CONSTRUCTION LAW LETTER

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LexisNexis

LexisNexis is pleased to announce that Harvey Kirsh has been nominated for the Vancouver International Arbitration Centre's Award, in the "Outstanding Book for 2022" category, for his new book, *Alternative Dispute Resolution in the Construction Industry in Canada*.

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HERE'S THE DRILL: THE NEW CCA 1–2021 STIPULATED PRICE SUBCONTRACT

In December 2021 the Canadian Construction Association released an updated version of its widely used standard form stipulated price subcontract, the CCA 1-2021 Stipulated Price Subcontract. The updated subcontract contains several changes from its predecessor, the CCA 1-2008. Notably, the new CCA 1-2021 has been modified to align more closely with the new CCDC 2-2020 stipulated price prime contract. Below is a high-level summary of some of the key changes in the new CCA 1-2021 subcontract.

Payment Terms

Similar to the CCDC 2-2020, the payment terms in the new CCA 1-2021 now clarify that the contractor's payment obligations are subject to "Payment Legislation". This would include the prompt payment rules under Ontario's *Construction Act* and similar prompt payment legislation that may be introduced in other provinces.

In the event of the owner's non-payment to the contractor, the contractor is still required to take certain steps, including enforcing its lien rights to

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recover all amounts unpaid to the subcontractor and providing written notice of those steps to the owner. However, unlike the CCA 1-2008, the contractor is no longer required to stop performing work.

Ready-for-Takeover

The new CCDC 2-2020 introduced "Ready-for-Takeover" as the key contractual milestone in the contract and the new CCA 1-2021 has followed suit. The one-year warranty period under the CCA 1-2021 subcontract will now, for example, start running from Ready-for-Takeover.

If the prime contract documents do not contemplate Ready-for-Takeover (as would be the case if the owner and contractor are using an older CCDC contract form, such as the CDC 5B-2010 construction management contract), the references to Ready-for-Takeover in the CCA 1-2021 are deemed to refer to "Substantial Performance of the Work".

It is important to remember that while Ready-for-Takeover replaces Substantial Performance of the Work as the key contractual milestone, Substantial Performance of the Work is still relevant for purposes of provincial statutory lien rights and release of holdback.

Early Occupancy by the Owner

The CCA 1-2021 adds a new section related to the owner's rights to occupy a part or the entirety of the work. This new section resembles the new early occupancy section added to the new CCDC 2-2020. Most significantly:

- The contractor must consult the subcontractor and obtain its agreement before making any agreement with the owner for early occupancy.
- The subcontractor will stop being liable for care of the part of its work that is being used.
- The subcontractor's warranty period for the part of its work that is being used will start to run.

Adjudication

The CCA 1-2021 states that nothing under the subcontract is deemed to affect the rights of parties to resolve any dispute by adjudication (which will be relevant for provinces that contemplate statutory adjudication, such as Ontario).

Prime Contract Flow Down

Like its 2008 predecessor, the CCA 1-2021 gives the parties the option of selecting whether the prime contract or the subcontract will take precedence in the event of a conflict between the two. If the parties elect to have the prime contract take precedence, they now also have the option of listing certain subcontract provisions that would nevertheless not be subordinate to the prime contract.

Division 01

When the CCDC 2-2020 was published, the CCDC also published its CCDC Master Specification for Division 01 – General Requirements. Certain items in the general conditions of the previous CCDC 2-2008 are not present in the CCDC 2-2020 and are instead addressed in CCDC's new Division 01 form, such as terms related to cutting, remedial work and cleanup. These clauses are similarly absent from the new CCA 1-2021. However, as with the CCDC 2-2020, it is important to remember that the use of the CCDC Division 01 document is not assumed in the CCA 1-2021 form and the parties will need to expressly list it as a contract document if it is being used.

Indemnification

The new CCA 1-2021 adds a noteworthy limitation on the parties' obligation to indemnify each other under the subcontract. Now, the obligation to indemnify a party for losses it suffered is restricted to "direct loss and damage" and excludes indirect, consequential, punitive and exemplary damages. This significantly alters the parties' indemnification obligations under the subcontract and both contractors and subcontractors will want to consider this change carefully.

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THE *OPRON* SAGA: DO DRAMATIC AND FUNDAMENTAL CHANGES BEYOND THE NATURE AND SCOPE OF THE ORIGINAL FIXED PRICE CONTRACT AFFECT THE CLAIM PROCESS?

Few large owners – whether in the public or private domain – can resist the temptation over the years to generate their own tailored contract forms to increase the odds in their favour when claims are made by trades. Yet, when events do not unfold as planned, owners can be blinded or seduced by their very own contract forms.

Such a situation happened recently in *Procureur Générale du Quebec v. Opron Inc.*, a decision of the Quebec Court of Appeal. Although the province of Quebec operates under a civil law system, most likely the same outcome would have resulted had the matter been tried under the precedent-based approach of the common law jurisdictions.

