CONSTRUCTION LAW LETTER

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DISSENT IN CONSTRUCTION ARBITRATION

"*Dissent is as American as cherry pie.*"

—Richard N. Haass, American diplomat

In circumstances where there are three members of an arbitration tribunal, the conventional wisdom is that they should strive to reach a unanimous decision. As one legal writer opined, "(o)*nce appointed, the tribunal's implied duty to render a unanimous award is usually unforgiving*". Furthermore, as another wrote, "(i)*t is undeniable that a dissenting opinion is likely to create a certain degree of turbulence in any arbitration proceedings*". To the extent that dissenting opinions critique and depart from the majority view, they are sometimes acrimonious and controversial, and, it may be argued, could negatively affect the perception of the legitimacy and authority of the award.

However, if members of a tribunal are unable to achieve unanimity, an award may nevertheless be rendered by two of them, representing the majority. Since members of tribunals often have different perspectives, experience and backgrounds, they are bound to disagree occasionally. Accordingly, a dissent, although independent and not considered to be a part of an award, may be issued by the third arbitrator, consisting of an expression of disagreement with the majority opinion.

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What do the Arbitration Rules say Regarding Dissent?

Private arbitration agreements rarely provide for dissenting opinions. Additionally, the arbitration rules of most major institutional alternative dispute resolution (ADR) service providers (e.g., ADRIC, ADR Chambers, UNCITRAL, ICDR, AAA, CAA, JAMS, LCIA, HKIAC and SIAC) contain no specific reference to dissenting opinions. The absence of rules regarding dissent could be interpreted to mean that dissenting opinions are either not contemplated or not prohibited.

Interestingly, the ICC's Commission on International Arbitration published a report in 1988 ("Final Report on Dissenting and Separate Opinions of the Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration") mandating that "*it is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations. A minority opinion was expressed to the effect that the ICC should seek to minimize the role of dissenting opinions, but the prevailing view was that the ICC should neither encourage nor discourage the giving of such opinions*".

The authoritative U.S.-based College of Commercial Arbitrators' *Guide to Best Practices in Commercial Arbitration* expresses the view that "[a]*rbitrators should avoid issuing dissenting opinions except in rare instances and when issuing a dissent, should do so dispassionately and discreetly*".

Appeals and Judicial Review

Dissents do not establish grounds for any form of judicial challenge or appeal of an award, and, where the prevailing legislation might permit strictly limited avenues for judicial review, courts are generally precluded from reviewing the substantive merits of an award. Judicial review is usually limited to issues of jurisdiction, due process, and principles of natural justice.

The Value of Dissent?

Unlike the common law, there is no doctrine of *stare decisis* which would bind, guide or oblige a tribunal to follow legal rulings set by previous arbitration decisions. Accordingly, a dissent would not aid in the development and evolution of the law, particularly considering that arbitration proceedings are

usually confidential, and awards are rarely published. Nevertheless, an arbitrator's reasonable and balanced dissent could serve to inform the unsuccessful party that its arguments and submissions were seriously considered by the tribunal in its deliberations.

Furthermore, despite the cultural and peer pressure to collaborate on a unanimous decision, a dissenting opinion would allow the arbitrator issuing it to be true to his or her opposing views as to how the dispute should have been decided by registering his or her genuine and reasoned disagreement with the majority opinion.

As Justice William J. Brennan, Jr. of the U.S. Supreme Court wrote (see *In Defence of Dissents*, 37 Hastings L.J. 427, at 430), "(d)*issent . . . safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision*".

Two Anecdotes about Dissents

A few years ago, a three-person tribunal was appointed to arbitrate a substantial claim arising out of a large construction project in northern Canada. After a lengthy hearing, the members of the tribunal caucused privately to deliberate on the preparation of what they expected would likely be a unanimous award. However, it soon became apparent that two of the members of the tribunal (call them A and B) disagreed with respect to the legal analysis of a significant component of the claim, which was valued in the millions of dollars. The third member (call him C) sided with A. A was tasked with preparing the majority opinion, and B decided to prepare a dissenting opinion. Before any draft opinions were circulated internally for discussion or review, C notified the other tribunal members that, upon further consideration, he had changed his mind and supported the analysis undertaken by B. As a result, B then undertook to prepare the majority opinion, and A, being true to his initial view, decided to prepare a reasoned dissenting opinion. This dynamic itself was curious enough, and underscores how arbitral decision-making is a human process. Despite that most arbitration awards are typically final and binding, legislation in the territorial jurisdiction in this case permitted appeals to the court on a question of law, with leave. The question of law, in this case, was the one raised in the dissent. However, the leave application was subject to stringent statutory requirements and was unsuccessful on other grounds. Leave to appeal was therefore denied, and the majority opinion in the arbitration award was confirmed. One might observe, though, that, without a reasoned and compelling dissent, it is doubtful that the unsuccessful party would have had any prospect whatsoever of a successful appeal.

