus on an early resolution, claimants should not rely on *PQ Licensing* to delay commencing a proceeding where mediation is a precondition to arbitration without an assessment of "appropriateness" under section 5(1)(a)(iv). Appropriateness will always be based on an interpretation of the particular contract between the parties and assessed on the facts of each case.

However, in light of *PQ Licensing*, it is important for parties negotiating commercial contracts to appreciate the potential implications of including preconditions to arbitration in dispute resolution provisions. Such preconditions could have the effect of postponing the start date of the two-year limitation period beyond the date of when a claimant knows it has incurred a loss. This may, among other things, impact the viability of a limitation period defence.

Divisional Court Requires Monies to Remain in Court for Discharged Lien

Heinrichs v. 374427 Ontario Ltd.,
2018 ONSC 78 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

ONSC (Div. Ct.)

ONTARIO

From time to time parties in a lien dispute will, for various reasons, agree to pay monies for a claim for lien into a lawyer's trust account on the basis of a negotiated agreement rather than into court pursuant to the statutory provisions permitting such payment in to court as of right in order to vacate the claim for lien. The motives may be for legitimate business reasons, such as avoiding motion cost or to provide for more flexibility in dealing with the funds in the event the dispute is settled or adjudicated in some fashion other than through a courtroom trial.

However, such arrangements need to be entered into with caution. A recent decision of the Ontario Divisional Court dealing with a private agreement respecting the provision of security for a lien as an alternative to the statutory scheme highlights that if the parties intend the provisions of the lien legislation to continue to apply to the proceedings and to the monies held in trust, that they should explicitly provide for the continued application of these statutory provisions in the agreement. On appeal from a decision releasing the funds from the lawyer's trust account, it was ruled that it was an error for a master to have applied the provisions of the Ontario *Construction Lien Act* to such a private agreement by way of analogy, meaning the funds were required to remain in place notwithstanding litigation delay by the plaintiff.

The project lands had been sold by the mortgagee pursuant to a power of sale without having first removed the plaintiff's lien from title. The lien claimant and mortgagee subsequently negotiated terms of an agreement whereby part of the proceeds from the sale of the land were to be held in aa lawyer's trust account pursuant to an undertaking to release the funds only upon a mutual direction or court order. The agreement between the parties provided as follows:

> IN CONSIDERATION of the Instruments being discharged from the Lands on or before the 21st day of February, 2016, Brattys LLP undertakes to hold the sum of FOUR HUNDRED FIFTY-TWO THOUSAND THREE HUNDRED AND EIGHTY-EIGHT DOLLARS AND SIXTY-TWO CENTS ($452,388.62) in escrow pending receiving a joint direction from Sahar Zomorodi and Allan L. Morrison or in the alternative a Court order directing the payment of the same

Rather than vacate the lien pursuant to section 44 of the Ontario *Construction Lien Act*, the lien was discharged on consent. Put another way, by operation of law the lien was irrevocably extinguished and the parties chose an alternative process to the statutory scheme whereby security for the plaintiff's claim was provided for by way of private agreement and not through the provisions of section 44 of the *Construction Lien Act*. Of course, had the parties chosen to proceed under the statute, the usual court order would have lifted the lien from title, but kept the lien alive as a charge on funds

Divisional Court Requires Monies to Remain in Court for Discharged Lien

Heinrichs v. 374427 Ontario Ltd.,
2018 ONSC 78 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

ONSC (Div. Ct.)

ONTARIO

deposited with the court. However, the agreement in this case explicitly provided for the discharge of the lien and did not purport to make the retention of the funds subject to the *Construction Lien Act* or subject to any particular timeline to bring the action to trial.

More than two years passed from the date of the agreement, and the plaintiff had taken no steps to bring its action forward, let alone set the action down for trial. The defendants brought a motion to dismiss the action in its entirety for delay or, in the alternative, to direct that the action proceed as an action in contract under the *Rules of Civil Procedure*. In respect of both options, the defendants sought an order directing the release of funds held in trust by the law firm. The master granted the motion in part and ordered the release of the funds, holding as follows:

> On the issue of the release of security, I find that it would be inappropriate to allow the plaintiff the benefit of the security contemplated by the Construction Lien Act in circumstances where the plaintiff failed to set down the lien action for trial within the two year limitation period required by section 37 of the Act. Had the security for the lien claim been posted in court pursuant to section 44 of the Act, and had the action not been set down for trial within two years as required by section 37 of the Act, then the lien would have expired and the funds would have been ordered released from court.