In 2008, the Minister of Transport called for tenders for the reconstruction of two bridges that straddled a highway and their approaches. Opron Inc. (the contractor) submitted the lowest compliant bid at $8.3 million and was awarded a fixed price contract for the project. The tender required the work to be performed in two stages. The first stage allowed a period of 20 weeks for the reconstruction and temporary paving of both bridges before the winter. The second phase called for the permanent paving of the bridges and completion of

their approaches in the following spring, after the winter thaw.

Very quickly, two weeks of the very tight Phase 1 schedule were lost due to tardy authorizations and other causes. By the end of October, the Minister and the contractor recognized the impossibility of proceeding with the work as planned. The parties reached an agreement. They agreed to put blame for the start-up delay aside. They agreed to completely re-sequence and accelerate the work, so that at least one of the two highway overpasses might be usable before Christmas, if possible. They agreed that the Minister would pay the contractor the expenses of acceleration, including winter conditions, on a cost-plus basis. They agreed to defer the remaining work to the following spring, with completion in the summer. This agreement was verbal – but not denied by anyone and indirectly corroborated by revised construction schedules and collateral correspondence between the parties.

Weeks later, the Minister again changed the new schedule so that both overpasses would not be closed at the same time when work resumed in the spring.

At no point did the contractor guarantee that it would be able to achieve the radically revised schedule. Indeed, despite its efforts, the contractor had to work beyond Christmas and during a particularly severe winter in order to open one of the overpasses in mid-February. The contractor at its own initiative, but without opposition, started its Phase 2 spring work two months earlier than anticipated to make up for lost time. The contractor ultimately succeeded in completing the project according to the revised schedule.

After three lost years disputing compensation, the contractor brought an action against the Minister for the unpaid portion of the expenses it had incurred for acceleration and winter conditions. The trial judge granted the contractor $980,610 plus interest and costs.

The Quebec Attorney General, on behalf of the Minister, appealed to the Quebec Court of Appeal. The Minister cited the claim process in the fixed price contract awarded to the contractor. The process allowed the Minister to direct the contractor to perform the additional work, permitted the contractor to formally request a corresponding extra, and specified that, failing agreement by the parties on the extra, the Minister arrogated to itself the right either to deny payment or to pay the contractor an amount which the Minister considered to be appropriate, while reserving to the contractor the right to proceed with a claim *should it still feel aggrieved*. Having denied the contractor's claim, the Minister argued that it was justified in refusing payment because the contractor had failed to scrupulously observe the elaborate process prescribed in the contract for making a claim, including the contractor's failure to seek and receive prior authorization to proceed, failure to present a formal notice of claim with backup, failure to present a claim within stipulated timelines, and so on.

Both the trial judge and Court of Appeal acknowledged the well established principle that the claims procedure stipulated in a fixed price contract must be strictly observed, since a claim for additional compensation derogates from the basic notion of a fixed price contract whereby a contractor, for gain or loss, is bound to its bargain with an owner – unless otherwise agreed by the parties (Article 2109, *Civil Code of Quebec*; *Construction Infrabec inc. v. Paul Savard, Entrepreneur électricien inc.*; and *Coffrage Alliance ltée v. Hydro-Québec*. Indeed, one practical economic rationale for a comprehensive contract claims process is precisely to enable an owner to obligate an engaged contractor to perform additional work, knowing that compensation will be forthcoming, so that an owner in the midst of a project does not have to look elsewhere.

Harking back to the 1982 seminal decision of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada* (a case arising from Quebec), that the courts in Quebec and elsewhere in Canada have stressed the need for a contractor to strictly comply with the notice of claim or notice of dispute provisions in a contract, as it would be inappropriate for a contractor to invoke relief under some change provisions in the contract while simultaneously ignoring its concomitant notice requirements. In this regard, the Canadian College of Construction Lawyers published two comprehensive papers outlining the differing degrees of intensity in various Canadian provinces when courts confront issues of compliance with the claims provisions in construction contracts: see B. Bowles & M. Sontrop, *Update on the Law of Notice* (2019) J.C.C.C.L. 1 and P. Scheibel & P. Vetch, *An Overview of Contractual Notice Requirements and the Effect of the Doctrine of Waiver and Estoppel in Cases of Imperfect Compliance*, (2019) J.C.C.C.L. 47.

In the *Opron* saga, the decision of the trial judge focused on whether the claims procedure in the contract applied to a change of the magnitude described above. Quebec jurisprudence distinguishes between a change routinely occurring during a construction project and a profound quantum change caused by the intervention of an owner that considerably transforms the contractual bargain. And implied the trial judge in *Opron*, when a public body conducts business in an ingrained manner by routinely deploying against constructors with whom it deals an array of technical provisions regarding claims in its contractual arsenal, the public owner thereby contractually engages its liability for its "*institutional bad faith*". Indeed, Article 7 of *the Civil Code of Quebec* instructs that "*No right may be exercised … in an excessive and unreasonable manner which is contrary to the requirements of good faith*", a rule that applies to both the public and private domains.