In another arbitration, involving a complex and substantial array of claims arising out of the development of a major pipeline project, the claimant brought a motion to the three-person tribunal to schedule an early hearing for an interim enforceable partial award relating to a multi-million dollar component of the total claim. The majority of the tribunal agreed to schedule the interim hearing strictly with respect to entitlement and quantum and postponed a review of the balance of the claims and defences to a full hearing at a later date. The dissenting arbitrator, however, was of the view that the motion for an early hearing was premature and should not be granted because it could only be based upon limited evidence, and the respondent would be denied the opportunity to make submissions, lead evidence and raise arguments relating to the respondent's other legal and contractual defences which were not scheduled for consideration until the full hearing.

This anecdote demonstrates the possibility of a dissent on a procedural motion, unrelated to a full or partial award, in the context of an arbitration proceeding. The "body language" of the tribunal on the disposition of that motion may very well have caused the parties and their counsel to infer that the

members of the tribunal might not be unanimous in their view of the merits of the claims and the defences. Given the added concern about the millions of project documents and the dozens of percipient and expert witnesses, the parties decided to settle.

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ONLY BRICKS AND MORTAR? YOUR PERFORMANCE BOND MIGHT COVER MORE THAN YOU THINK

Players in the construction industry rely on risk allocation to keep the industry functioning. As Covid-19 has reminded us, the world is full of uncertainty; even carefully planned, well-organized projects can be derailed by insolvencies, poor performance, inclement weather, breakdowns in the supply chain, or global pandemics.

For owners, a performance bond is an effective hedge against the negative consequences of unpredictable risks. In fact, on larger projects, owners may require that a general contractor procure a performance bond from a bonding company or surety as a condition of being awarded the project. Under a performance bond, the owner typically assumes the role of "Obligee" and the general contractor assumes the role of "Principal". If a general contractor defaults under the contract, a performance bond enables the owner to call on the surety to complete the project. The surety may complete the project using one of three options:

(1) the surety may remedy the contractor's default;

(2) the surety may complete the contract in accordance with its terms and conditions; or

(3) the surety may obtain bids to complete the contract in accordance with its terms and conditions, and, in consultation with the owner, may award the completion contract to the "lowest responsible bidder".

Among these three options, option 3 is the one most commonly pursued. Once the surety and the owner solicit bids for the remaining work and determine the "lowest responsible" bidder, the surety must make available sufficient funds to pay the "costs of completion" minus the balance of the original contract price. But what do the "costs of completion" include, exactly? Are these costs limited to the cost of labour and material? Case law suggests that the "costs of completion" might be more expansive than you think.

Whitby Landmark Development Inc. v. Mollenhauer

The Ontario Court of Appeal weighed in on this issue in the 2003 decision *Whitby Landmark v. Mollenhauer*. In 1990, Whitby Landmark Development Inc. entered into a contract with Mollenhauer Construction Ltd. for the construction of a condominium in Whitby, Ontario. The construction contract included a provision whereby Landmark and Mollenhauer would share any costs savings on the project (75 per cent to the owner and 25 per cent to the contractor). The construction contract also required Mollenhauer to provide Landmark with a performance bond.

Mollenhauer ceased carrying on business before it had completed work under the contract. Landmark completed the work itself, then made a claim under the bond. Landmark demanded payment of the balance of its 75 per cent share of the costs savings under the construction contract, ultimately fixed at $601,972.

The surety refused to pay. Its position was that the bond only covered the costs of completing the

physical construction work and did not extend to collateral obligations such as the contractor's obligation to share the cost savings it achieved.

