CONSTRUCTION LAW LETTER

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FIXED PRICE OR COST PLUS? A TALE OF TWO CONSTRUCTION PROJECT PAYMENT ARRANGEMENTS

When it comes to construction projects, the choice of payment arrangement between the parties is a crucial consideration. In a fixed price (lump sum) arrangement, the total payment for the required work is determined from the outset. Responsibility falls on the contractor to stay within the fixed price or risk financial losses. In a cost-plus arrangement, the price paid by the owner depends on the amount of work actually performed by the contractor plus a fixed or percent fee. The owner generally provides more oversight to prevent inflated or inappropriate costs.

Whether you are an owner or a contractor, it is important to understand how your payment arrangements for a project can be interpreted by a court. In *Twister Developments Ltd. v. 1406676 Alberta Ltd*, the court ruled that the payment arrangement between the parties was a cost-plus

LexisNexis Canada Inc. congratulates Harvey J. Kirsh on his being awarded the Governor General of Canada's Medal for Meritorious Service for achievements in the development of the field of construction law in Canada. He has demonstrated exemplary leadership as a construction arbitrator, mediator, referee, author, counsel and advocate, and as the founding president of the Canadian College of Construction Lawyers. The presentation ceremony by the Governor General will take place at Rideau Hall in Ottawa in the Fall.

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CONSTRUCTION
LAW LETTER

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contract, even though the parties had entered into written fixed-price contracts. Twister Developments Ltd. (the contractor) and 1406676 Alberta Ltd. (the owner) agreed to construct two buildings in Fort McMurray, Alberta. However, events beyond either party's control caused delays and the relationship broke down before the project could be completed. The owner subsequently hired a new contractor to complete the project and refused to pay the original contractor's last invoice.

In *Twister*, the court ruled it was "*not fair or reasonable to try to impose the terms of the fixed price contract on the parties when their* ***history and relationship*** *establishes that it was not reflective of the agreements under which they were operating*" (emphasis added). A number of factors in how the parties carried out the project led the court to this conclusion:

- **Adherence to legal formalities**: The parties carried out the project informally and without adhering to what had been formally set out in their written agreements. They did not obtain legal assistance when drafting the contracts and had recycled contracts from previous projects.
- **Budget involvement**: The fixed price was determined based on a budget the owner and the contractor created together. They watched budget items and sought cost savings together. The fixed price was mutually amended in light of a price reduction on a large line item. For cost-plus contracts, it can benefit both parties to reduce large budget items; while in a fixed-price contract, the owner would not be concerned with budgeting since the fixed price protects them from changes in costs, and the responsibility to come under budget falls on the contractor.
- **Intent of parties**: The parties apparently never intended to rely on the executed written contract. The fixed-price contract was only used to secure financing from the bank. The contractor operated as if they were to complete the project for the budget, plus a profit for themselves.
- **Invoice process**: Even though the fixed-price contract stipulated progress payments based on the percentage of work actually completed, the quantity surveyor/project monitor appointed was not instructed to, nor did they, certify

the contractor's work in that manner. Instead, the surveyor certified each invoice as being "*fairly reflective of the work that had been completed*" by the contractor.

As a result, the owner was ordered to pay the contractor's last invoice of $173,012. Had the court ruled a fixed price arrangement existed, the owner may have been entitled to set off damages arising from the contractor's failure to complete the project against the contractor's last invoice. The ruling in *Twister* is in line with existing principles of contract law. If subsequent conduct of parties to a written contract indicate they do not consider themselves governed by that contract, and instead have developed an alternative arrangement that is established on clear evidence, it is unreasonable to impose the written contract on the parties.

Alberta Court of King's Bench

Twister Developments Ltd v. 1406676 Alberta Ltd.
M.E. Burns J.
September 21, 2023

Louis Carriere
Fasken Martineau DuMoulin
S.E.N.C.R.L., Quebec City

Alexandre Belzile
Fasken Martineau DuMoulin
S.E.N.C.R.L., Quebec City

THE END OF THE WORK JUSTIFIES THE LEGAL MEANS

The concept of completion of the work, our subject here, is crucial for any property developer, contractor or construction professional in several respects.

First, it sets the starting point for calculating the grace period for preserving a construction legal hypothec (equivalent to lien under Quebec law) (art. 2727 of the *Civil Code of Québec* (C.C.Q.)): if the deadlines are not met, the legal hypothec may be cancelled.

It is also the starting point for the warranty against loss of the work (structure) that occurs within five years as against the parties who participated in its construction (art. 2118 C.C.Q.) and the starting date for calculating prescription (generally three years) of the remedy between the client and their contractor (arts. 2116 and 2925 C.C.Q.).