The master held that the payment to the law firm was “simply an alternate repository of the security otherwise payable into court to vacate a lien, pursuant to s. 44 of the Act”.

The Divisional Court held that since the parties had specifically agreed to a "discharge" of the lien, section 44 had no application, and that the master’s use of that section by analogy was in error. The court also held that the Master misapprehended the evidence and made a palpable and overriding error in interpreting the undertaking in failing to take into account contemporaneous emails between counsel that established that the agreement was intended to provide that the funds were to remain in the lawyer’s trust account pending the resolution of the dispute between the parties or further court order. In other words, the agreement did not provide that the monies were to be subject to the procedural requirements of the *Construction Lien Act* and the master should not have applied these requirements by analogy where the lien was already discharged.

In the result, ironically, the party seeking the return of the funds had less protection in these circumstances where they had sought and received a discharge of the lien than they would have enjoyed had they simply paid the money into court in order to have the lien vacated. A couple of observations thereby emerge. One, parties should be careful about departing from the

Divisional Court Requires Monies to Remain in Court for Discharged Lien

Heinrichs v. 374427 Ontario Ltd.,
2018 ONSC 78 (Div. Ct.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

ONSC (Div. Ct.)

ONTARIO

statutory procedure in favour of private agreements concerning the holding of monies subject to a lien claim in trust. It is easy to imagine circumstances such as these where unintended consequences generate costs and complexities which far exceed the costs that would have been incurred on a simple motion to have vacated the lien upon posting of security in the ordinary course. The statutory provisions are well-known and outcomes of failing to follow the provisions are generally predictable, whereas a private agreement will very much depend on the parties' specific drafting and is therefore inherently less predictable. Two, if the intention is to replicate some or all features of the lien legislation in the treatment of the dispute and the funds going forward, the parties would be well-advised to say so explicitly in the agreement. At least in Ontario it does not appear legally permissible to apply the *Construction Lien Act* by analogy once the action is taken outside the statute by a discharge of the underlying lien.

Ruling on Materiality of Tender Terms is Mixed Fact and Law for Appeal Purposes

Maglio Installations Ltd. v. Castlegar (City)
2018 BCCA 80

LUC #148 [2018]

Primary Topic:
XII Tendering
Jurisdiction:
British Columbia
Authors:
W. Dirk Lauden, Borden Ladner Gervais LLP

CanLII References:

BC Court of Appeal

BRITISH COLUMBIA

This case deals with the standard of appellate review in procurement disputes. Here, the City of Castlegar, British Columbia, embarked upon a Contract A / Contract B construction procurement. It was common ground that the terms of tender contained the usual implied term that the City would not accept bids that contain material defects. Only non-material defects could be waived by the City. The terms of tender required the bidders to provide a preliminary schedule. The low bidder failed to provide that schedule, but the City accepted its bid anyway. The second-lowest bidder sued the City on the basis that it was the low qualified bidder.

At a summary trial under the British Columbia *Supreme Court Civil Rules*, the Court rejected the City's argument that the provisional character of the preliminary schedule rendered it unimportant to the City's deliberations. Instead, the Court found that providing a preliminary schedule was a material requirement of the terms of tender, and therefore the bid accepted by the City was materially non-compliant and invalid.

On appeal, the Court of Appeal concluded that the summary trial judge had applied the correct legal test, and his finding on the materiality of the requirement for a schedule was a mixed question of fact and law. The standard of appellate review was, therefore, palpable and overriding error. The summary trial judge had made no palpable or overriding error, and on that basis the Court of Appeal deferred to his finding. The appeal was dismissed.

Ontario Superior Court Provides Helpful Summary of Consequences of Breaches of Construction Contracts

D & M Steel Ltd. v. 51 Construction Ltd., 2018 ONSC 2171 (S.C.J.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

Ontario Superior Court (S.C.J.)

ONTARIO

The Ontario Superior Court decision in *D & M Steel Ltd. v 51 Construction Ltd.* is of general interest on at least two important topics: (a) the standard of review to be applied by a Superior Court Judge on a motion to oppose confirmation of a master's report; and, on the legal consequences for both owners and contractors if they are found to be in breach of contract.