In responding to the surety's argument, the Ontario Court of Appeal noted that the bond provided that the construction contract documents were part of the bond. All benchmarks for actions and obligations under the bond were referenced to the contraction contract. In other words, the surety's obligation was not simply to complete the construction work, but to complete the *contract* in accordance with its terms. The Court of Appeal wrote: "*There is no language in the bond that limits in any way the references to the construction contract or the obligations to complete that contract or to act on a default under that contract*". After parsing the specific language setting out the surety's options for completing the contract under the performance bond, the Court of Appeal concluded:

> [Subject] *to the operation of the bond in any particular circumstances, I conclude that there is no basis in the language of the bond or in the circumstances surrounding its negotiation or completion to suggest that the cost-sharing provisions of the construction contract are not included as bonded losses.*

Whitby Landmark stands for the proposition that payment of a collateral monetary obligation that is provided for in a construction contract (such as a cost-sharing arrangement) may become the surety's obligation in the event of a contractor's default. While *Whitby Landmark* specifically referenced a cost-sharing arrangement, it is easy to imagine how this principle could extend to similar collateral monetary obligations provided for in a construction contract. For example, if a contract were to provide that the contractor were to be responsible for paying the owner costs incurred as a result of the contractor's delay, and then the contractor defaults as a result of causing delay, arguably the delay costs owed by the contractor form a collateral monetary obligation no different than the obligation to pay the owner a portion of cost-savings. If the latter is considered a bonded loss by the Ontario Court of Appeal, could not the former be considered a bonded loss as well?

Lac La Ronge Indian Band v. Dallas Contracting Ltd.

The Saskatchewan Court of Appeal subsequently adopted a competing approach in the 2004 decision of *Lac La Ronge Indian Band v. Dallas Contracting Ltd*. Like *Whitby Landmark, Lac La Ronge* dealt with a contractor in default, and to what extent the surety's obligation to complete the contract included an assumption of collateral monetary obligations.

At trial, the judge found that the surety's obligation to "*complete the Contract in accordance with its terms and conditions*" included a contractual obligation to pay $1,000 per day in liquidated damages for late completion of the contract. The trial judge relied on the trial decision in *Whitby Landmark* (among other authorities) in support of his conclusion that the surety was obligated to include payment of liquidated damages in its calculation of the costs of completion.

The Saskatchewan Court of Appeal disagreed with the trial judge on this point, noting that, where a surety is found liable for failing to respond to a performance bond claim, liability flows from the surety's failure to respond to the bond claim *as a whole*; not a failure to adopt one option for completion over another. Damages owed by the surety should be the same regardless of which of the three options for a completion the court uses to determine the extent of the surety's liability. The court discussed option 3, in which "*balance of the contract price*" is defined as "*the total amount payable by the Obligee to the Principal under the Contract, less the amount properly paid by the Obligee to the Principal*" and analyzed the implications of this wording as follows:

> *[65] The phrase is not "amount payable by the Obligee to the Principal." It is, rather, the "total amount payable by the Obligee…less the amount properly paid". The total amount*

> *payable by the Obligee to the Principal under the Contract is the amount of the Contract.*

Relying on principles of contractual interpretation, as well as the need for commercial certainty arising from the widespread use of an industry-standard performance bond, the court concluded that the surety's obligation under the performance bond is to "*complete the work*" rather than to "*perform all obligations under the Contract*".

Whitby Landmark vs. *Lac La Ronge* – Who's Winning?

The appellate decisions in *Whitby Landmark* and *Lac La Ronge* are over 15 years old, but the differences between these decisions reflect a live, unsettled issue in the case law.

Essentially, the debate is this: is the surety's obligation under a performance bond an obligation to pay for only the remaining bricks-and-mortar construction work (the *Lac La Ronge* approach), or is it a broader obligation to complete the contract, and in doing so, provide the owner with the same collateral benefits it would have received if the contractor had not defaulted under the contract (the *Whitby Landmark* approach).

The debate has been most recently considered in two decisions out of Alberta: the 2013 decision in *MGN Constructors Inc. v. AXA Pacific Insurance Co.*, and the 2017 decision in *Vermilion & District Housing Foundation v. Binder Construction Ltd*.

