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Construction Law Newsletter

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Construction Act: Update

On July 1, 2018, certain amendments to the *Construction Lien Act* came into force, including changing its name to the *Construction Act*, R.S.O. 1990, c. C.30 (the "*Act*"). We provided an overview of the expected changes in our Spring 2018 newsletter. Since our publication, the draft regulations referred to therein have been updated. This article reflects those updates, and is intended to provide a cursory overview of the *Act*.

While the amendments with respect to matters such as the extended lien period and changes to the holdback came into force on July 1, 2018, the more significant amendments with respect to prompt payment and adjudication are not expected to come into force until October, 2019.

Substantial Performance

To reflect the modern cost of construction projects, calculations with respect to substantial performance have been revised. A contract is now considered substantially performed when the project is ready for its intended use or is being used, and where the cost of completion, or of the correction of a known defect, is not more than:

i. 3% of the first $1 million of the contract price (formerly $500,000);

ii. 2% of the next $1 million of the contract price (formerly $500,000); and

iii. 1% of the balance of the contract price.

A contract is also deemed complete when the price of completion, correction of known defect, or last supply is the lesser of 1% of the Contract Price or $5,000 (formerly $1,000).

Lien Periods

Lien periods have also been significantly revised. The period within which a party must "preserve" their lien by registering a claim for lien against title has been extended to 60 days (formerly 45). Further, the period within which a party must "perfect" their lien claim by commencing a court action has also been extended to 90 days (formerly 45) from last day the claim for lien could have been preserved.

The termination of a contract and/or subcontract is now considered an event that triggers the clock with respect to preserving or perfecting lien claims. Further, where a contract is terminated, a notice must be published in a construction trade newspaper.

Finally, where a party wishes to vacate a claim for lien by paying monies into Court or posting security, not only must they post the full amount of the lien claim, they must also post the lesser of $250,000 (formerly $50,000) or 25% of the lien claim as security for costs.

Holdbacks

The requirement for a payor in the construction pyramid to retain 10% of payment on account of the basic and/or finishing holdback has not changed. However, it is now permissible for the holdback to take the form of security, such as a letter of credit, rather than cash, which is the current industry standard.

Also, while it was previously merely permissible for a payor to release the holdback following the expiry of the lien period, such release will now be mandatory, subject to specific amounts that may be retained pursuant to a payor's right of set-off. Note that, as outlined further below, a party that holds amounts back on the basis of set-off are now required to provide formal notice that they are doing so.

There are also provisions that allow for the annual or phased release of the holdback, as long as a contract explicitly states so. Further, in the case of annual holdbacks, the project must have a completion schedule longer than one year, and provide for payment of the accrued holdback on an annual basis. For phased holdbacks, the contract must provide for the payment of the accrued holdback on a phased basis and identifies each phase. In both cases, the contract must exceed a prescribed amount, which the regulations set at $10 million.

In the event that a payor does not want to pay the holdback, it must follow specific steps. For example, an Owner that does not wish to pay some or all of a holdback is required to publish a Notice in a construction trade newspaper, within 40 days of the applicable Certificate or Declaration of Substantial Performance, specifying the amount not being paid, and notifying the Contractor of the publication.

A Contractor that refuses to pay one of its subcontractors can refuse to pay some or all of the holdback if the Owner refuses to pay the holdback to the Contractor, the Contractor refers the matter to Adjudication (described below), and the Contractor notifies every Subcontractor of the amount not being paid and of the Adjudication referral. Provisions also exist for Subcontractors that refuse to pay holdback monies to their Suppliers.

Prompt Payment

Late payment is a well-known and industry-wide problem. The new regime addresses this issue by providing sub/contractors the right to claim for progress payments that must be either paid or disputed within a reasonable amount of time.

A Contractor's request for payment must take the form of a "Proper Invoice", which is a formal document detailing the amount payable, the period of supply, a description of the services supplied, and how the work was authorized.

Owners should take note that the submission of a Proper Invoice cannot be conditional on prior approval from the Owner or the Owner's payment certifier, such as its architectural consultant.