A recent decision of the Superior Court, *11489470 Canada inc. c. Constructions Maxime Langevin*, rendered on March 22, 2023, offers a good summary of the principles by which anyone working in the construction industry must be guided in determining this key concept.

Criteria Used in the Courts' Analysis

To determine whether completion of the work has occurred, a distinction must be made between the work provided by the contract and work that was not provided in the contract, plans and specifications:

> [**TRANSLATION**] *[51] In principle, when the scope of the work is provided for by contract,* [completion of the work] *occurs when the contract of enterprise has been performed in full, including all work that is a logical continuation of the work expressly set out in the contract, as minor as it may be. For work that is not expressly provided for in the contract, only work that is of a certain degree of importance for the usefulness of the building can operate to postpone completion of the work. Accordingly, correcting defects or poor workmanship does not delay completion, nor does failure of the work to comply with the applicable regulations in force.*
>
> [**TRANSLATION**] *[52] Where the scope of the work is not specified in the contract, the completion of the work used for calculating the time applicable to a legal hypothec occurs when a combination of indications show that the building is fit to be used for its intended use, even if some work remains to be done.*

As a result, if additions are made to the work initially

agreed to, the question then becomes whether the additions are accessory to the work provided in the contract and foreseeable when the contract was signed or are additions independent of the work initially agreed to. In the latter case, the additions do not postpone completion of the initial work since they are considered to be separate work with their own completion.

It is also worth noting what the courts will examine when the scope of the work is not clearly defined and whether the work has been completed has to be determined:

> [**TRANSLATION**] *[81] Given that completion of the work is a question of fact, certain common factual elements suggest or provide indications that the work has been completed within the meaning of article 2110 C.C.Q. Occupation of the building by the owner, provisional acceptance, the words and deeds of the contractor, demobilization of the work site, the end of daily reports, payment by the contractor of the final electricity and gas accounts, removal of construction trailers, and holding a final site meeting are all indications from which completion of the work and the starting point for the prescriptive period can be established.*

We can therefore see from the foregoing that completion of the work as it is conceived in the *Civil Code of Québec* does not depend on one single document, such as a completion of work certificate or substantial completion certificate; rather, it calls for a broader factual and technical analysis.

Important Distinctions

As stated in the *Langevin* decision above, defects and poor workmanship cannot delay completion, since *corrective measures* are considered to be distinct from the work that must be completed in order to trigger the deadlines provided in the *Civil Code*.

What about starting up equipment? Tests to determine whether the building is in compliance? Manuals to be delivered when the work is completed?

While it may be provided for in the contract, the delivery of manuals, warranty documents or other material is a contractual obligation but does not constitute work. As the court pointed out in *Langevin*, it is important not to confuse [**TRANSLATION**] "*the end of* [the] *contractual relationship ... and the relevant completion of the work for registration of the Hypothec, when those two points in time do not necessarily coincide*".

The tests for determining compliance with certain standards or regulations are not *work* within the meaning of the *Civil Code*. All that such tests can reveal is whether or not there is a defect in the work previously carried out. However, since such a defect cannot delay completion, it is logical that the test that could detect it, without adding anything to the structure, would not delay completion either.

In addition, if start-up is necessary for the structure to be used or comprises a logical continuation of the construction or supply of the structure, a deadline for start-up would normally mean a deadline for completion of the work.

Obviously, it will then be critical to distinguish start-up (starting up the equipment) from tests for proper operation (start-up diagnostics), since the latter cannot delay completion of the work, as noted above.

Here, the determining criterion for distinguishing between them is whether the outcome of the manipulation is to enable the structure to function, or the purpose is to detect a *malfunction* of the structure.

Checklist for Completion of the Work

To help those involved in the construction industry in properly analyzing the issue of completion of the work, we suggest the following checklist. This is not in any way a substitute for a legal opinion based on the facts specific to each situation, in order to assess all key criteria for completion of the work.

Is the issue work as opposed to corrective measures, tests, or contractual obligations other than work?

If so, move on to the next question. If not, these actions should not delay completion of the work.

Does the contract provide a clear description of the work, in particular in the plans and specifications? If so, is the work in question part of the list or is it a logical and foreseeable continuation of the work?

If so, it should be work in the sense of the concept of completion of the work, even if the work is minimal and does not prevent the use of the structure.

Where there is no clear designation, or if the work analyzed was not provided for in the contract, does non-completion of that work prevent the structure from being used for its intended use?