In *MGN*, Justice Graesser was not able to reach a decision on the scope of the performance bond based on the evidence available to him; however, he considered the debate between *Whitby Landmark* and *Lac La Ronge*, and wrote that he preferred the *Whitby Landmark* approach:

> *[126] Were it necessary for me to decide the case on this basis, I prefer the reasoning of Justice Lamek at trial and the Ontario Court of Appeal in Whitby Landmark, and the trial judge's reasoning in Lac La Ronge, to that of the Saskatchewan Court of Appeal. I fail to see how a surety can arrange for completion of the contract in accordance with its terms and conditions unless it is responsible for any acceleration costs to meet the original schedule, and any delay damages the owner is entitled to if the schedule is not met. Otherwise, that would mean in cases where it is not possible, even by herculean acceleration efforts, to complete the work on schedule after the Principal's default, the blameless owner would be unable to deduct its legitimate delay damages from the amount otherwise owed to the defaulting Principal. That in my view distorts a fair interpretation of "the amount properly paid by the Obligee to the Principal".*

In *Vermillion*, Justice Nielsen also considered the debate between *Whitby Landmark* and *Lac La Ronge* and also adopted reasoning that favours *Whitby Landmark*. The issue in *Vermilion* was whether lost income related to forgone rent (resulting directly from remedial work) was within the surety's obligations under the performance bond. Justice Nielsen noted that payment of lost income resulting from the correction of deficiencies was a contractual obligation of the contractor, and was therefore part of the cost of completing the contract:

> *[315] In my view, it would have been within the reasonable contemplation of both Vermilion and Guarantee Company that if it was necessary to carry out remedial work in relation to the work of Binder pursuant to the Construction Contract, such remedial work might result in some loss of income to Vermilion. In my view, such losses would fall within the "cost to complete" the work as set out in option 4 of the Performance Bond. Such costs fall within the indemnity obligations of Binder pursuant to General Condition 9.2.1 and the obligation to pay for damage resulting from corrections made during the warranty period pursuant to General Condition 12.3.5.*

Conclusion

While the debate over the extent of the surety's obligations under a performance bond continues, it is notable that, in the two most recent decisions to consider the competing positions, the judge in each case adopted the more expansive approach reflected by *Whitby Landmark*.

However, the debate over the extent of the surety's obligations becomes meaningless if the owner calling on the bond fails to adhere to their own obligations in the first place. In *Whitby Landmark*, the owner's success on the cost-sharing issue became a moot point after the court found that the owner had not given the surety timely notice of the contractor's default. This underscores a point that may be obvious but is nevertheless essential: owners and contractors must familiarize themselves with the terms and conditions of their contracts (including performance bonds), and scrupulously observe all notice periods. Defective notice given to the surety of a contractor's default may leave an owner unable to collect any costs at all from a surety, let alone collateral costs.

Provided that notice is given in a proper form, and within the correct time period, case law suggests that owners in Ontario have a reasonable prospect of collecting more than just their bricks-and-mortar costs from their sureties. If you are faced with a contractor that has defaulted, or potentially defaulted, under contract, it is advisable to inform your surety as soon as possible to thoroughly mitigate all potential losses.

BOOK REVIEW

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Alternative Dispute Resolution in the Construction Industry in Canada
(Harvey J. Kirsh, Editor and Contributor)

In this excellent book, Harvey Kirsh assembles articles from leading Canadian alternative dispute resolution practitioners that reflect the current state of practice and thought in the area.

The book covers all forms of dispute resolution common to the construction industry (arbitration, mediation, med-arb, adjudication, reference, expert determination, and dispute boards) with a chapter devoted to each area.

Every article provides a wealth of practical advice and observations from experienced practitioners. For example, the Hon. Neil Wittmann, Q.C. (former Chief Justice of the Alberta Court of Queen's Bench) writes on the origin and use of Scott Schedules; Duncan W. Glaholt provides advice on how to chair dispute boards; and John "Buzz" Tarlow (a Fellow of the American College of Construction Lawyers) discusses deception's role in mediation and the resulting ethical considerations. In addition, both the present and previous Chief Justices of the Supreme Court of Canada make contributions — the former (The Rt. Hon. Richard Wagner) has penned the Foreword to the book, while the latter (The Rt. Hon. Beverley McLachlin) authored an article on concurrent expert testimony or, as it is more commonly (and somewhat distressingly) referred to, "expert hot-tubbing".

Among my favourite articles is one written by Harvey Kirsh himself. "Pitfalls, Perceptions and Processes in Construction Arbitration" covers several potentially thorny issues that both counsel and arbitrator should consider when embarking on an arbitration. Harvey's practical advice, starting with the drafting of the arbitration clause and ending with the award of costs, is invaluable for both those new to the field and veteran practitioners alike.