An Owner must pay the Contractor within 28 days of receiving the Proper Invoice. However, an Owner can refuse to pay all or a portion of the Proper Invoice if it gives notice of non-payment to the Contractor within 14 days and details the reasons for non-payment, including amounts retained as set-off.

A Contractor that receives payment from an Owner is required to pay its Subcontractors within 7 days.

A Contractor can refuse to do so if it gives the Subcontractor notice of non-payment within 7 days after receiving a non-payment notice from the Owner. If no notice was given by the Owner, the Contractor must give Notice to Subcontractor no later than 35 days after the Proper Invoice was submitted to the Owner. Provisions also exist for payments and disputes between Subcontractors and their suppliers.

Adjudication

Perhaps the most important change to the *Act* and industry is the addition of "Adjudication" as a dispute resolution forum.

In short, Adjudication is a process designed to produce an interim binding decision to a construction dispute rendered by an impartial Adjudicator within a matter of weeks.

Parties are free to develop their own dispute resolution procedures in their contracts as long as they comply with the minimum requirements set out in the *Act*.

The province of Ontario must now develop a body, currently defined as the Authorized Nominating Authority (the "Authority"), which will be responsible for training, licensing, and supervising a roster of qualified Adjudicators. Adjudicators must have at least 10 years of relevant experience in the construction industry, and are expected to include professionals such as architects, engineers, project managers,

accountants, and lawyers. They are also expected to complete a training program, unless exempted based on past experience.

Where a dispute arises, for example, with respect to the valuation and/or payment of services and/or materials supplied, one party can serve the other with a Notice of Dispute (the "Notice"). The Notice sets out the nature of the dispute and proposes an Adjudicator. The Adjudicator must agree or decline to conduct the Adjudication within 4 days of the Notice. Where the proposed Adjudicator declines, one will be appointed by the Authority.

Where the Adjudicator agrees to conduct the Adjudication, he or she is provided with a copy of the Notice, the underlying sub/contract, and key relevant documents. The Adjudicator has broad powers to conduct the Adjudication as he or she sees fit, including conducting on-site inspections, and obtaining the assistance of third parties. Within 30 days of receiving the documents the Adjudicator will issue a "Determination" of the dispute, supported by written reasons. The Adjudicator and/or the parties can request an extension of this deadline.

Unless they agree otherwise, parties cannot commence Adjudication if the Notice is given after the date the sub/contract is complete. Parties can terminate the Adjudication any time before a Determination is made. Parties can also refer a matter to Adjudication even if it is the subject of a Court action or Arbitration, unless it has been finally determined in that forum. Further, parties are not allowed to name an Adjudicator in their contract in advance.

Only a single dispute can be referred to Adjudication at a time, unless the parties and the Adjudicator agree otherwise. However, if the same matter or related matters are the subject of separate Adjudication proceeding, the parties to each Adjudication can agree to have the issues resolved together by a single Adjudicator. Even where the parties do not agree, the Contractor has the power to require the consolidation of separate Adjudications.

Generally, each party bears their own costs of Adjudication and the Adjudicator's fee is split evenly between them, unless a party has acted in a manner that is frivolous, vexatious, an abuse of process or in bad faith.

A party required to pay as a result of Adjudication must do so within 10 days of the Determination, subject to any applicable holdback requirements. If an amount payable under a Determination is not paid when due, the sub/contractor may suspend further work until paid, including interest, and reasonable costs incurred, including the costs of resuming the work.

Note that a Determination of amounts payable or overpaid should be included in the Contract Price for the purposes of calculating substantial performance.

Resort to the Courts

Within 30 days of the Determination a party can apply to the Divisional Court for leave to appeal the Determination. The Court can set aside the Determination only in certain limited circumstances, including Adjudicator bias, fraud, or improper procedure.

A party has 2 years to file a certified copy of the Determination with the Court to make it an enforceable Court Order.

It is important to note that the Determination is binding until a further decision is rendered by a Court or an Arbitrator, which means that a party can re-litigate the subject matter of the Adjudication if they are not satisfied with the result. However, in the UK, where statutory adjudication has been in use since the 1990s, parties have tended to treat the Determination as a final result without the need for further litigation. There is hope that parties in Ontario will treat Adjudication in a similar fashion.