Looking at the rationale of the trial judge, a change initiated by an owner, public or private, is susceptible to different treatment depending on many fact-specific factors along a matrix of severity of the change. An anodyne change has little impact on cost and schedule; a critical path change will likely impact cost and schedule; and a cardinal change that radically demolishes the critical path, fundamentally alters the contractual bargain between owner and contractor. Most fixed price contracts quite properly allow an owner to oblige a contractor to perform a change of lesser consequence that falls *within* the nature and general scope of the original contract and, absent agreement on a change order, the change mechanism in many contracts will contain a formula for valuing the change and time extension. However, most owner-developed contracts understandably do not contemplate that an owner might require a dramatic and drastic change that is *beyond* the nature and scope of the original contract. As the undisputed facts in the *Opron* decision show, the fundamental changes made by the owner destroyed the planned critical path and vastly re-sequenced the entire project, with attendant costs to be determined on a cost-plus basis notwithstanding the fixed price environment of the underlying original contract. Faced with a cardinal change imposed by an owner, a contractor generally cannot be constrained to perform a radical change that was beyond the contemplation of the parties when the original call for tender was issued and resultant contract awarded – unless the parties reach a subsequent arrangement that is over and beyond the routine change provisions in the original contract. A vast grey area lies between a lesser change that falls *within*, and a cardinal or fundamental change that falls *outside* of, the nature and scope of a contract. The trial judge in *Opron* did not provide indicia setting parameters for what is a lesser change *within* a contract and a cardinal change that is *outside* of the original contact. This is to be expected, as the facts in each instance determine the severity of the change.

The Court of Appeal agreed with the conclusions of the trial judge but for a vastly different reason. The Court of Appeal was able to sidestep the issue of a routine nimbly and correctly versus a cardinal change that was a preoccupation of the trial judge. The Court of Appeal focused uniquely on the arrangement reached by the parties regarding management of the change. Regardless of the nature of the change, the arrangement constituted in effect a verbal amendment of the original contract. The Minister had to value the work performed by the contractor as a consequence of, and in accordance with, the payment and other parameters of that amendment, not pursuant to the terms and conditions of the original contact. The amendment of the contract charted a new delivery sequence for the project with attendant expenses for acceleration and winter conditions to be reported daily and compensated on a cost-plus basis. This was the applicable regime for recovery of these limited expenses – not the regime for recovery of a routine extra under the original fixed price contract.

Accordingly, the Court of Appeal found the Minister at fault for having rejected the contractor's application for the recovery of expenses relating to acceleration and winter conditions in accordance with the contract amendment. The Court of Appeal swept aside the hubris of the Minister relating to non-compliance with technicalities of the claims mechanism under the original contract and sustained the contractor's action to the extent of $866,975 with interest and costs for all items logically flowing from the amendment, while partially reducing the decision of the trial judge by $113,634 through the application of normal rules of evidence and leaving the contractor nevertheless with a richly deserved although hard-earned award.

Quebec Court of Appeal

Procureur Général du Québec v. Opron inc., Marie-France Bich J.C.A., Robert M. Mainville J.C.A. and Stephen W. Hamilton J.C.A.
January 24, 2022

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ONTARIO COURT DISMISSES APPLICATION FOR REVIEW OF ADJUDICATOR'S DETERMINATION

The Ontario Divisional Court recently released a decision on a court application for judicial review of an adjudicator's determination under the prompt payment provisions of the *Construction Act.* The application was dismissed (without any consideration of the underlying merits of the application) because of the applicant's failure to obtain a stay of the adjudicator's determination or to make payment. The Divisional Court's decision is a cautionary tale and highlights the importance of compliance with both the prompt payment and adjudication provisions of the *Construction Act.*

The Underlying Adjudication

The applicant, SOTA, retained Andrid Group to build a dental clinic in Vaughan, Ontario. Andrid Group performed work and invoiced SOTA. SOTA did not dispute the invoices within 14 days of receipt, resulting in those invoices becoming due and payable pursuant to s. 6.4 of the *Construction Act.* When SOTA did not pay, Andrid Group commenced an adjudication under the prompt payment provisions of the *Construction Act.* An adjudicator was appointed who ultimately determined that SOTA should pay Andrid Group approximately $38,000.

Following the release of the adjudicator's determination, SOTA did not make payment in accordance with s. 13.19(2) of the *Construction Act.* Andrid

Group pursued enforcement efforts and recovered a nominal amount, but a significant portion of the adjudicator's determination remained outstanding.

The Divisional Court Decision

SOTA sought and was granted leave under s. 13.18(1) of the *Construction Act* to bring an application for judicial review of the adjudicator's determination on September 21, 2021. Prior to the hearing of the application in April 2022, a case conference was held before the Divisional Court to address the scheduling of steps required for the application for judicial review. As part of that case conference, the issue of SOTA's failure to bring a motion to stay the determination of the adjudicator's decision was raised.

Specifically, under the adjudication provisions of the *Construction Act*, an application for judicial review does not operate as a stay of the implementation of an adjudicator's determination unless the Divisional Court orders otherwise; therefore, a party's obligation to pay amounts under the determination remains in effect. While SOTA was made aware of this issue by the Divisional Court, no stay motion was brought.

