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Construction Law Newsletter

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COVID-19: *Construction Act* Timelines Exempt from Suspension Order

Under Ontario Regulation 73/20, which was enacted under Ontario's *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, statutory limitation periods and procedural timelines were deemed suspended as of March 16, 2020 for the duration of Ontario's COVID-19 state of emergency (the "Suspension Order").

The prevailing view amongst the construction bar was that the Suspension Order suspended the time periods within which lien claims must be preserved and perfected under the *Construction Act*, R.S.O. 1990, c. C.30. Consequently, since payors in the construction pyramid are obliged to holdback funds as long as lien rights have not been extinguished (or else risk being held liable for deficiencies in the holdback funds), there was concern in the construction industry that the suspension of lien claim expiry periods meant that holdback funds could not be safely released. As such, the Suspension Order had the potential to create significant cash flow problems on construction projects.

However, effective April 16, 2020, the government of Ontario has expressly exempted all limitation periods and procedural time periods under the *Construction Act* from the Suspension Order.

Consequently, where a lien claimant had a certain number of days remaining to preserve or perfect a lien claim before the relevant time period expired as at March 16, 2020, that claimant will now have an equal number of days to preserve or perfect their lien claims commencing April 16, 2020. For example, if prior to the Suspension Order, the lien preservation period would have expired 10 days after March 16, 2020, the lien claimant will now have 10 days commencing April 16, 2020 to preserve the lien claim. Nevertheless, given concerns about cash flow and finances generally in these times, it remains prudent for lien claimants to preserve their lien claims early.

More importantly, the exemption will now allow payors in the construction pyramid to release holdback payments to payees upon the expiry of lien periods. Note that, because the holdback can only be released once all potential lien claims have expired, been discharged or been vacated, payors will have to consider the 31 day period between March 16, 2020 and April 16, 2020 (the "Standstill Period") when determining how long the holdback must be retained.

A further consequence of the exemption to the Suspension Order is that other procedural timelines in the *Construction Act* apply as usual, including, but not limited to, responding to requests for information, setting the lien action down for trial, and, to the extent they apply, mandatory holdback release, prompt payment, and mandatory adjudication. As always, it is better to be cautious and act in accordance with the timelines set out in the *Construction Act* as though they had never been affected by the Suspension Order rather than relying on the Standstill Period as an extension to those timelines.

— KC —

COVID-19: Ontario Permits Additional Essential Construction Projects to Reopen Under New Workplace Safety Guidelines

In response to the COVID-19 pandemic, in early April, 2020 the government of Ontario ordered all businesses not identified by the government as an essential workplace to close their physical locations before April 5, 2020. That list, which we covered in our Spring, 2020 Newsletter, deemed certain construction projects and services to be essential workplaces.

Shortly thereafter, the government added the following construction projects to its list of essential businesses:

> 29.1 Construction projects that are due to be completed before October 4, 2020 and that would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products.

On May 1, 2020, the Ontario government announced the following additional essential construction projects, which are permitted to reopen operations on Monday, May 4 at 12:01 a.m.:

> 28.1 Construction projects and services that support the operations of, and provide new capacity in, schools, colleges, universities, municipal infrastructure and child care centres within the meaning of the *Child Care and Early Years Act, 2014.*
>
> …
>
> 29.2 Construction projects that were started before April 4, 2020, and that would:
>
> i. provide additional capacity for businesses that provide logistical support, distribution services, warehousing, storage or shipping and delivery services, or
>
> ii. provide additional capacity in the operation and delivery of Information Technology (IT) services or telecommunications services.
>
> …
>
> 30.1 Construction to prepare a site for an institutional, commercial, industrial or residential development, including any necessary excavation, grading, roads or utilities infrastructure.

On April 30, 2020, the government of Ontario also released new COVID-19 workplace health and safety guidelines for specific sectors, including the construction industry. The guidelines were created to work toward a gradual reopening of workplaces while preventing the spread of COVID-19 to workers, customers and the general public. Businesses that have been permitted to reopen are required to comply with strict public health measures, and these guidelines provide direction on how to reopen operations safely during the pandemic.