In respect of the standard of review on appeal, in jurisdictions where a reference to a master for the trial of a lien action is possible, a motion to oppose confirmation of the master's report is in effect the appeal of the trial decision at first instance. Justice Perrell confirmed that the applicable standard of review on such a motion is consistent with the standard of review of an appellate court on an appeal from a trial judgment, namely "palpable and overriding error". This requires a deferential approach such that the master's conclusions on matters of fact should not be readily interfered with by the judge hearing the motion to oppose confirmation of the master's report.

The case itself involves many of the elements of a "classic" construction project dispute where an owner and contractor are arguing over a litany of construction issues: deficiencies; alleged extra work; project delay; and, ultimately whether a contract was improperly terminated by the owner or abandoned by the contractor. In the case at hand the disputes had caused the relationship between contractor and owner to deteriorate to a point of crisis whereby the contractor refused to continue with work unless their demands for payment were met. This sort of "stand-off" is all too common a situation in construction projects, and the stakes for clients and the lawyers advising them through such crises are high. It is useful in such situations to return to first principles, and Justice Perrell has provided in his reasons for decision a helpful summary of the relevant law from the perspective of both the contractor and owner.

Ultimately, the actual facts of this case and the court's disposition thereof are of less interest beyond the interests of the immediately affected parties. That being said, it is worth if for counsel to read this case not just for the helpful statements of law on both the standard of appellate review of a master's trial decision and on the consequences of breach of contract, but also as a cautionary tale for clients about the risks of embarking on a full determination on the merits of a "project in crisis" through litigation. Both contractor and owner had claims against each other for approximately $150,000. Ultimately the contractor was found to have breached its contract by refusing to work unless it received payments that the court found were not yet due. Justice Perrell affirmed that a party found to be in fundamental breach of a contract was not entitled to an award of damages, and the contractor was therefore only entitled to a judgment of only $1,130.00 consisting of previously approved extras to be paid out of the holdback. The owner, although almost entirely successful in defending the lien action, sim-

Ontario Superior Court Provides Helpful Summary of Consequences of Breaches of Construction Contracts

D & M Steel Ltd. v. 51 Construction Ltd., 2018 ONSC 2171 (S.C.J.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

Ontario Superior Court (S.C.J.)

ONTARIO

ilarly failed to establish an entitlement to damages for almost all of the counterclaim, and was left with a judgment on the counterclaim for only $560 in inspection costs. Both levels of decision left the issue of legal costs to be resolved by the parties. It is difficult to characterize this result as having been very successful for either side, and no doubt both sides must have incurred significant unrecoverable legal costs, plus wasted time and resources. Again, counsel looking for an example to present clients with a real-world example of how litigation can go horribly wrong for both sides in a construction dispute need look no further.

In reaching this result, Justice Perrell carefully reviewed the law pertaining to breaches by both contractor and owner. The court first dealt with the consequences of an owner's breach of the construction contract. If the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached the contract and it has no claim for damages. In this event the contractor is justified in abandoning the work and is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time. The court may also award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract.

In a *quantum meruit* claim, deficiencies in the work actually performed are deducted from the value of the work done, but no account is taken of the owner's costs to complete in calculating the contractor's damages.

The court then reviewed several examples of contractor breach and the resulting consequences. Merely bad or defective work, or insignificant non-completion will not, in itself, entitle an owner to terminate a contract, but the owner will have an obligation to pay for the work and make a claim for damages for the defective work. Nor will an owner be able to terminate the contract because of some minor or inconsequential failure to complete, although the owner may have a claim against the contractor for damages for non-completion or for defective workmanship, which will generally be the cost of completing the non-completed items or remedying any defects. If the contractor breaches the contract, an owner who alleges that the work performed or the materials supplied are defective must provide proper evidence on the basis of which his or her damages can be assessed.

If there are defects in a contractor's workmanship, but not enough to amount to a fundamental breach entitling the owner to terminate the contract, the contractor should be permitted to remedy the defects, and failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim to remedy the defects as a result of its failure to mitigate.

D & M Steel Ltd. v. 51 Construction Ltd., 2018 ONSC 2171 (S.C.J.)

LUC #148 [2018]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII References:

Ontario Superior Court (S.C.J.)

ONTARIO

Ontario Superior Court Provides Helpful Summary of Consequences of Breaches of Construction Contracts

If a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed.