As a result, on April 14, 2022, the Divisional Court dismissed SOTA's application for judicial review (without any consideration of the underlying merits of the application), suggesting the following principles be borne in mind by parties in future applications:

- Prompt payment is integral to the scheme of the *Construction Act.* The obligation to pay, and pay promptly, when ordered to do so, is fundamental to the scheme of the prompt payment provisions.
- Failure to pay in accordance with the prompt payment requirements of the *Construction Act* may lead the Divisional Court to refuse an application for leave.
- Where leave is granted, an applicant must obtain a stay or make payment, failing which the Divisional Court may dismiss the application on a motion to quash at the hearing of the application.

The Divisional Court recognized that prompt payment is reinforced under the *Construction Act* by the provisions related to appeals and reviews. There are no appeals from prompt payment adjudication determinations. They are "interim binding" on parties until a further determination of the matter by a court, an arbitration, or a written agreement between the parties. There may be judicial review of the decisions (on limited grounds), but only with leave of the Divisional Court.

The court also rejected SOTA's argument that "there was no money" to make payment of the adjudicator's determination. Even though the applicant filed no evidence to support this claim, the Divisional Court accepted it – noting that it reinforced their decision to dismiss the application. If SOTA was in fact insolvent, the Divisional Court did not wish to permit it to run up further costs and delays through recourse to litigation. The avenue for that argument would have been a motion for a stay with proper evidence available to the court for its consideration.

Key Takeaways

The Divisional Court's decision highlights the importance of not only understanding the application and processes that govern adjudications in Ontario, but also understanding what comes next after receiving an adjudication determination. There are six key considerations that parties to an adjudication will want to keep top of mind if they have received a determination from an adjudicator under the *Construction Act.*

In particular, where a party wishes to set aside the determination of an adjudicator by an application for judicial review (which can only be done on limited grounds), they must ensure that they adhere to the timelines under the *Construction Act*. As set out under s. 13.18(2) of the Act, a motion for leave to bring an application for judicial review of a de-

termination of an adjudicator must be filed no later than 30 days after the determination is communicated to the parties.

Furthermore, the Divisional Court has now made it clear that a failure to pay in accordance with the prompt payment requirement of the *Construction Act* may lead the Divisional Court to refuse an application for leave – and where leave is granted – an applicant must either obtain a stay of the adjudicator's determination, or make payment, or risk the dismissal of its application for judicial review altogether.

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ONTARIO COURT OF APPEAL RULES THAT OBLIGATION TO INSURE DOES NOT ALWAYS ENTAIL ASSUMPTION OF INSURED RISK

An agreement to insure against a peril does not always mean that the party obtaining the insurance assumes all responsibility for that peril. Rather, courts will read the agreement as a whole, in light of the factual matrix, in order to ascertain the meaning of the disputed contractual provision. One party's covenant to insure against a peril does not displace a counterparty's obligation to indemnify against that risk if the contract is sufficiently clear on how the parties intend on distributing risk of the peril's occurrence.

That was the Ontario Court of Appeal's conclusion in *Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors*. The decision represents a significant clarification of the interplay between indemnity obligations and covenants to insure in construction and other commercial contracts.

Background

The parties to the proceeding were Crosslinx Transit Solutions Constructors, the construction contractor on the Eglinton Crosstown LRT project in Toronto, and Capital Sewer Servicing Inc., an experienced sewer servicing subcontractor retained by Crosslinx.

In February of 2018, a sewer backup incident occurred while Capital Sewer was conducting sewer bypass work near Avenue Road. The backup resulted in flooding which damaged three nearby commercial properties. The property owners sued Crosslinx, Capital Sewer, and other parties up the contractual pyramid. Crosslinx demanded that Capital Sewer honour its express indemnity obligations in its subcontract agreement and provide a defence and assurance of indemnity for Crosslinx in respect of the legal actions. Capital Sewer refused to do so. It argued that a covenant by Crosslinx in its prime contract to take out a project wide insurance policy effectively displaced or extinguished Capital Sewer's express indemnity obligation in the subcontract. The parties brought competing applications for interpretations of the subcontract.

The parties' dueling positions stemmed from two groups of provisions in the subcontract.

Crosslinx argued that the language of the subcontract was abundantly clear that the parties had in-

tended to allocate all risk of expense or loss to Capital Sewer in any way related to its work. Crosslinx relied on provisions that stated that it shall "*not incur for its own account and without recourse to* [Capital Sewer] *any obligation or liability*" relating to the subject matter of the subcontract, and that Capital Sewer "*shall be liable for, and shall indemnify and hold harmless* [Crosslinx] *from and against, all Claims*" arising under or relating to the subcontract.

Capital Sewer argued that these provisions were effectively nullified by a provision in the subcontract that gave it the benefit of commercial general liability insurance required to be obtained by Crosslinx's upstream contractual counterparty (known as "Project Co"). Capital Sewer's position was that this covenant to insure by Project Co (which was incorporated by reference into the subcontract) amounted to an agreement to assume the risk of damage for all perils Project Co's insurance might cover.