The construction sector guidelines include resources, best practices, and tips to help construction employers understand their rights and responsibilities while operating during the COVID-19 pandemic. The guidelines include, for example, recommended actions for construction employers related to sanitation, posting workplace policies, tracking workforce information, and reporting illnesses (including employers' duty in some instances to report to the Ministry of Labour, Training and Skills Development). The guidelines also discuss specific measures which employers may consider adopting to implement the physical distancing requirement of two metres.

There are also additional COVID-19 health and safety resources available to the construction sector, including from the Infrastructure Health and Safety Association ("IHSA"). The IHSA's construction sector resources include guidance, best practices documents, and COVID-19 workplace safety posters available for download by employers.

In addition, the Canadian Construction Association ("CCA") has created an online Pandemic Preparedness Guide, which includes Standardized Protocols for All Canadian Construction Sites. The Protocols outline the best practices for construction sites in order to maintain the health and safety of all workers during the COVID-19 crisis.

The government of Ontario resources, as well as links to the resources of the IHSA and CCA, are available here:

> https://www.ontario.ca/page/construction-site-health-and-safety-during-covid-19?_ga=2.171208228.526539310.1588432075-1525596855.1575254459

Note that the government of Ontario has also announced the addition of 58 new provincial labour inspectors who will be tasked with communicating the guidelines to essential workplaces and enforcing emergency measures, including physical distancing and the closure of non-essential businesses.

Employers and constructors should be reminded that under Ontario law, they have obligations to protect workers from hazards in the workplace, and workers have the right to refuse unsafe work. All safety measures implemented in response to the COVID-19 pandemic should be done in compliance with existing legal requirements, including those under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 and associated regulations, and public health directives issued by the Chief Medical Officer of Health.

— KC —

Court of Appeal Confirms Insolvent Developer's Condo Unit Sale Proceeds Form Trust for Benefit of Suppliers

In *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197 ("*Urbancorp*"), a developer of condominium units was granted insolvency protection under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") and the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 (the "*CCAA*"). Pursuant to proceedings under that legislation, condominium units (the "condo units") built and owned by the developer were sold by the Court-appointed Monitor. The Ontario Court of Appeal determined that the proceeds of those sales, less sale expenses and mortgage indebtedness, were impressed with a statutory trust in favour of unpaid suppliers that contributed to building the condo units.

Background

The Cumberland Group (the "Developer"), which consisted of a number of related entities, built a number of condo units, which it owned. Toro Aluminum, Speedy Electrical Contractors Ltd., and Dolvin Mechanical Contractors Ltd. (the "Suppliers"), had supplied work and material to the condominium development project and were owed significant unpaid sums.

In 2016, each of the related entities of the Developer filed a Notice of Intention to Make a Proposal under the *BIA*. The Ontario Superior Court of Justice (the "Court") appointed a Proposal Trustee and gave it the authority to conduct a sale of the condo units. A further order was made continuing the *BIA* Proposal proceedings under the *CCAA*, appointing the Proposal Trustee as Monitor under the *CCAA*, and directing that the sales process be continued under the *CCAA*. The condo units were successfully sold by the Monitor.

Subsection 9(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*CLA*"), provides that, where an owner's interest in a premises is sold, an amount equal to the sale proceeds received by the owner, less the reasonable expenses arising from the sale and any amounts paid to discharge any mortgage on the premises, will constitute a trust fund for the benefit of contractors. Consequently, the unpaid Suppliers claimed a trust over the proceeds of the condo unit sales to the extent of the amounts owing to them, and claimed priority for these amounts.

Motion Judge

The Monitor brought a motion to the Court to determine whether the sale proceeds were impressed with a trust in favour of the Suppliers.

Relying on previous case law from the Ontario Court of Appeal, the motion judge found that a s. 9(1) trust did not arise because the sale proceeds were not received by the "owners", but rather, by the Monitor.

Court of Appeal

The Suppliers obtained leave to appeal the motion judge's decision to a five-judge panel of the Court of Appeal.

The Court of Appeal began its analysis by noting that "a s. 9(1) trust is triggered by the receipt of proceeds of a sale of premises that have been improved by a contractor's labour or materials". The question before the Court of Appeal was therefore whether a s. 9(1) trust was effective in insolvency, and whether a trust arose on the facts of this case.