This book is a welcome addition to the short catalogue of Canadian books on alternative dispute resolution. It provides a useful, practical resource for those in the construction industry and, indeed, all alternative dispute resolution practitioners. It is one to be kept close at hand.

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AMENDMENTS TO AIBC CODE OF ETHICS AND PROFESSIONAL CONDUCT: THE REQUIREMENT TO SELF-REPORT

Since 2011, the Architectural Institute of British Columbia (AIBC), which is the governing body for architects in the province, has been engaged in a comprehensive bylaw review process. The AIBC appointed a Bylaw Review Committee, which is tasked with reviewing bylaws and making recommendations to the AIBC council with respect to any bylaw amendments, deletions or additions that may be appropriate in the context of British Columbia's *Architects Act*, R.S.B.C. 1996, c. 17 and the AIBC's public interest and professional regulation mandate.

As part of this ongoing bylaw review process, there have been a series of amendments to the AIBC's Code of Ethics and Professional Conduct. One such amendment pertains to the requirement of an architect to self-report with respect to specified matters, including legal proceedings related to professional negligence and ethics. For underwriters of insurance policies issued to architects in British Columbia, several issues of interest arise, which are discussed below.

Bylaw 32.5: the Requirement to Self-Report

Bylaw 32.5 provides:

> An architect must promptly notify the AIBC in writing in any of the following circumstances:
>
> (a) Having reasonable grounds to believe that a non-AIBC registrant has illegally practised or offered to practise the profession of architecture, or otherwise violated the *Architects Act*;
>
> (b) Having reasonable grounds to believe that an AIBC registrant, including oneself, has breached any standard related to competency, professional conduct, or public safety, including any breach of the Code of Ethics and Professional Conduct;
>
> (c) Upon filing for assignment or upon being petitioned into bankruptcy or receivership;
>
> (d) In the event of a finding or admission of professional misconduct, unprofessional conduct, incompetency, conduct unbecoming or other disciplinary breach in another jurisdiction in which the architect is registered;
>
> (e) Upon being charged with an offence under the Criminal Code; and
>
> (f) **Upon receipt or service of a notice of civil claim or other legal proceeding in which allegations are made of professional negligence, fraud, or other cause of action, claim, or offence that may be determined by council rules.** (Emphasis added)

The AIBC's stated rationale for these amendments include providing AIBC with "*information relevant to its public protection mandate*". The goals were also to better clarify the threshold for reporting and separate illegal practice reporting from other reporting obligations. The amended reporting requirements also recall British Columbia's "leaky condo crisis", which was the subject of the Barrett Commission Report,[1] which admonished the AIBC for its role in that crisis, stating:

> [The AIBC's] *regulatory and discipline role* [being] *passive in that a formal complaint regarding the architect's activities must be filed*

[1] British Columbia, Commission of Inquiry into the Quality of Condominium Construction in British Columbia, *The Renewal of Trust in Residential Construction* (Victoria: Government of British Columbia, 1998) at Chapter One, II. What Has Gone Wrong.

> *with the* [AIBC] … [T]*here is no attempt on the* [AIBC's] *part to deal with evidence of ineffective or negligent practices unless a formal complaint is filed.* ***That is, an architect is under no obligation to advise the Institute when a settlement is made regarding quality of design work or professional performance. As a result, it is difficult for the*** **[AIBC]** ***to identify, on a pro-active basis, problems such as design issues related to leaky condos.*** (Emphasis added)

The new self-reporting requirements allow the AIBC to identify legal and liability issues facing the architectural profession, the prevalence of such issues, and to provide the ability to make an appropriate regulatory response, if necessary.

Sections 32.5(a) and (b) of AIBC's bylaws (effective March 25, 2021) oblige architects to report to the AIBC certain instances of non-compliance or possible non-compliance with the *Architects Act* or key professional standards. Sections 32.5(b) through (f) establish the obligation on registrants to self-report in certain specific circumstances.

Section 32.5(f) is of obvious interest to underwriters insuring architects. This section is broadly worded and requires architects to self-report actions in which the notice of civil claim contains allegations of professional negligence which, practically speaking, is almost every action commenced against an architect arising from the architect's professional services rendered (otherwise there would be no cause of action alleged). The question is whether such self-reporting will result in greater investigation by AIBC where allegations of professional negligence are made.