If so, it will normally be work within the meaning of the concept of completion of the work. If not, it is very likely to be minimal unforeseen work that would not delay completion, or additions that would then constitute distinct, autonomous work that will have its own completion point, separate from the work initially agreed to.

Superior Court of Quebec

11489470 Canada inc. c. Constructions Maxime Langevin
Katheryne A. Desfossés, JCS
March 22, 2023

Quebec Court of Appeal

11489470 Canada inc. c. Constructions Maxime Langevin
Stéphane Sansfaçon, J.C.A., Frédéric Bachand, J.C.A. & Lori Renée Weitzman, J.C.A.
July 6, 2023

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ARBITRATION CLAUSES IN CONSTRUCTION AGREEMENTS: MANDATORY OR PERMISSIVE?

Although arbitration clauses are commonplace in many standard form construction contracts, owners and contractors may only turn their minds to the implications of such clauses for the first time after a dispute arises. At that time, the arbitration clause must be carefully considered, as it may oust the jurisdiction of the court. Language like "may" and "shall" needs to be carefully considered in light of analogous jurisprudence, as such language may not be an indication that an arbitration clause is permissive or mandatory. Further, there may be notice or other requirements that must be met before a mandatory arbitration clause becomes enforceable, or such a clause may be inoperative in certain contexts.

Selecting an Appropriate Dispute Resolution Process

Where a resolution to a dispute is not forthcoming, parties may wish to litigate for several reasons. A court's decision is public, is generally considered unbiased, and there is a right of appeal. On the other hand, alternative dispute resolution processes such as arbitration are commonly pursued for being private, efficient, cost-effective and flexible procedures. Once a dispute arises, it is important to review the construction contract to determine if a dispute resolution procedure and forum is mandated by the terms of the contract.

Mandatory Arbitration Clauses

On its face an arbitration clause that uses the word "may" vis-à-vis resolving disputes by way of arbitration, appears to be permissive. However, courts have held that the word "may" indicates that a party has the option to invoke the arbitration clause, but once invoked, arbitration becomes mandatory. At the same time, in the case of a contract containing a *mandatory* arbitration clause, which indicates, for example, that the parties "shall" have disputes decided by way of arbitration, if neither party elects arbitration as a means of dispute resolution, they may pursue other avenues to resolution, including in the court.

Does a Dispute Fall Within the Scope of an Arbitration Clause?

In determining how the parties will resolve a dispute, it must be considered whether the arbitration clause contemplated the nature of the dispute that has arisen.

Arbitration clauses in construction contracts often contain broad language that requires "*any dispute arising out of, or relating to, the contract*" to be referred to an arbitrator. While the language encompasses an array of disputes, it does not capture every possible dispute that may arise. Such clauses are self-limiting, constraining matters that shall proceed to arbitration to those that arise specifically from the contract documents.

Not every claim arising is governed by the contract. It must be determined whether the plaintiff is enforcing rights that arise by way of the contract, or rights that are extraneous to the contract. The court has provided guidance on this point, directing one to look to the pleadings themselves; if the plaintiff relies on the contract documents and the contractual relationship to establish the claim, the dispute is likely captured by the broadly worded arbitration clause. On the other hand, a personal injury claim relying on the duty of care owed to one's neighbour, though potentially arising between an owner and contractor, for example, is not a "*dispute arising out of, or relating to, the contract*". Such a claim is pleaded without reference to the contract and is not within the scope of such arbitration clause.

Whether a dispute falls under the arbitration clause may be controversial in itself. The competence-competence principle indicates that such questions of the arbitrator's jurisdiction should be decided by arbitrators at first instance, signalling the current approach to encourage commercial arbitration. An exception to this rule exists where the jurisdictional issue is a pure question of law or a question of mixed fact and law, requiring only a "*superficial consideration of the evidentiary record*". Only then should a court intervene to resolve a challenge to an arbitrator's jurisdiction.

An Example: OPSS.MUNI 100, General Condition 3.14, Arbitration

Most municipal construction contracts for roads and public works include the following arbitration clause, imported from the Ontario Provincial Standards (OPS):

> If a claim is not resolved satisfactorily through the negotiation stage noted in clause GC 3.13.04, Negotiations, or the mediation stage noted in clause GC 3.13.05, Mediation, either party may invoke the provisions of subsection GC 3.14, Arbitration, by giving written notice to the other party.