It is clear from the foregoing that the stakes can be very high indeed when a contractor and owner are at a point of crisis where the contractor refuses to proceed unless paid. Both sides must proceed with caution, and the foregoing legal principles are full of traps whereby each side can find themselves without remedy. In *D & M Steel*, the contractor was trapped in that the terms of the contract did not permit them to demand the payments at issue and the decision to cease work therefore constituted abandonment. For the owner, the main trap was that they failed to adduce evidence of their damages. In the end, neither side could have been left happy with the result of this "zero sum game". Of course each case turns on its unique facts, but counsel would be well advised to review both the result and the summary of principles contained in this decision with their clients, particularly when advising either a contractor or an owner on a "project in crisis" as to the risks and consequences they respectively face when both the work and payments have stopped.

Court Refuses to Consider Sanctions for Excessive Lien Due to Aggressive Positions Taken by Owner for Leverage

Atlas Painting & Restoration Ltd. v. 501 Robson Residential Partnership
2018 BCSC 600

LUC #148 [2018]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
British Columbia
Author:
W. Dirk Lauden, Borden Ladner Gervais LLP

CanLII References:

BC Superior Court

BRITISH COLUMBIA

In this case, the lien claimant proved its lien at trial, but in a far lesser amount than what it had originally filed on title. At trial, the owner sought damages by way of counterclaim, on the basis that the lien was an abuse of process. The Court agreed that the exaggerated lien was an abuse, but declined to award punitive damages, or even make an unfavourable costs award. The lien claimant was not alone in advancing claims or taking steps purely for leverage. The owner had also done so, including terminating the contractor, and advancing claims for delay, foregone revenue, and "stigma". In light of this, Griffin J. thought "the howls of outrage seem somewhat artificial" (para 166).

Ongoing Dispute does not constitute "Notice in Writing"

Urban Mechanical v University of Western Ontario, 2018 ONSC 1888

LUC #148 [2018]

Primary Topic:
III Building Contracts
Secondary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court

ONTARIO

The Defendant Norlon Builders London Limited ("Norlon") was retained by the University of Western Ontario ("Western") as the general contractor responsible for the construction of a new School of Nursing Building. The Plaintiff Urban Mechanical Contracting Ltd. ("Urban") was subcontracted to provide the goods and labour necessary to install the building's mechanical systems.

There was a dispute over the amount owed to Urban which brought a claim for payment. Norlon brought a motion for partial summary judgment dismissing a portion of the Urban claim. The motion related whether work performed by Urban to replace piping it had installed could be claimed as an extra to the subcontract. The piping referred to as Victaulic piping is a clamp-on connector with a rubber gasket that connects the ends of two lengths of piping. The pipes to be connected each have a groove near the connection point which allows the Victaulic clamp to hold the gasket in place and create a seal between the pipe ends. The system is highly efficient when compared to the other options of threading or welding. Urban had used the Victaulic connection in places in the building where Western, the consultants and Norlon believed the specifications did not allow its use. Specifically, the connection had been used for hot water piping and the specifications provided that the connection could not be used for water piping over 140 degrees. The hot water system was designed for 160 degree water.

On September 3, 2015, the mechanical consultant raised the problem with the installation. Urban requested a meeting to discuss the installation and the University responded on several occasions over the next month that no meeting was necessary as its position was that the specifications were clear. On October 8, 2015, a written field report by the consultant mentioned the issue and indicated that the heated water lines had to be installed in accordance with the specifications. Eventually a meeting occurred and there was further ongoing debate back and forth. Norlon stated in writing on April 12, 2016 that no extra would be considered for the required remedial work. On June 8, 2016, Urban expressed that they were proceeding with the work under protest and Norlon responded that the claims for extras relating to the work had already been rejected. Norlon also took the position that Urban had contractually accepted the disallowance of the Victaulic claim because it had not given a Notice in Writing of dispute as required by the CCDC subcontract form.

The motion for partial summary judgment came before Mr. Justice Grace. Urban firstly presented evidence that the manufacturer's specifications for the Victaulic coupling system showed it was fully capable of withstanding temperatures of up to 230 degrees. Justice Grace however found that the project specifications were clear that it was not to be used for the hot water system. In the circumstances, he stated that the evidence of whether the

Ongoing Dispute does not constitute "Notice in Writing"

Urban Mechanical v University of Western Ontario, 2018 ONSC 1888

LUC #148 [2018]

Primary Topic:
III Building Contracts
Secondary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court

ONTARIO

system could work or not work was simply irrelevant. Western had the right to insist on compliance with its specification. The reasonableness of the Western specification was not for the Court to consider. The Court would not consider rewriting the specification.