The AIBC has confirmed that self-reporting of legal actions is not an automatic trigger for a professional conduct investigation. The purpose of this reporting obligation is to provide the regulator with information relevant to its public protection mandate, particularly since the AIBC does not "self-insure" its registrants in the way that the Law Society of British Columbia and the Ontario Architects Association do. Those regulators are able to draw on trends and information from their "captive" or related insurance organizations.

The reporting standards required by s. 32.5 cannot be avoided through confidentiality agreements or otherwise "contracting out" pursuant to a release of claims. Entering into an agreement not to notify or complain to the AIBC may itself constitute unprofessional conduct. Registrants unsure whether to report or self-report may contact the AIBC's practice advisors to discuss the matter on a hypothetical and "no-names" basis. The written reporting obligation can be satisfied by sending a confidential email to the attention of the Director of Professional Conduct and Illegal Practice at <complaints@aibc.ca>.

Section 32.5 does not impose an ongoing reporting obligation upon architects. For instance, if a notice of civil claim contains allegations of professional negligence, which are generic and unparticularized, the architect will be required to self-report upon service of the notice of civil claim. However, should the action continue and an opposing party serve an expert report particularizing the architect's alleged professional negligence, there is no express requirement in s. 32.5 for the architect to provide those expert reports to AIBC or to further self-report.

Self-Reporting in Other Canadian Provinces

British Columbia appears to be unique in the self-reporting requirements contained in s. 32.5 of the Code of Ethics.

Ontario Requirements

There is no requirement in Ontario's *Architects Act*, R.S.O. 1990, c. A 26 for architects to self-report claims, but there is a requirement for members of the Ontario Architects Association to report unauthorized practice. The failure to do so could result in a finding of professional misconduct.

Sections 49(3) and (4) of Regulation 27 of Ontario's *Architects Act* require members to report as follows:

> 3. Every member of the Association or holder must promptly bring to the attention of the Registrar any act or omission by another member or holder that may constitute professional misconduct or incompetence.
>
> 4. Every member of the Association or holder must promptly bring to the attention of the Registrar any act or omission by any person that may constitute a contravention of the Act or the regulations.

There is also a requirement under s. 49(29) of the Regulation to notify the Registrar of: (i) a petition to declare the member or holder bankrupt, or (ii) the making of a general assignment for the benefit of creditors, and (iii) of the manner in which the professional responsibilities of the member or holder will be discharged.

Alberta Requirements

Section 45(1) of the regulation issued pursuant to Alberta's *Architects Act*, R.S.A. 2000, c. A-44 states: "*An authorized entity must forthwith inform the Registrar in writing of the following: (a) the receipt by the authorized entity of a petition to declare the authorized entity bankrupt*". This requirement is similar to the AIBC's and Ontario's self-reporting requirements for issues relating to bankruptcy.

Conclusion

While the AIBC has stated the purpose of self-reporting claims of professional negligence is not to allow the AIBC to embark upon professional disciplinary investigations, it seems inevitable that at some point, in the right circumstances, a civil claim against an architect will trigger an investigation by the AIBC. Whether the AIBC would be entitled to production of reports and documents from the civil action pursuant to its investigation remains unanswered. At present, such production is prohibited by the implied undertaking rule.

Architects should ensure that they are fully compliant with this self-reporting requirement and underwriters should inquire as to whether prospective insureds have satisfied their self-reporting requirements.

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NEW DECISION BRINGS CLARITY TO ROAD BUILDERS FOR REVIEWS OF A REFEREE'S DECISION UNDER MTO'S DISPUTE RESOLUTION PROCEDURES

A recent decision by Justice Steele in the Ontario Superior Court of Justice has brought some much-needed clarity for road building contractors seeking to uphold (or overturn) an interim-binding decision of a referee under Ministry of Transportation's (MTO) dispute resolution procedures.

In *HMQ (Minister of Transportation) v. Bot Construction (Ontario) Ltd.*, a payment dispute arose on an MTO project as a result of additional costs incurred by Bot Construction for excavating, stockpiling, and compacting an unforeseen volume of rock material. Bot Construction ultimately submitted its claim to a referee in accordance with the contract's dispute resolution procedure, set out in the February 2016 SP100S55 amendment to the contract's general conditions.