The use of the word "may" indicates that the clause is permissive. This clause contains two conditions precedent that must occur prior to either party invoking mandatory arbitration:

1. The parties must have "[made] *all reasonable efforts to resolve their dispute by amicable negotiations*". Where negotiations are unsuccessful, optional mediation in accordance with the contract terms may be pursued; and
2. written notice of arbitration must be provided to the other party.

Once the conditions are satisfied and the clause invoked, arbitration becomes mandatory and binding.

Prior to unilaterally invoking the arbitration clause, the party must consider whether the language of the clause captures the type of dispute that has arisen. In the case of municipal construction contracts utilizing the OPS, the language limits disputes that may be arbitrated to "claims for additional payment". Thus, disputes arising that are unrelated to the payment of contract or additional work are not within the scope of the OPS arbitration clause.

Conclusion

Arbitration clauses should be reviewed and negotiated by both parties prior to entering a construction contract, as such clauses will impact how disputes arising between the parties may be resolved. Arbitration clauses may set out notice periods or other private dispute resolution processes that must be explored prior to commencing arbitration.

Where parties have *consensus ad idem* with respect to an arbitration clause, for reasons of public policy, the courts will enforce the clause.

When it comes to municipal contracts, the Request for Tender or Request for Proposal generally includes a boilerplate arbitration clause. The Contract Administrator may not specifically turn their mind to such clause in consideration of the specific project being procured. The bidder is generally not permitted to submit a qualified or conditional bid, and therefore, does not have an opportunity to negotiate terms, including that of the arbitration clause. Since the arbitration clause may have a significant impact on how a dispute is resolved, including who the arbitrator will be, how the process shall proceed and limiting potential rights of appeal, it is critical that both parties turn their mind to such clauses prior to entering the contract. If the arbitration clause is not ideal for the bidder with no opportunity to negotiate, it may have a monetary impact on the bids received by the municipality, or contractors may elect not to submit a bid.

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CONSTRUCTION SUPERVISOR CONVICTED OF OCCUPATIONAL HEALTH AND SAFETY CRIMINAL NEGLIGENCE

A recent trial decision of the New Brunswick Court of King's Bench resulted in another prosecution of a supervisor under the Westray Bill amendments to the *Criminal Code*, effectively establishing a new crime of occupational health and safety (OHS) criminal negligence for individuals and organizations.

This case, *R. v. King*, has broad implications for construction and high-risk workplaces across Canada. The case arose from confined workspace at a municipal wastewater treatment and pumping plant. The supervisor was charged when a worker under his direction was subject to an inrush of water into the confined space that trapped the worker, who could not be rescued in time to save his life.

This case addressed a number of important legal issues and at least three critical questions that apply to all Canadian employers. These questions are also important for the information and guidance to OHS professionals. First, can OHS regulatory standards be used to form the basis of an OHS criminal negligence charge? Second, is there a legal obligation to conduct a formal hazard assessment when performing potentially dangerous work? Third, what is the personal responsibility of a supervisor to understand and follow OHS regulatory standards if not provided formal training by his employer?

On August 16, 2018, Michael Henderson died at a construction site in Fredericton, New Brunswick. He was employed on the site by Springhill Construction Ltd. and worked under the supervision of the accused, Mr. King. The charge on the indictment reads as follows: "*On or about August 16, 2018 at Fredericton, New Brunswick did, by criminal negligence cause the death of Michael Henderson, contrary to s. 220(b) of the Criminal Code of Canada and amendments thereto".*

The facts leading up to the incident were as interesting as they were tragic. The owner of the municipal wastewater treatment and pumping station contracted out the construction of a secondary clarifier. The project would enhance the plant's treatment of liquid waste before it went into the Saint John River. The deceased was working in an eight-foot-deep hole in the middle of the new clarifier. He was protected from the surrounding water by a large pneumatic rubber plug. The plug unexpectedly released into the hole with an onrush of water pinning the worker in the confined space work area that quickly filled with water. The worker drowned before the emergency response effort could rescue him.

The evidence at trial was that the worker's supervisor was not specifically trained in the provincial confined space safety regulations, and he had not read the instructional manual relating to the use of the industrial plug. The trial judge summarized the failures of the accused as follows:

> ***para. 159*** *Mr. King had no viable safety plan in place. He knew Michael Henderson was in the hole, after lunch finishing the clean-up, yet he kept putting water into the manhole increasing the pressure on the plug. Mr. King did not do a hazard assessment before directing that anyone work within a clearly identifiable confined space. He did not place any barrier around the hole during the test to ensure no one went near it. He put water into the system knowing a person was working on the other side of a plug installed in a manner inconsistent with the manufacturer's clear direction. He ignored the Springhill site specific directions for work in a confined space. He did not comply with the legislative provisions that he was required to uphold.*
>
> ***para. 160*** *At 12:51, under the pressure of the water that Mr. King had begun to introduce into the manhole approximately an hour earlier, the plug let go. It trapped Mr. Henderson and, despite the best efforts of those on scene, including his brother Eric, Michael could not be removed from the hole. Approximately one minute after the plug released and trapped Mr. Henderson, Mr. King turned off the hydrant stopping the flow of water into the hole. But the force of the plug on Mr. Henderson's chest, and the water that was rushing into the hole, could not be overcome. By the time Michael Henderson was removed from the hole, efforts to revive him were futile.*

The central legal development of the Westray Bill is the new legal duty under s. 217.1 of the *Criminal Code*, which if contravened may lead to a charge of OHS criminal negligence. That legal duty reads as follows: *"Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a* ***legal duty to take reasonable steps*** *to prevent bodily harm to that person, or any other person, arising from the work or task".* (emphasis added)

This raises the first question mentioned above, can OHS regulatory standards be used to form the basis of an OHS criminal negligence charge? This has critical implications for all workplace stakeholders, not just supervisors. The trial judge conducts the following analysis and provides the answer to that question in the affirmative:

> ***para. 167*** *As noted above, I am satisfied that the duties set out in the Act and Regulations impose legal duties on Mr. King and fall within the intent and meaning of s. 219 of the Code when it speaks of duties that arise by the imposition of law. I will not therefore opine on the application of the Crown's alternative argument as it relates to s. 217* [sic] *of the Code.*

The second question of the court's review was the accused supervisor's failure to conduct a hazard

assessment of the construction work. The supervisor had neither been asked by his contractor employer nor by the owner of the facility to conduct a hazard assessment. The accused argued that this duty did not apply to the supervisor and, alternatively, the workplace was not a "confined space". Both arguments were rejected and the failure of the accused supervisor to conduct a hazard assessment of the work at the construction project was a critical failure of a legal duty of the accused supervisor. The second question was also answered in the affirmative.

Third, since the supervisor did not have confined space training from his employer, the trial judge had to determine what degree of responsibility did the supervisor have to conduct hazard assessment, understand the precautions to be taken when using the plug, and how to be prepared to rescue the worker if something went wrong. The standard of proof of all elements of an OHS criminal negligence charge, and any criminal offence, is proof beyond a reasonable doubt. However, the rank tragedy of the worker's preventable death appears to have moved the court towards strict application of the OHS regulatory standards to the accused under the Westray Bill. The court said,

> ***para.*** *172 In my view, the standard expected of a reasonable site supervisor on a construction site of this type must include, at a minimum, that the supervisor had familiarized themselves with the legislated duties that were binding upon them as set out in the Act and the Regulations. Construction sites, by their nature, contain hazards and can be dangerous (as this incident so tragically proves) and the legislative scheme is meant to reduce and, if followed, hopefully eliminate, that risk. In addition, one should expect that the reasonable supervisor would have familiarized themselves with any site-specific safety plan. Furthermore, the reasonable site supervisor would have familiarized themselves with the basic manufacturer's instructions regarding the safe use of equipment used on the site. These are the basic, fundamental elements of what I find to be the minimally acceptable standard of conduct for a supervisor in the circumstances of Mr. King. I use the phrase 'basic fundamental elements' because, in my view, any failure to meet those basic fundamental elements would, by its very nature, represent a marked and substantial departure from this acceptable minimum standard.*

The net result of this assessment of the accused to take "basic fundamental elements" of workplace safety, even though that is not part of the criminal law, was a criminal conviction. There appeared to be little sympathy towards the accused supervisor's plea that he was not given proper safety training by his employer. The judge says the following:

> ***para. 174*** *I accept Mr. King's evidence that he was not given any training by Springhill. There was no evidence to the contrary. But whatever the reason, Mr. King did not take the steps one would expect of a 'reasonably prudent person' to protect Mr. Henderson, having directed him to work in a confined space in the circumstances existing. With that said, it must be established that his acts or omissions give rise to criminal liability as set out on the Indictment.*

On balance, the accused supervisor was convicted in a trial where he was remarkably the only accused. This case and the reasons for judgment reinforce the importance for supervisor, and their employers of hazard assessment, OHS law compliance, and informed decision making before hazard work is performed. It is also a stark reminder that the consequences of failing to take those steps may result in criminal charges under the Westray Bill that retrospectively places blame on all those who may have been able to prevent a workplace tragedy.