On a second issue raised by Norlon as to whether the parties had settled the dispute by allowing the Victaulic system to remain in place in certain locations, the Court found that the determination on the specifications was dispositive and the issue did not have to be considered. However, Justice Grace noted that if the first issue was not dispositive, he would not have been in a position to resolved the matter on a motion based on the settlement argument due to a lack of evidence on the record.

The third issue raised by Norlon was that Urban had not provided the required Notice in Writing pursuant to the CCDC subcontract form. Section 8.2.1 of the Subcontract provided:

> *The Subcontractor shall be conclusively deemed to have accepted a decision of the Contactor under paragraph 8.1.1…and to have expressly waived and released the Contractor from any claims in respect of the particular matter dealt with in that decision unless, within 7 Working Days after receipt of that decision, the Subcontractor sends a Notice in Writing of dispute…which contains the particulars of the matter in dispute and the relevant provisions of the Subcontract Documents…*

The Court found that Norlon had rejected Urban's demand for additional payment on April 12, 2016 and that the matter was not pursued further until June at the earliest.

Urban argued that in September and October 2015 was the relevant time period and reference should be had to Section 8.13 of the subcontract which stated

> *If a dispute is not resolved promptly, the Contractor shall give instructions for the proper performance of the Subcontract Work and to prevent delays pending settlement of the dispute. The Subcontractor shall act immediately according to such instructions, it being understood that by doing so neither party will jeopardize any claim the party may have. If it is subsequently determined that such instructions were in error or at variance with the Subcontract Documents, the Contractor shall pay the Subcontractor costs incurred by the Subcontractor in carrying out such instructions which the Subcontractor was required to do beyond what the Subcontract Documents correctly understood and interpreted would have required…*

Ongoing Dispute does not constitute "Notice in Writing"

Urban Mechanical v University of Western Ontario, 2018 ONSC 1888

LUC #148 [2018]

Primary Topic:
III Building Contracts
Secondary Topic:
VII Breach of Terms of Contract
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

CanLII References:

Ontario Superior Court

ONTARIO

The Court did not accept this argument. The solution was negotiated in meetings and not imposed so the section was considered inapplicable. The Court considered the important period to be April of 2016 when Urban submitted its invoice and it was rejected which triggered Section 8.21. The Court referred to *Corpex (1977) Inc. v Canada,* [1982] 2 S.C. R. 643, *Doyle Construction Co. V Carling O'Keefe Breweries of Canada Ltd.,* [1988] B.C.J. No 832 (C.A.) and *Technicore Underground Inc. v Toronto (City)* 2012 ONCA 597 all of which upheld the need to comply with the strict notice requirements in construction projects. The Court found that the consequence for non-compliance was a waiver of the claim under Section 8.2.1.

In the result, the Court granted Norlon's motion for partial summary judgment respecting the additional costs claimed by Urban.

It is the author's perception that the courts are moving towards a more literal enforcement of the terms in construction contracts. While *Corpex* and *Doyle* have been around for many years, they were not always followed. Judges looked to actual circumstances to determine whether the parties were fully aware of the items in dispute such that formal notice was not considered necessary, despite the contract wording. When notice was required, judges sometimes found sufficient in minutes of meetings, informal correspondence or other circumstances. Sometimes the non-compliance of the opposing party with other formal requirements in the contract was found to relieve the claimant from strict compliance with the notice provisions. This case is an indication that a more formal approach to the terms of the contract is now more likely to be enforced and judges are reluctant to apply creative solutions to circumnavigate the strict contract terms.

Is the Two Year Limitation Period for Claims for Contribution and Indemnity Absolute or Presumptive?