Capital Sewer relied on a trilogy of cases from the Supreme Court of Canada and a later case from the Ontario Court of Appeal. In those cases, the courts generally held that the landlord's covenant to take out fire insurance amounted to an assumption of risk for any damage caused by fire, even where the fire resulted from the tenant's own negligence. Capital Sewer argued that these cases created a rule that, where a party covenants to obtain insurance, they assume the risk of loss should the risk insured against occur.

The Trilogy

The trilogy are fundamentally cases about contractual interpretation. Ontario's Court of Appeal has held that the trilogy does not pronounce "a rule of general application" or "enunciate freestanding principles". Rather, the outcomes of the trilogy cases reflect the agreements at issue in those cases.

The facts of *Cummer-Yonge Investments v. Agnew-Surpass Shoe Stores*, the first decision in the trilogy, are straightforward. A fire broke out at the landlord's shopping centre. One of the landlord's tenants was alleged to have caused the fire. The landlord's insurer commenced a subrogated action against the tenant for negligence resulting in the fire. The tenant argued that the lease, which required the landlord to insure the premises, protected the tenant from its own negligence. The Supreme Court of Canada agreed, relying heavily on another provision of the lease which required the tenant to make repairs except for "*damage caused to the building caused by perils against which the* [landlord] *is obligated to insure*".

The next decisions in the trilogy, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.* and *T. Eaton Co. v. Smith, et al*., had similar facts. In each case, a fire was alleged to have been caused by a tenant's negligence. The landlord's insurer commenced subrogated actions against the tenants. The issue in each case was whether the provisions of the parties' lease passed the risk of loss by negligence of the tenant to the landlord. In *Ross Southward*, for example, the lease provided that the tenant would "*pay all … insurance rates immediately when due*". The tenant took the position that as it paid for the insurance to be taken out by the landlord, it would be deprived of a contractual benefit if it were to be liable for negligence covered by the insurance. The Supreme Court of Canada agreed but was careful to state that the issue was to be determined based on the language of the lease and not insurance policy considerations.

In *Madison Developments Ltd. v. Plan Electric Co*., the Supreme Court of Canada's reasoning from the trilogy was applied to a case involving a construction dispute. In that case, a general contractor covenanted with the property owner and a subcontractor to obtain comprehensive fire insurance. When the subcontractor's employees were alleged to have caused a fire on the job site, the

general contractor's insurer commenced a subrogated claim against the subcontractor for negligence. The Ontario Court of Appeal reasoned, by analogy to the trilogy, that, given the language of the agreement at issue, it made no business sense to interpret the agreement as disentitling the subcontractor from the benefit of the insurance. As a result, and given that the insurer was advancing a subrogated claim, the Court of Appeal held that the insurer could not advance a negligence claim against a person who was intended to receive the benefit of the insurance.

Decision of the Commercial List

Crosslinx's and Capital's applications were heard by Justice Koehnen of the Ontario Superior Court of Justice (Commercial List). Justice Koehnen considered the line of case law relied on by Capital, but found that it did not establish a hard and fast rule of risk apportionment which would override basic principles of contractual interpretation. In light of the very clear language in the subcontract indicating that the parties intended for Capital to assume all risks relating to its work, the judge ordered Capital to indemnify and hold Crosslinx harmless from all costs and damages arising in relation to the property damage claims.

Justice Koehnen also concluded that Capital's duty to hold Crosslinx harmless included a duty to defend Crosslinx in the proceedings arising from the sewer backup incidents. The judge interpreted indemnity at issue as meaning that Crosslinx should "*never have to put his hand in his pocket in respect of a claim covered*" by the indemnity. Justice Koehnen distinguished the case relied upon by Capital, *UPS Supply Chain Solutions, Inc. v. Airon HVAC Service Ltd*. The agreement at issue in that case did not expressly set out the intent of the parties, as the agreement between Crosslinx and Capital did.

Decision of the Court of Appeal

On appeal by Capital, the Ontario Court of Appeal agreed with Justice Koehnen that there is no "*legal rule that a party's covenant to insure against a risk must mean it was intended that the party's undertaking to insure assumed the risk of the harm insured against*". Each contract containing a covenant to insure must be interpreted according to its own wording in order to ascertain the intent of the parties. In the circumstances of this case, the Court of Appeal accepted that a reading of the subcontract as a whole reasonably led to the conclusion that Capital had agreed to indemnify Crosslinx for all risk and costs associated with the property damage claims. The Court of Appeal found that Capital's arguments regarding its duty to defend Crosslinx did not disclose any extricable question of law, nor did they reveal that Justice Koehnen's interpretation was unreasonable.

The Ontario Court of Appeal's decision is consistent with the Supreme Court of Canada's reasoning in *Corner Brook (City) v. Bailey*, where it held that the long-standing "Blackmore Rule" applicable to the interpretation of contractual releases should be discarded in favour of the interpretive principles set out in *Sattva Capital Corp. v. Creston Moly Corp*. The modern rule of contractual interpretation is that a court must "*read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract*". The Capital Sewer decision reflects this principle and is part of a growing trend in the judicial interpretation of contracts to move away from entrenched "rules of thumb" in favour of a more flexible interpretive framework.