New Brunswick Court of King's Bench
R. v. King
E.T. Christie J.
June 5, 2023

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ONTARIO SUPERIOR COURT PROVIDES CLARITY ON THE AVAILABILITY OF LIEN RIGHTS IN CONNECTION WITH PRE-FABRICATED STRUCTURES

In *On Point Ltd. v. Conseil des Ecoles Catholiques du Centre Est, et al*., the Ontario Superior Court of Justice confirmed that the construction and installation of portable classrooms are "improvements" as that term is defined under Ontario's *Construction Act*, and therefore constitute a lienable supply eligible to be the subject of a lien claim.

The matter involved a summary judgment motion brought by the defendant owner, Conseil des Ecoles Catholiques du Centre Est (CECCE), seeking a finding that the plaintiff's supply of portable classrooms was not a lienable supply, and that therefore the lien remedy was not available to the plaintiff subcontractor lien claimant.

Background

In July 2019, CECCE contracted Ty Corporation (Ty Corp) to construct and install 14 school portables on the Paul Desmarais school site in Stittsville, Ontario.

The court defined the portables as buildings located outside the school building which serve as classrooms for teachers and students. CECCE required the portables to be ready in advance of the school year commencing in September 2019.

Ty Corp entered into a verbal subcontract with On Point Group Ltd. for the construction portion of the work. Under the subcontract, the parties agreed that On Point would construct the portables at its facility in Vars, Ontario. Once the construction of the portables was complete, one of Ty Corp's other subcontractors would deliver the partially completed (two halves of the) portables to the school site. At the school property, the portables were placed by another subcontractor arranged by Ty Corp on temporary foundation stilts. On Point connected the two halves of the portables and another subcontractor arranged by Ty Corp moved them to their final resting spot. On Point then completed the roofing, siding, stairs landing and window casings in respect of the portables on site.

On or about August 13, 2019, it became evident to CECCE that Ty Corp would be unable to supply all 14 portables to the school site by September 2019, thus failing to fulfill its contractual obligations. CECCE subsequently terminated its contract with Ty Corp and entered into a contract with Multi-Service Restoration, an intervening party in the motion, for the construction and supply of the remaining portables. On Point was not fully paid by Ty Corp, and registered a construction lien on the school site.

CECCE subsequently brought a summary judgment motion to determine whether the portables and On Point's supply were "improvements" within the meaning of the Act. CECCE's position was that On Point's lien should be discharged as the portables were not "improvements" within the meaning of the Act.

Analysis

The court began by engaging in an exhaustive review of the legislative framework, historical developments, and relevant case law with respect to the evolution of construction liens in Ontario. Through this review, the court reaffirmed that whether or not a party is entitled to a lien should be strictly construed. Furthermore, the court confirmed that the determination of whether construction work is an "improvement" as defined in the Act, is a fact-driven exercise where the court must determine

whether there has been "value added" to the property in question.

The court ultimately determined that the portables were improvements to the school site, and therefore On Point was entitled to lien rights under the Act for the following reasons:

- On Point completed the portables on the school site;
- The final destination of the portables was known to the parties and therefore there was a connection to the school site;
- CECCE regularly held back 10 per cent of the funds advanced to Ty Corp; and
- The portables enhanced the value of the school.

In reaching the foregoing determination, the court undertook a detailed analysis of the following four factors: (1) the intentions of the parties; (2) the construction of the portables; (3) the installation of the portables; and (4) the building features of the portables.

Intentions of The Parties

The court found that the parties did not expressly contemplate lien rights in the contract, and the contract made no explicit reference to the Act. However, while the contract did not contemplate a retention of a 10 per cent holdback which is only required for lienable services, CECCE did retain a 10 per cent holdback for any portable-related work. Therefore, the court found that CECCE's retention of the 10 per cent holdback, suggested that CECCE was operating on the basis that the portables were a lienable supply. The court further found the parties intended for the portable classrooms to remain at the project site on CECCE's property (and CECCE did not intend for the portables to be leased, or to be returned).

Construction of the Portables

The court found that the construction of the portables was a factor that weighed in favour of a finding that the subject portable supply was an improvement. While the court acknowledged that portables had an inherent impermanence as they can be removed from the school site, the removal would not be a simple task as the portables were anchored to the land with custom support. The court considered various aspects of attachment to the premises through a detailed review of the construction of the portables, reinforcing the importance of the fact-driven exercise associated with an assessment in respect of the issue of lienability.