Mega International Commercial Bank (Canada) v. Yung, 2018 ONCA 429

LUC #148 [2018]

Primary Topic: I General
Jurisdiction: Ontario
Authors: Brendan D. Bowles and Myles Rosenthal, Glaholt LLP

CanLII Reference:

Ontario Court of Appeal

ONTARIO

It is often the case in construction disputes that the defendant will make claims for contribution and indemnity against a third party. Although often pursued together, it is worth noting that the concepts of "contribution" and "indemnity" are not one and the same. A contribution claim seeks shared liability between a defendant and a third party for a plaintiff's injury. For example, should a plaintiff-property owner sue a defendant-contractor for breach of contract because of an undue delay in the plaintiff's development project, the defendant-contractor may make contribution claims against subcontractors who contributed to the delay. Indemnity, on the other hand, seeks full liability from a third party. Returning to the above example, should a subcontractor's negligence be the sole cause of the undue delay, the defendant-contractor may seek indemnification from the subcontractor, considering it would be inequitable for the defendant-contractor to be "on the hook" for an injury caused by no fault of its own.

Claims for both contribution and indemnity are routinely brought together as a means of risk and damages mitigation by defense counsel for their clients. Indeed, contribution and indemnity claims are treated together under section 18 of Ontario's *Limitations Act, 2002*. Subsection 18(1) provides:

> For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

Until recently, decisions in the Ontario Superior Court of Justice were split over the meaning of this provision. Specifically, it was unclear whether the provision provides for an absolute or a presumptive limitation period of two years from the day the plaintiff serves the defendant bringing a third party claim. An absolute limitation period would bar any claim brought more than two years after this date, without exception. A presumptive limitation period would bar any claim brought more than two years after this date, subject to the principle of discoverability. The issue was addressed in an Ontario Court of Appeal decision *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429 (*"Mega International"*), released on May 7, 2018. Although not a construction case, this is a "must-read" for construction lawyers due to the prevalence of third and even fourth party claims in construction disputes. With both projects and disputes often measured in spans of years, the limitations risks of claims for contribution and indemnity seems particularly acute in respect of construction project claims.

Mega International Commercial Bank (Canada) v. Yung, 2018 ONCA 429

LUC #148 [2018]

Primary Topic: I General
Jurisdiction: Ontario
Authors: Brendan D. Bowles and Myles Rosenthal, Glaholt LLP

CanLII Reference:

Ontario Court of Appeal

ONTARIO

Is the Two Year Limitation Period for Claims for Contribution and Indemnity Absolute or Presumptive?

In *Mega International*, Justice Paciocco interpreted the provision using the purposive approach of statutory interpretation. The purposive approach establishes that:

> ...there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. *Rizzo & Rizzo Shoes Ltd (re)*, [1998] 1 SCR 27 at para 87.

With this as a guiding principle, Justice Paciocco first turned to the opening line of section 18, which states that the provision should be read in light of subsection 5(2) and section 15 of the *Limitations Act, 2002.* Subsection 5 (2) establishes a rebuttable presumption to the effect that the "limitation clock" begins to run against the plaintiff on the date of the alleged injury unless the they neither knew nor ought to have known of their injury on this date. Moreover, section 15 establishes an absolute limitation period of 15 years in Ontario from the date of any wrongdoing.

Relying on the Supreme Court of Canada decision *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, which stands for the proposition that one can presume that a legislature avoids using "superfluous or meaningless" words in a statute, Justice Paciocco found that the reference in section 18 to subsection 5(2) and section 15 would be superfluous and meaningless if section 18 provided for an absolute two year limitation period. For one thing, it would not make sense for section 18 to invoke the rebuttable presumption in subsection 5(2) if section 18 did not provide for a presumption that could be rebutted. In addition, any invocation of the absolute limitation in section 15 would not make sense if section 18 established its own absolute limitation period ending thirteen years earlier.

Accordingly, section 18 provides for a presumptive, not an absolute limitation period. The Court found that this interpretation aligned with the goals of the Act, which is to strike a balance between a plaintiff's right to sue and a defendant's need for certainty and finality.

Mega International clarified a few other points. Firstly, the words "the day on which the first alleged wrongdoer was served with the claim", in subsection 18(1) refer to the day the defendant who is bringing the third party claim is served by the plaintiff in the parent action. In this case, the third party suit was brought by two defendants the plaintiff had served two years apart in the parent action. The motion judge erroneously found that the "limitation clock" for the third party claims began to run against the second defendant when the plaintiff served the first defendant. The motion judge thus based his findings on a misinterpretation of "the first alleged wrongdoer" under subsection 18(1).

Mega International Commercial Bank (Canada) v. Yung, 2018 ONCA 429

LUC #148 [2018]

Primary Topic:
I General
Jurisdiction:
Ontario
Authors:
Brendan D. Bowles and Myles Rosenthal, Glaholt LLP

CanLII Reference:

Ontario Court of Appeal

ONTARIO

Is the Two Year Limitation Period for Claims for Contribution and Indemnity Absolute or Presumptive?