A party that intends to re-litigate the subject matter of Adjudication should be mindful of the potential limitations periods that might apply. Based on UK precedent, where the parties do not agree that a Determination is final, the winning party should commence legal action to confirm the Determination within 2 years of the cause of action underlying the dispute. By contrast, the losing party should bring a legal action for repayment of amounts awarded pursuant to the Determination within 2 years of the date of Determination. Where an Adjudicator rejects a party's claim outright or even partially, that party should bring legal action within 2 years of the underlying cause of action.

Also note that, with Court permission, parties can now proceed in the Small Claims Court for claims worth less than $25,000. Claims worth $25,000 to $100,000 can proceed via Simplified Procedure in Superior Court.

Bonds

Note that contracts involving public bodies now require the Contractor to provide the Owner with a Labour and Material Bond, as well as a Performance Bond, if the Contract Price exceeds $500,000.00. Owners are free to require other types of bonds as well.

Trust Funds

There are new record keeping and other requirements for sub/contractors with respect to trust funds. In short, trust funds must be deposited into a bank account in the trustee's name, and the trustee must maintain records detailing amounts received and paid out, transfers made, and any other prescribed information.

Transition Period

The Attorney General, Yasir Naqvi, has announced that all changes, except those related to prompt payment and Adjudication are expected to come into force on July 1, 2018. Amendments related to prompt payment and Adjudication are expected to come into force on October 1, 2019, presumably to allow the province time to establish the Authority and develop a roster of qualified Adjudicators.

In general, the pre-amendment version of the *Act* will continue to apply to construction contracts entered into before the amendments come into force, regardless of when any subcontract is entered into. That is also the case where a procurement process with respect to such a contract was commenced before the new provisions come into force.

General Comments

It will be interesting to watch how the construction industry and the Courts react and adapt to these amendments, and in particular, what influence the role of prompt payment and Adjudication will have on the industry. In the interim, parties should begin reviewing their contracts to ensure compliance with the forthcoming amendments. Further, given the relatively tight timelines for prompt payment and dispute notices, parties should begin considering ways to streamline their internal processes for payment approvals, dispute notices and related matters.

Further, given the quick turnaround expected in the Adjudication process, parties should review their document organization practices to ensure that participation in the Adjudication process involves well-organized files that can be easily transferred to counsel as necessary, as opposed to suddenly trying to compile relevant invoices, purchase orders, change orders, emails and other relevant documents. Finally, once the roster of Adjudicators is developed and posted, parties should review it and develop a list of Adjudicators they consider acceptable.

— KC —

Court of Appeal Extends Limitation Period for Owner Faced with Construction Defects

In *Gillham v Lake of Bays (Township)*, 2018 ONCA 667, the Ontario Court of Appeal reversed a lower court decision to summarily dismiss a lawsuit for damages arising from construction defects because it was brought out of time. In its reasons, the Court of Appeal addressed when a party with a claim arising from construction defects should commence an action, including the propriety of waiting until it knows that a defect is serious enough to warrant litigation.

Background

The action arose from alleged deficiencies in the construction of a prefabricated cottage. In May 2006, the Plaintiffs, Mr. and Mrs. Gillham (the "Gillhams"), retained the services of the Defendant, J.D. MacKay ("Mr. MacKay"), to excavate the foundation, the pier footings for the deck, and to construct and backfill a stacked rock retaining wall. The Defendant, Royal Homes Limited ("Royal Homes"), constructed the footings and foundation for the cottage and deck, then assembled the prefabricated cottage and deck, completing its work in July 2006.

The Gillhams first noticed a problem with one of the deck piers in the summer of 2009, namely, that the northeast corner of the deck behind the stone retaining wall had sunk about 1 ¼ inches, pulling the deck post away from the cottage. When approached, Royal Homes informed the Gillhams that the problem had nothing to do with the cottage construction and that it was not a serious issue.

The Gillhams later hired a structural engineering firm that provided a report in September 2009 stating that the issue was caused by underlying soil conditions (the "2009 Report"). The 2009 Report did not point to the construction of the stone retaining wall or the cottage foundation as the source of the issue. When the Gillhams discussed the issue with Mr. MacKay, he advised them to "wait and see" how things

progressed. As a result, the Gillhams took no other immediate action.