Installation of The Portables

The court reaffirmed the proposition that the concept of the construction lien is rooted in adding value or utility to the land. The court determined that in this case, there was a direct connection between the work performed to install the portables and adding value to the school site. In particular, the court cited that installation of the portables involved installation of cement footings, electrical work to connect the portable to the school's electrical system and installation of skirts around the portables.

Building Features of The Portables

The court held that the case law on modular prefabricated structures suggests that the availability of lien rights will turn on the nexus between the structure and its connection to the specific lands. Specifically, the case law suggests that the court should consider whether a modular prefabricated structure that can be moved around at will is a chattel. The court noted that lien rights will exist where the structure is manufactured for specific land or in respect of a specific construction project. Furthermore, and pursuant to the nexus test, a supply of services and/or materials will give rise to lien rights where the owner considers the subject services or materials necessary to the completion of the project. The court ultimately held in this case that the portables added utility to the school as it enabled the school to receive further student population without the expense of expanding the school's building, and therefore the portables were improvements to the school site.

Key Takeaways

Given modern engineering techniques, and changing construction processes, including modular building, construction industry stakeholders should carefully consider the applicability of Ontario's lien legislation to their construction projects and any supply in respect of their construction projects (including in situations where there are questions in respect of permanence/impermanence and portability, as movability is one of many considerations).

The issue of lienability, and whether or not a particular supply falls within the meaning of an "improvement" under Ontario's lien legislation is a critical threshold issue with respect to the prosecution/defence of a construction lien claim (in addition to the threshold issues of timeliness and quantum). The analysis with respect to whether a particular supply of services and materials is lienable and meets the definition of "improvement" under Ontario's lien legislation, is a determination requiring a fact-driven exercise.

The *On Point* case highlights that despite the moveable nature of a prefabricated structure, the availability of lien rights will ultimately depend on if the structure adds value or utility to the lands, and whether the subject supply is essential to the normal or intended use of the land, building, structure or works. In the case of prefabricated structures, the court will evaluate various factors, including the construction and removal complexities associated with the structure and the structure's contribution to the property's value.

Furthermore, this case serves as an important reminder to parties that the court may look beyond the governing construction contract/subcontract (in addition to the express words/terms contained therein) and interpret the parties' conduct to determine whether their actions imply an application of the Act.

Ontario Superior Court of Justice
On Point Ltd. v. Conseil des Ecoles Catholiques du Centre Est, et al.
A. Doyle J.
February 6, 2023

Charles Bois
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Noah Robinson-Dunning
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WILL A COURT UPHOLD YOUR ARBITRATION AGREEMENT?

Construction contracts often contain a hierarchy of dispute resolution provisions commencing with "without prejudice" negotiations, then mediation, and culminating in the dispute being resolved by binding arbitration, rather than traditional litigation. Section 15(1) of British Columbia's former *Arbitration Act* provides that if one party to an arbitration agreement commences a legal action, the other party can ask the court to enforce the arbitration provisions of the contract and stay the court action. Section 15(2) of the Act provides that the court must stay the legal proceedings, unless the court determines that the arbitration agreement is void, inoperative or incapable of being performed. Recently, in *Peace River Hydro Partners v. Petrowest Corp.* the Supreme Court of Canada considered whether an arbitration agreement in a construction contract was enforceable and whether a civil action commenced by a receiver to recover payment of funds owing to Petrowest and its affiliates should be stayed. In reaching the decision that the action could proceed, the Supreme Court had to consider whether, and in what circumstances, a contractual arbitration agreement governed by the Act should give way to the public interest in ensuring the orderly and efficient resolution of a court-ordered receivership pursuant to the *Bankruptcy and Insolvency Act* (BIA).

Peace River Hydro Partners v. Petrowest Corp.

In this case, several businesses came together to create a partnership called Peace River Hydro Partners to build a hydroelectric dam in northeastern British Columbia. In 2015, the Partnership subcontracted some of its work to Petrowest Corporation, an Alberta-based construction company and its affiliates. The construction contracts contained several provisions that stipulated that disputes under the contracts were to be resolved through arbitration.

Within two years of commencing the work, Petrowest and the Petrowest Affiliates began to encounter financial difficulties, which led to the Alberta Court of Queen's Bench granting a receivership order pursuant to s. 243(1) of the BIA, and appointed Ernst & Young as receiver over their affairs.