The second holding relates to the principle of discoverability and its relationship to fraudulent concealment. The defendants brought a third party claim for contribution and indemnity against their solicitor and his law firm after the solicitor allegedly failed to release the defendants from personal guarantees that formed the basis of the plaintiff's parent action. Despite conflicting accounts, the motion judge found that both defendants knew they had a claim against the solicitor more than four years prior to bringing their third party claim. The motion judge reasoned that the plaintiff had sent letters to the defendants prior to commencing the parent action explaining the guarantees were never released.

Justice Paciocco clarified that even though the defendants might have known of the facts giving rise to their claim against the solicitor, this did not imply that they knew a claim against the solicitor was legally appropriate. The defendants made a number of allegations against the solicitor including that he assured the defendants they could not be found personally liable on the basis of the guarantees. This would by definition be considered fraudulent concealment and therefore the facts presented a genuine issue for trial. Justice Paciocco thus held that the motion judge committed an "error in principle" in granting summary judgment to the solicitor and his law firm.

The case was remanded for further proceedings in accordance with Ontario's *Rules of Civil Procedure.* For construction practitioners, the counsel of prudence is to ensure that third party claims and the like which seek contribution and indemnity are served within two years of service of the statement of claim, remembering that the claim is deemed to be discovered on that date. This should always be the default advice of the careful lawyer.

However, *Mega International* is a helpful reminder that there are very few "absolutes" in our system of law, and in a proper case this presumption may be rebutted. This could be very useful in multi-year disputes where additional causes of action for contribution and indemnity are only uncovered during a process of discovery well after service of the original statement of claim. Counsel will at least be able to argue that the deemed discovery upon service of a statement of claim is a presumption that should be rebutted in an appropriate case. As always, each case will depend on its own facts to determine when it is appropriate to permit third party claims brought more than two years after service to proceed.

Contact the Legal Update Committee:

c/o **Kenneth Crofoot**
Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
Tel: 416-597-4110
Fax: 416-979-1234
E-mail: kcrofoot@goodmans.ca

Legal Update Newsletter Design and Desktop Publishing:
Nicholas J. Dasios

Next Legal Update — watch for it!

CANADIAN College of CONSTRUCTION Lawyers Inc. | Le Collège CANADIEN Des Avocats en droit de la CONSTRUCTION INC.

CCCL Fellows-Only Website Board of Governors Website EDIT LINKS

Legal Update Document Database

- Home
- Upcoming Events
- Announcements
- Groups
  - All Fellows - Actions
  - Board of Governors
  - Website Committee
  - More...
- Legal Update Document Database
- Experts Database
- Important Documents
- Annual Conference Docs
- Group E-mail + Links
- Pictures
- Recent

EDIT LINKS

new document or drag files here

All Documents ...

Name	Year	Issue	Details	1st Topic
LegalUpdate123	2014	123	Full text of newsletter	I. General
LegalUpdate122	2014	122	Full text of newsletter	I. General
LegalUpdate121	2014	121	Full text of newsletter	I. General
LegalUpdate120	2014	120	Full text of newsletter	I. General
LegalUpdate119	2014	119	Full text of newsletter	I. General
LegalUpdate118	2013	118	Full text of newsletter	I. General
LegalUpdate117	2013	117	Full text of newsletter	I. General
LegalUpdate116	2013	116	Full text of newsletter	I. General
LegalUpdate115	2013	115	Full text of newsletter	I. General
LegalUpdate114	2013	114	Full text of newsletter	I. General
LegalUpdate113	2013	113	Full text of newsletter	I. General
LegalUpdate112	2013	112	Full text of newsletter	I. General
LegalUpdate111	2012	111	Full text of newsletter	I. General
LegalUpdate110	2012	110	Full text of newsletter	I. General
LegalUpdate109	2012	109	Full text of newsletter	I. General
LegalUpdate108	2012	108	Full text of newsletter	I. General
LegalUpdate107	2012	107	Full text of newsletter	I. General
LegalUpdate106	2012	106	Full text of newsletter	I. General
LegalUpdate105	2012	105	Full text of newsletter	I. General
LegalUpdate104	2012	104	Full text of newsletter	I. General