As the problem continued, the Gillhams had the property inspected in 2012. The inspector advised that a soil study should be done, following which a soil study report dated July 30, 2012 was produced (the "2012 Report"). The 2012 Report found that there were issues with construction, and its findings were later confirmed when remedial steps were taken.

On October 21, 2013, the Gillhams commenced a lawsuit against Mr. MacKay and Royal Homes, alleging that they were negligent in the construction of the cottage foundation and the stone retaining wall. The Gillhams also sued Lake of Bays (Township) alleging that the oversight and approval it provided was negligent.

Summary Judgment Motion

The Defendants moved for a summary dismissal of the action as being brought out of time pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the "*Act*"). The motion judge found that the 2009 Report "alerted or ought to have alerted the plaintiffs to the fact the problems were construction related and that they had a cause of action against the defendants". As a result, the judge granted the Defendants' motion and dismissed the action.

Court of Appeal

The Gillhams appealed the dismissal to the Court of Appeal, which found that the motion judge misapprehended the evidence and undertook a flawed analysis of when the Gillhams discovered they had a claim against the Defendants.

In an unanimous decision, the Court clarified the discoverability analysis under s. 5(1) of the *Act*. In this case, the essential question to be asked in determining when the *Act*'s presumptive 2 year limitation period began to run was "whether the Appellants knew or reasonably ought to have known that the problem observed with the deck pier in 2009 was possibly caused by the acts or omissions of the respondents and gave rise to a claim that was appropriately pursued in a court proceeding".

The Court held that the motion judged erred by stopping his analysis once he determined that the 2009 Report should have alerted or ought to have alerted the Gillhams that they might have a cause of action against the Defendants. The Court stated that more is needed than simply being aware that a problem exists.

The motion judge failed to consider whether the Gillhams knew or ought to have known that court proceedings were the appropriate means to remedy the issue once they knew or should have known that they had a claim. The nature of the injury, loss or damage is important to this analysis because if the harm is trivial then the limitation period will not begin to run because the common law recognizes that a prudent plaintiff will not bring an action to remedy a trivial loss.

The Court held that the limitation period did not begin to run until the remedial work was done in 2013. It was at this point that the Gillhams knew, or ought to have known, that their loss was not trivial and legal proceedings were an appropriate means to remedy their loss. By finding that the limitation period started to run after the 2009 Report, the motion judge made a material misapprehension of the expert reports. Instead, it was appropriate for the Gillhams to wait until they knew that the problem was serious, and was also the fault of the Defendants, before commencing litigation.

The Court allowed the appeal and set aside the lower court's decision because the Appellants' claims were not statute-barred by the *Act*.

Takeaways

As this case demonstrates, determining the applicable limitation period in a case that involves construction defects can be complicated. Not only must the aggrieved party know the defect, but they must know, or ought to know, that it is serious enough to warrant legal proceedings, which itself could depend on the nature of any representations made by the at-fault contractor. That said, wherever possible, it is usually better to err on the side of caution and issue a claim as soon as possible to avoid litigating a limitations issue.

— KC —

Conduct Prevents Owner From Relying on Strict Contractual Provision to Defeat Contractor Claim for Extras

In *Clearway Construction Inc. v. Toronto (City)*, 2018 ONSC 1736, the Ontario Superior Court of Justice decided that clear evidence that contracting parties intended to change the terms of the contract may disentitle an Owner from relying on strict notice provisions in the contract to defeat a contractor's claim for extras.

Background

Clearway Construction Inc. ("Clearway") had contracted with the City of Toronto (the "City") with respect to the construction of sewers. Clearway brought an action against the City for additional payments it claimed it was owed. Clearway alleged that they relied on a report by the City about the subsurface soil conditions, but that in fact such conditions were significantly different than what the City's report indicated. As a result, Clearway's work was made more complicated and costly.

The City moved for a summary judgment dismissal of Clearway's claims because (a) Clearway did not bring the action in accordance with the provisions set out in the contract, (b) Clearway signed a release, and/or (c) the action was barred by the limitation period.