The Receiver commenced a civil action against the Partnership in the Supreme Court of British Columbia seeking to collect the money it said was owing to Petrowest and the Petrowest Affiliates. The Partnership sought to stay the action arguing that the dispute should be resolved by arbitration in accordance with the arbitration agreements. The Receiver opposed the Partnership's attempt to stop the lawsuit and argued that the BIA grants the courts the ability to exercise "centralized judicial control" over the dispute instead of sending the Receiver to multiple arbitration forums. The chambers judge agreed with the Receiver and dismissed the stay application and allowed the civil claim to proceed.

In reaching that decision, the chambers judge found that s. 183 of the BIA empowered the superior court to exercise its "*inherent jurisdiction to control its own processes in order to promote the objectives of the BIA*". The chambers judge also noted that enforcing the arbitration agreements would entail multiple overlapping arbitrations and potential litigation, resulting in "*significant cost and delay*" when compared with a single judicial proceeding. The chambers judge emphasized that the parties agreed that overriding the arbitration agreements "*would promote the efficient and inexpensive resolution of their dispute*". Therefore, the chambers judge concluded that granting a stay of the Receiver's court action would "*significantly compromise achievement of the objectives of the BIA*".

The Partnership appealed that decision to the Court of Appeal for British Columbia. In dismissing the appeal and allowing the Receiver's civil action against the Partnership to proceed, the court reasoned that the Receiver was not a "party" to the arbitration agreements, and that under the doctrine of separability, the Receiver was allowed to disclaim these arbitration agreements and pursue its court action against the Partnership based on the underlying contracts.

The Partnership then appealed the Court of Appeal's decision to the Supreme Court of Canada. The Supreme Court affirmed the dismissal of the Partnership's stay applications by the courts below and allowed the Receiver's action against the Partnership to proceed. In reaching its decision, the Supreme Court first rejected the Court of Appeal's conclusion that s. 15 of B.C.'s *Arbitration Act* was not engaged because the Receiver was not a "party" to the Arbitration Agreements, as it was inconsistent with "*a proper reading of s. 15, ordinary principles of contract law, party autonomy and the SCC's decisions with respect to arbitration*". The Supreme Court made clear that only a court can make a finding that an arbitration agreement is inoperative or incapable of being performed.

The Supreme Court found that although s. 15 of the *Arbitration Act* was engaged, the chambers judge was entitled to refuse to grant the stay sought by the Partnership. The Supreme Court

noted that there may be circumstances where an otherwise valid arbitration agreement may be inoperative or incapable of being performed, such as where enforcing an arbitration agreement would compromise court-ordered receivership proceedings under s. 243 of the BIA and preclude the orderly and efficient resolution of the receivership.

However, the Supreme Court confirmed that the fact that a party has entered receivership or insolvency proceedings is not, on its own, a sufficient basis to find an arbitration agreement inoperative, and the party seeking to avoid an arbitration must establish, on a balance of probabilities, that a stay of a court proceeding in favour of arbitration would compromise the integrity of the insolvency process. The Supreme Court set out a non-exhaustive list of factors that may assist a future court's analysis when deciding whether to uphold the arbitration agreements or render them inoperable in favour of the bankruptcy and insolvency proceeding. These factors include, but are not limited to: (1) the effect of arbitration on the integrity of the insolvency proceedings, which are intended to minimize economic prejudice to creditors; (2) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (3) the urgency of resolving the dispute; (4) the effect of the stay of proceedings arising from the bankruptcy and insolvency proceedings under the BIA, and (5) any other factors that the court considers material in the circumstances.

When Will a Court Uphold an Arbitration Agreement?

The Supreme Court of Canada found that the facts in this case were unique and pit public policy objectives underlying the BIA against freedom of contract and party autonomy which justified departing from long standing legislative and judicial preferences for upholding arbitration agreements. The Supreme Court reasoned that the unique circumstances of this case warranted rendering the arbitration agreements inoperative within the meaning of s. 15(2) of the *Arbitration Act* and that ss. 183 and 243 of the BIA authorize courts to do what practicality demands in the context of a receivership.

The *Arbitration Act* has since been replaced by the new *Arbitration Act.* The new *Arbitration Act* does not contain ss. 15(1) and 15(2) and reflects a legislative preference to uphold arbitration agreements. Section 4(a) of the new *Arbitration Act* provides that "*In matters governed by this Act,* […] *a court must not intervene unless so provided in this Act*". Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, the legislative intent may be that judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule. However, this case demonstrates that courts can and will exercise their authority to render arbitration agreements inoperative when warranted in the context of a bankruptcy and insolvency matter.

Supreme Court of Canada

Peace River Hydro Partners v. Petrowest Corp.
R. Wagner C.J. and M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin, N. Kasirer and M. Jamal JJ.
November 10, 2022

CITATIONS

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