Ontario Court of Appeal

Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors
D.H. Doherty, M.L. Benotto and G. Huscroft JJ.A.
January 12, 2022

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WHAT IS BUILDER'S RISK INSURANCE?

Builder's risk insurance is specialized first-party property insurance that protects a project during construction or renovation. It is designed to react to losses that occur during construction, with the goal of getting the project back up and running after a loss. This type of insurance is recommended for anyone with a financial interest in a property that is being built or renovated.

Why is Builder's Risk Insurance Important?

Buildings in the process of being constructed or renovated are vulnerable to significant risks, including fire, theft, wind damage, lightning or hail, and damage caused by vandals. However, typical commercial property insurance policies do not adequately insure ongoing construction projects. Builder's risk insurance fills this gap by providing coverage for the period before the project is ready for use or occupancy.

Who is Covered?

All parties with an "insurable interest", whose financial interest would be detrimentally impacted by a loss, should be listed as insureds under the builder's risk policy. Typically, the builder's risk policy is purchased by the building owner or general contractor, which makes sense considering these parties have the most to lose if the property is damaged or destroyed in construction. Whichever party purchases the policy is then responsible for ensuring that all parties with an "insurable interest" in the property are listed as insureds. This will commonly include the owner/general contractor (whoever is not the first named insured), subcontractors, and financial lenders.

How Long Does Coverage Last?

Because builder's risk insurance is meant to protect insureds during construction, it is temporary in nature. Therefore, coverage usually terminates on a date specified in the policy or, in the absence of a specified date, when the project is considered "completed". Generally, policies define the date of completion as the owner's acceptance of the structure as complete, the local building authority's issuance of a certificate of occupancy, or the structure being put to its intended use. Additionally, a builder's risk policy may terminate when permanent property insurance is obtained.

What is Covered?

For a loss to be covered under a builder's risk policy, the loss generally must be: (1) a direct physical loss or damage to (2) covered property, or (3) caused by a covered cause of loss.

1. Direct Physical Loss

The "direct physical loss or damage to" requirement excludes coverage for purely economic losses or diminution in value. Generally, courts have held that this condition is satisfied only where there is some physical change in the condition of the covered property.

2. Covered Property

All builder's risk policies cover the structure being built or renovated. Additionally, builder's risk policies usually provide coverage for building materials, supplies, equipment, and machinery intended to become a permanent part of the covered property. Coverage may also be provided for temporary structures on the job site and materials in transit or in temporary storage away from the job site.

3. Covered Cause of Loss

There are two basic types of builder's risk insurance: "named perils" and "all-risk". If the policy is

written on a "named perils" basis, then only those risks specifically enumerated in the policy will be covered. On the other hand, if the policy is written on an "all-risks" basis, then all risks of loss, except for those specifically excluded, will be covered.

What are Common Exclusions Associated with Builder's Risk Policies?

Builder's risk policies written on an "all-risk" basis begin with a broad grant of coverage and then limit the scope of coverage through exclusions. Builder's risk coverage is not standardized, but common exclusions include faulty workmanship, subsidence – earth movement, design/specification, consequential damages, and anti-concurrent/antisequential loss provisions.

Conclusion

In sum, construction projects are susceptible to significant risks that standard commercial property policies will not cover. To mitigate these risks, builder's risk coverage should be a consideration for any new construction or renovated project. An experienced coverage lawyer can analyze a situation and make specific recommendations based on individual needs and considerations.

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DISINTERESTED OWNER – STILL PROPER PARTY TO A LIEN ACTION

A claim of lien pursuant to the *Builders Lien Act* (BLA) in British Columbia creates a lien against the specific property where work and services were provided. The lien is registered against the interest of the registered owner of the land. The lien claimant may be a subcontractor with no contractual relationship with the owner, but the subcontractor is nonetheless entitled to encumber the owner's lands.

The subcontractor in this scenario is obliged to commence a court action to enforce the lien claim within one year of filing the lien. The owner is a necessary party to the action to enforce the claim against the lands. It is common practice for the subcontractor to also pursue his or her claim for payment from the contractor in the same action.

Recently in the case of *Trans Canada Trenchless Ltd. v. Targa Contracting (2013) Ltd.*, the court considered the consequences when a subcontractor failed to name the owner in the action. In this case the subcontractor, Trans Canada, filed a lien in relation to certain underground utilities work carried out for the contractor Targa Contracting. The lien was filed on time and the action to enforce the lien was commenced on time, but Trans Canada failed to name the owner in the action. Further, the action did not include any wording to enforce the lien as against the lands.

The lien was cancelled from title to the land by Targa Contracting posting financial security for the lien. The litigation proceeded, with the lien secured, and Targa Contracting defended the claim. Three years later, Targa Contracting took steps to strike the lien arguing that the pleadings did not include a claim to enforce the lien as required by the BLA, and that Trans Canada's failure to name the owner as a defendant in the action was a fatal defect. Trans Canada brought a cross-application seeking to add the owner as a defendant and to claim enforcement of the lien against the lands.