Court's Decision

The *Rules of Civil Procedure* require a court to grant summary judgment where the court "is satisfied that there is no genuine issue requiring a trial". There will be no genuine issue requiring a trial if the Court is presented with evidence that allows the Court to fairly and justly adjudicate the dispute between the parties. As outlined below, the Court found that such evidence was lacking and declined to grant the City summary judgment.

Notice Provision

The contract between the parties had a Notice provision that specifically dealt with claims for additional payment for extras. This provision was not followed by Clearway. As such, the Court had to consider whether Clearway's failure to follow this provision was fatal to Clearway's claim.

The contract provided that Clearway was to proceed with extra work when it received a Change Directive. As well, Clearway was to proceed with Additional Work authorized by the City "upon receipt of a change order". Despite this, on multiple occasions, actual work was undertaken months before the City issued a change order or a change directive.

Consequently, the Court found that Clearway's method for advancing the claim was not in compliance with the Notice Provision. However, the Court then had to consider whether the pattern of conduct between the parties varied the terms of the contract. The Court found that this indicated there was a genuine issue for trial as to whether the City is "disentitled from strict compliance with the Notice Provision on the basis of a pattern of conduct of deviation from strict adherence with the Contract".

The Release

Clearway signed a release which discharged all claims against the City arising out of the contract, except claims for work not yet performed and claims properly submitted in accordance with the Notice Provision.

The Court considered whether the release executed by Clearway barred its claim for extras. The Court noted that its main interpretive task was to assess what specifically was exempted by the release. The Court found there was a genuine issue for trial regarding whether the claims for additional payments constituted work not performed and was thereby exempted from the release.

Limitations Period

The City also sought to dismiss the claim for falling outside the limitation period. In order to do so, the City had to establish that "Clearway discovered "the damage caused by the City's faulty tender documents" within the two year limitation period, and "knew or ought to have known […] that a proceeding was the appropriate means to seek a remedy" .

The Court found that the City did not have enough evidence to establish that the problem with the soil was discovered more than two years before the action was commenced. The Court found there was a genuine issue requiring trial for the date Clearway discovered a claim for damages against the City. The Court found there was also a genuine issue about when Clearways claim "fully ripened" and when Clearway "discovered or reasonably ought to have discovered that a legal action would be the appropriate means to seek a remedy".

Conclusion

The Court concluded that it did not have the evidentiary record required for it to fairly and justly adjudicate the genuine issues identified in each of the grounds for summary dismissal presented by the City. Therefore, the Court declined to grant summary judgment and dismissed the City's motion.

Takeaways

It is easy for parties to a construction contract, especially those that last for quite some time, to slowly drift away from strict adherence to the language of the contract. However, those parties should beware that doing could undermine the strict language in the contract and prevent them from relying on it when a dispute arises. As this case demonstrates, where the conduct of the parties becomes an issue of contractual interpretation, a resolution can be anything but straightforward and may require a trial to determine just what the modified terms of the contract may be.

— KC —

Failure to Provide Notice of Dispute Bars Subcontractor's Claim for Extras

In *Urban Mechanical Contracting Ltd. v University of Western Ontario (Board of*

Governors), 2018 ONSC 1888, the Ontario Superior Court of Justice summarily dismissed a sub-contractor's claim for additional compensation because it failed to comply with a mandatory notice of dispute provision contained in its contract with the general contractor.

Background

Norlon Builders London Limited ("Norlon") was hired by the University of Western Ontario ("Western") as the general contractor for the construction of a new building on campus. Urban Mechanical Contract Ltd. ("Urban") was contracted by Norlon to install the new building's mechanical system (the "Sub-contract").

Over the course of the Sub-contract, Norlon became aware that Urban was using a certain type of pipe that was not permitted under the Sub-contract because the pipe did not meet Western's project specifications. Urban's position was that those pipes did meet the specifications and did not violate the Sub-contract. On October 29, 2015 the dispute appeared to be resolved as Urban agreed to not use the pipes at issue, and to replace the pipes that had already been installed, with limited exceptions. However, Urban maintained that it incurred significant additional costs as a result.