Positions of the Parties

The Suppliers argued that s. 9(1) of the *CLA* was satisfied because each condo unit sale was a sale by the Developer as "the owner" because the sale agreements were entered into on the Developer's behalf by the Monitor. It was also the Developer's interest in the condo units that was sold, and the sale proceeds were "received" by the Developer as "owner" when those proceeds were deposited into bank accounts opened for the Developer. Finally, the sale proceeds exceeded the expenses of the sale and the amount of mortgage indebtedness, which

resulted in a positive balance that could constitute a trust fund for the benefit of the Suppliers.

The responding parties argued that the condo units sales were not made "by the owner" because of the involvement of the Monitor in respect of the sales process, and that the proceeds of sale were not "received by the owner", but by the Monitor on behalf of creditors.

Constitutional Issue

The Court of Appeal noted previous case law that held that "…the *BIA* excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among its creditors", but that this exclusion only applies if the trust satisfies the three certainties of trust law: certainty of intention, certainty of object, and certainty of subject matter. The Supreme Court of Canada has previously held that "a statutory trust created by a province that does not meet the requirements of general trust law is ineffective in bankruptcy", because, as a matter of federal paramountcy the federal legislation of the *BIA* and *CCAA* will prevail. However, a statutory trust created by provincial legislation that does meet the three requirements of general trust law is effective.

The Court of Appeal reviewed its decision in *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 ("*Guarantee*") (as discussed in our Spring, 2019 Newsletter), which considered the statutory trust created under s. 8(1) of the *CLA* in a bankruptcy context. Section 8(1) of the *CLA* deems amounts received by a contractor (on account of the contract price) to constitute a trust fund for the benefit of subcontractors. In *Guarantee*, the Court of Appeal held that monies owing or received under s. 8(1) met the general principles of trust law, and thus were excluded from distribution to the bankrupt's creditors under the *BIA*.

The Court of Appeal in this case held that the same reasoning that applied to s. 8(1) of the *CLA* applied to the trust provisions of s. 9(1), and applied as equally to the *BIA* as to the *CCAA*.

The Trust

The Court determined that the agreements of purchase and sale of the condo units were made by the Developer as represented by the Monitor, and thus were sales "by the owner". The fact that the Developer entered into the agreements through a representative did not detract from the fact that it was the Developer that entered into the sale agreements as vendors of condo units it legally owned. The sale by the Developer was a sale of its interest as owner, regardless of the fact that the sales occurred via an insolvency process.

Further, the value of the sales proceeds exceeded the mortgage debt, and because the proceeds were deposited into bank accounts that had been opened in accordance with the Developer's registered ownership of the condo units sold, they were considered "received" by the "owner".

The Court noted that the issue under s. 9(1) of the *CLA* is not who makes decisions for the owner in respect of making sales, conveying an interest, or depositing funds. Rather, "it is simply whether the owner, regardless of who decides for it, had made a sale of its interest and received funds that exceeded mortgage indebtedness and the expenses of sale". Accordingly, the Monitor's control over the process did not detract from the conclusion that the Developer, as owner, sold its interest and received sales proceeds in excess of the sales expenses and mortgage debt.

Conclusion

The Court of Appeal held that the trust created by s. 9(1) of the *CLA* would only be displaced under the doctrine of federal paramountcy if it in fact conflicted with a specific priority created under the *CCAA*. In this case however, there was nothing that displaced the operation of the s. 9(1) trust over the condo unit sales proceeds to the extent of the amounts owed to the Suppliers.

The Court of Appeal thus allowed the appeal, set aside the order of the motion judge, and made an order that a s. 9(1) trust under the *CLA* applies to the sum of $3,864,428.72 held in the accounts of the Developer for the benefit of the Suppliers, pro-rata in accordance with the amounts owing to each Supplier.

Takeaways

After years of confusion and conflicting decisions from courts across the country, the recent decisions of the Court of Appeal in *Guarantee* and *Urbancorp* provide some welcome clarity on the exclusion of construction trust funds from property divisible amongst general creditors in insolvency proceedings. In our view, given that the *CLA* seeks to protect the most vulnerable parties in the construction pyramid, this is an appropriate and welcome development.

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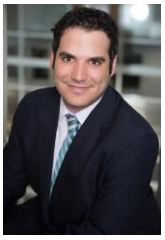

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