It is noteworthy that the limitation period for Trans Canada to commence an action against the owner had expired. In a surprising result, the court allowed Trans Canada to add the owner as a defendant and to amend the claim to expressly include a claim to enforce the lien. Targa Contracting's application to strike the lien claim was dismissed.

Targa Contracting argued that the BLA requires strict compliance and, if the action to enforce the

claim of lien was not properly pled, the lien is extinguished. If Targa Contracting succeeded in its application to strike the lien, the lien security it had posted could be released, leaving Trans Canada with an unsecured claim.

Trans Canada argued that the BLA should be read in a purposive manner. Trans Canada acknowledged that there was a "technical defect" in the pleadings and that the provisions of the BLA creating the right to a lien required strict compliance. However, Targa Contracting argued that once the lien was properly filed and entitlement was established, the BLA is to be construed liberally with consideration to its remedial purpose.

The court acknowledged that meaning must be given to s. 33(5) of the BLA which requires that the action explicitly include language to enforce the lien. However, the relief sought by Trans Canada under the civil rules allowed the court to exercise its discretion to determine if the owner could be added as a party and whether the claim could be amended to correct the defect.

The determination that the owner should be added as a party turned on the fact that the owner waived the non-compliance with s. 33(5) — the owner did not object to being added after the limitation period had expired and did not object to the amendments to the claim to enforce the claim of lien. Although not stated in the reasons, we can assume that the owner did not take issue with the relief sought because its contract with Targa Contracting likely contained language requiring the contractor to indemnify and defend the owner with respect to any liens filed by subcontractors.

Targa Contracting still had a vested interest in having the lien struck because then the lien security it posted could be released. Targa Contracting argued that the claim against the owner was extinguished because the limitation period expired, and it cannot be revived. Targa Contracting also argued that, as a matter of policy, lien claims should be dealt with expeditiously because an owner whose land is subject to a lien requires more expeditious resolution than might otherwise be the case. But here the lien no longer attached to the land and the owner did not take issue with being added as a party.

The court held that the overriding question is whether it is just and convenient to add the new party and grant leave to raise the new claims. The issue was resolved in favour of Trans Canada, and it was allowed to amend the pleadings and to add the owner as a party defendant.

The case serves as a useful reminder that careful consideration is required when drafting pleadings to enforce a lien claim and identifying the proper parties to the action. It also serves as a helpful illustration of how an owner can shield itself from liability for lien claims with properly drafted provisions downloading the obligation to defend and indemnify the owner with respect to matters arising from a subcontractor's lien.

British Columbia Supreme Court

Trans Canada Trenchless Ltd. v. Targa Contracting (2013) Ltd.
Master S. Harper (In Chambers)
December 10, 2021

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ALBERTA COURT OF APPEAL OPENS DOOR FOR A FINDING OF DEVELOPER LIABILITY FOR CONSTRUCTION DEFICIENCIES

The Alberta Court of Appeal recently heard a court application involving a condominium board that had made a claim that a developer owed a duty of care regarding serious deficiencies in the design and construction of the condominium's balconies. In *Condominium Corporation No. 0522151 (Som-*

erset Condominium) v. JV Somerset Development Inc., the court held that there could potentially be a finding of liability in tort (or negligence) for a developer that fails to take reasonable care in constructing a building or repairing deficiencies.

The court made reference to the seminal Canadian decision regarding construction deficiencies, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, where the Supreme Court of Canada held that a contractor owed a duty of care to subsequent condominium unit owners. This duty depends on the existence of a foreseeable, real and substantial danger resulting from the building deficiencies. Ultimately, it was determined by the Court that this was not a matter that could be settled on summary judgment and would need to go to trial. If a duty of care is found at trial, it would result in the creation of a novel duty of care owed to subsequent condominium unit owners by developers. This duty could potentially exist even when the developer had no direct involvement in the design, physical construction or inspection of the building, and when the deficiencies are not identified for years after the original sale.

Facts

JV Somerset Development was the developer of a condominium building that was completed during 2004/2005. The 215 units were then sold to members of the public during the same years. In 2012, defects with the balconies due to water infiltration were identified. The balconies were considered part of the condominium common property, and as such were under the control of Condominium Corporation No. 0522151 (o/a Somerset Condominium). Somerset Condominium repaired the faulty balconies, and commenced an action against JV Somerset Development, who they claimed was liable with the architect and project manager to recover the costs.

Somerset Condominium's claim was brought in tort, arguing that, as the developer, JV Somerset Development owed a duty of care to the future unit owners. The alleged duties included that:

(a) the property will be reasonably fit for habitation;

(b) construction will be executed in a good and workmanlike manner;

(c) good and proper materials will be supplied throughout construction; and

(d) the final product delivered to the consumer will be free of defects in material and labour.

In its defence, JV Somerset Development asserted that a developer, unlike a contractor, does not owe a duty of care to the unit owners, as none of the named defendants were directly involved in the design, physical construction or inspection of the condominium complex.