On April 6, 2016 Urban delivered an invoice to Norlon to cover the additional costs it had incurred. On April 12, 2016 Norlon responded and denied Urban the extra costs requested. Thereafter, on December 20, 2016 Urban registered a claim for lien, which included a claim for the extra costs it had requested.

Under the Sub-contract, Urban was required to give Norlon notice in writing of a dispute seven working days after receiving a decision from Norlon, otherwise Urban was deemed to have accepted the decision (the "Notice Provision"). Norlon took the position that its April 12, 2016 response denying Urban the extra costs requested was a "decision", and that Urban did not provide a notice in writing of a dispute within seven working days. In fact, the matter was not further pursued by Urban until early June, 2016. Norlon thus argued that Urban was deemed to accept the decision and was precluded from pursuing the issue further.

Decision

The Court found that Norlon's email on April 12, 2016 was in fact a "decision", and that the Notice Provision was mandatory. The Court noted that the Notice Provision did not have an ambiguous time period and that it clearly delineated the consequence of non-compliance. Therefore, due to the fact that Urban had failed to respond to Norton's decision within seven days, Urban was presumed to have accepted the decision and could not pursue its claim for additional compensation.

The Court granted Norlon's motion for summary judgment and dismissed Urban's claim for extras.

Takeaways

This case serves as a reminder that all parties to a construction contract should be mindful of the contractual requirements applicable not only to submitting claims for extras, but also to the process that must be followed if that claim is denied. Luckily for the contractor here, the subcontractor's failure to strictly adhere to the contractual requirements doomed its chance at recovery.

— KC —

Registered Owner Uninvolved With Work on its Land Not Subject to Lien Claim

In *Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Co*, 2018 ABQB 617, the Alberta Court of Queen's Bench determined that a registered owner that allowed a developer to carry out work on its land before the sale of land to the developer was complete, and who had contractual authority to involve itself in the work, was able to defeat the lien claims of the developer's unpaid contractors.

Background

Georgetown Townhouse GP Ltd. ("Georgetown") agreed to sell 48 lots to Reidbuilt Homes ("Reidbuilt"). The contract between them allowed Reidbuilt to occupy the lands and build houses upon them prior to closing of the sale. Reidbuilt was to pay 15% of the lot purchase price before construction, with the remaining amount falling due in 603 days when the sale would be completed.

The contract allowed Georgetown to become significantly involved in the building activities. For example, Georgetown had rights to approve the style and colour of the homes, whether Reidbuilt could apply for building permits, and which contractors could perform utility services. In addition, Georgetown was to provide marketing support and in fact did so by maintaining a website for the subdivision.

Georgetown claimed that its interest in the land could not be liened by Reidbuilt's contractors. The lienholders argued that Georgetown's contractual authority to become extensively involved in the building process made their interests in the land lienable.

Decision

The Court found that, for the purposes of determining whether a registered owner is an "owner" under section 1(j) of Alberta's *Builders' Lien Act* (the "*BLA*"), the registered owner must be actively involved in the building process. Note that Ontario's *Construction Act*, R.S.O. 1990, c. C.30 has a similar definition of "owner".

The Court found that while Georgetown's contractual authority to involve itself in the building process was a relevant factor, the key component was the degree of Georgetown's actual involvement in Reidbuilt's building activities, which was a question of fact.

The Court found that, although Georgetown had authority to involve itself in the construction process, it did not do so to any significant degree. For example, it did not provide any of the approvals it had the authority to provide, and its only action was to maintain a website for the subdivision. Thus, Georgetown did not meet the definition of "owner" for the purposes of the *BLA*.

As Georgetown was not an "owner" within the meaning of the *BLA*, the Court found that the liens registered by the lien claimants were invalid. The Court thus ordered that the funds Georgetown had earlier paid into Court to discharge the liens be returned to it.

Takeaways

This case represents the potential danger an owner may face if it involves itself too much in the development of its lands by a purchaser before the sale is closed. It is easy to imagine how an owner with as much contractual authority as Georgetown could inadvertently cross that line and make itself liable to a lien claim. Fortunately for the

owner here, failing to exercise its contractual authority worked out in its favour.

— KC —

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