Decision of the Chambers Judge

JV Somerset Development brought a court application for a summary judgment. The grounds for the application were centered around the fact that, during questioning, Somerset Condominium's officer admitted that there was no knowledge or record that JV Somerset Development had been involved in the design, physical construction or inspection of the building, and that the only known involvement of JV Somerset Development was as the original developer and vendor to the initial purchasers. The chambers judge accepted this argument and dismissed the claim, holding that a developer does not owe a duty of care, and therefore cannot be liable in tort, for construction deficiencies, unless they were actually involved in the physical construction.

Court of Appeal Decision

On appeal, the court set out three possible categories under which a developer *could* be held liable for construction deficiencies: (i) contractual duties and covenants; (ii) tort duties; or (iii) statutory duties. While the application of contractual duties was discussed, the claim was brought in tort (negligence) and therefore no contracts between the parties were entered into evidence.

In *Winnipeg Condominium*, the Supreme Court of Canada considered whether a contractor could owe a duty of care to subsequent purchasers of a building for failures that were discovered 15 years after construc-

tion. In that decision, the Court held that the foreseeability of a failure to take reasonable care in constructing the building would create defects that posed a substantial danger to the health and safety of the future occupants and would establish a duty of care. If injury or damage occurred as a result, or if damage was identified and remedied, the contractor would be liable and there would be an ability to recover for the damage or economic cost of the repairs. This duty in tort exists independently of any contractual arrangement, and it was noted that there was no logical reason for a contractor to shield themselves from liability by relying on a contract made with the original owner.

The key question before the court in *Somerset Condominium* was whether the duty in tort established in *Winnipeg Condominium* could be extended to apply to a developer who was *not involved* in the physical construction of the building. *Winnipeg Condominium* was decided before the need to establish proximity between the parties arose. However, a subsequent decision that applied *Winnipeg Condominium* made no indication that there was a lack of proximity between the parties. (see *1688782 Ontario Inc. v. Maple Leaf Foods Inc*.).

The court stated that the principles in *Winnipeg Condominium* regarding a duty of care related to construction defects could arguably extend to apply to developers as well as contractors. However, it emphasized that this area of law remains unclear and could not be determined on a summary court application. Ultimately, the court directed the matter be determined at trial. On appeal, the terms of the original contracts between the parties will likely be central to the analysis, including because said contracts were not reviewable by the court as part of the summary court application. Further, the standard of care to be applied is also unclear, and the fact that there was no hands-on role played by the developer may be of significant consideration.

Alberta Court of Appeal

Condominium Corporation No. 0522151 (Somerset Condominium) v. JV Somerset Development Inc.
F.F. Slatter, J. Strekaf and E.A. Hughes JJ.A.
May 25, 2022

CITATIONS

1688782 Ontario Inc v Maple Leaf Foods Inc., [2020] S.C.J. No. 35, 2020 SCC 35

B. Bowles & M. Sontrop, *Update on the Law of Notice* (2019) J.C.C.C.L. 1

Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors, [2022] O.J. No. 94, 2022 ONCA 10

Civil Code of Quebec, art. 2109

Coffrage Alliance ltée v. Hydro-Québec, [2021] J.Q. no 6261, 2021 QCCA 954

Condominium Corporation No. 0522151 (Somerset Condominium) v. JV Somerset Development Inc., [2022] A.J. No. 674, 2022 ABCA 193

Construction Infrabec inc. v. Paul Savard, Entrepreneur électricien inc., [2012] J.Q. no 16968, 2012 QCCA 2304

Corner Brook (City) v. Bailey, [2021] S.C.J. No. 29, 2021 SCC 29

Corpex (1977) Inc. v. Canada, [1982] S.C.J. No. 91, [1982] 2 S.C.R. 643

Cummer-Yonge Investments v. Agnew-Surpass Shoe Stores, [1975] 2 S.C.R. 221

Madison Developments Ltd. v. Plan Electric Co., [1997] O.J. No. 4249, 36 O.R. (3d) 80 (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 659

P. Scheibel & P. Vetch, *An Overview of Contractual Notice Requirements and the Effect of the Doctrine of Waiver and Estoppel in Cases of Imperfect Compliance* (2019) J.C.C.C.L. 47

Procureur Générale du Quebec v. Opron Inc., [2022] J.Q. no 278, 2022 QCCA 98

Ross Southward Tire Ltd. v. Pyrotech Products Ltd., [1976] 2 S.C.R. 35

Sattva Capital Corp. v. Creston Moly Corp., [2014] S.C.J. No. 53, 2014 SCC 53

T. Eaton Co. v. Smith, et al., [1978] 2 S.C.R. 749

Trans Canada Trenchless Ltd. v. Targa Contracting (2013) Ltd., [2021] B.C.J. No. 2779, 2021 BCSC 2518

UPS Supply Chain Solutions, Inc. v. Airon HVAC Service Ltd., [2015] O.J. No. 1360, 2015 ONSC 1734

Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] S.C.J. No. 2, [1995] 1 S.C.R. 85