A contractually mandated meeting was held between the parties and the referee. At the referee's request, the referee received additional submissions and information after the meeting and before rendering a decision requiring MTO to pay Bot

Construction the sum of $341,012.70 plus H.S.T. for the claim. The referee's decision was provisionally binding on the parties, subject to the right of either party to "review" the decision by filing a notice of protest within 30 days.

The contractual dispute resolution process set out in SP100S55 does not specify a format or any procedural rules for a review of the referee's decision. The contract provided that either party may "resort to litigation" for a review of a referee's decision.

MTO Moves to Review (and Reverse) the Referee's Decision

MTO commenced an application seeking a declaration from the court that the referee's decision was wrongly decided and for an order requiring Bot Construction to return to MTO, the payment awarded by the referee. To our knowledge this is the first court challenge of the MTO's unique referee process and the path to be followed in seeking review of a referee decision under protest.

The grounds advanced by MTO, in challenging the referee decision, included an allegation that the referee had deviated from the prescribed referee process by allowing reply submissions from Bot Construction in response to written submissions by MTO that differed from those provided in MTO's original field level decision to deny the claim. MTO alleged that the referee erred by encouraging further submissions from both parties at the referee meeting.

MTO further alleged that the referee had made an error in interpreting and applying the relevant contractual provisions, particularly with respect to the contractual provisions dealing with increases in the volume of blasted rock material (compared to its pre-excavation volume) after it was placed and compacted in a stockpile by Bot Construction.

MTO sought a review of the referee decision by the court on a summary basis to be restricted to the limited documentary record that was before the referee. MTO took the position that this initial review of the referee decision could then be challenged a further time by the unsuccessful party with the commencement of a regular court action seeking a final decision at a trial based on a full documentary record.

Faced with the prospect of multiple proceedings to uphold the referee's decision, Bot Construction moved for an order to convert MTO's application into a regular action destined for a trial that would provide a single-step to fully and finally resolve the dispute.

The Decision

In her decision on Bot Construction's motion, Justice Steele reviewed the relevant factors that favour converting an application into an action, which would proceed to a full trial, including the following:

1. where there are material facts in dispute;
2. where the issues to be determined go beyond the interpretation of a document;
3. where there are complex issues and/or credibility determinations that require the court to weigh evidence; and
4. where the judge hearing the application cannot make a proper determination of the issues on the documentary record.

Justice Steele then reviewed the record before the court on MTO's application and noted that there was conflicting evidence on the central issue of how the excavated rock volume changed based on Bot Construction's handling and compacting operations. Resolving the contradictory evidence on this type of issue could not be done by a review of the contract documents and would likely require evidence from the road building industry and/or experts.

Another factor in favour of reviewing the referee decision by an action leading to a full trial was the lack of a complete record of the referee proceedings. There was no transcript or other record of the

referee's meeting with the parties, resulting in an incomplete record of the evidence considered, which prevented the court from making a proper determination of the issues on the application.

Finally, Justice Steele observed that reviewing the referee decision on an interim basis by way of an application was not required under the contract's dispute resolution provisions. To do so would add an additional step that would only increase the cost and time of all parties on their way to a final resolution. Converting the application into an action and sending it to trial in the normal manner would permit the court to finally resolve the dispute on its merits.

For these reasons, Justice Steele ordered that MTO's application to review the referee decision must proceed by way of an action. As the party challenging the referee decision, MTO would be the plaintiff and Bot Construction the defendant. The provisionally binding decision and resulting payment that MTO had to make under order of the referee would stand until such time as a trial judge ruled that the payment need not have been made, or otherwise determined that Bot Construction was entitled to keep the award of the referee.

Implications for Industry

This decision provides procedural clarity for road building contractors who are seeking to review (or uphold) a referee's interim binding decision. The lack of a complete evidentiary record for referee proceedings, when paired with the complex factual issues that are often encountered on MTO project disputes, will generally favour proceeding by way of an action for a final determination of the claim. Doing so will ensure that a contractor can secure the quickest and most cost-effective resolution of their dispute with MTO.

Ontario Superior Court of Justice

HMQ (Minister of Transportation) v. Bot Construction (Ontario) Ltd.
Steele J.
January 19, 2021

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UNSCRAMBLING THE EGG: NEW GUIDANCE FOR ASSESSING CONCURRENT DELAY ON CONSTRUCTION PROJECTS

A recent Ontario court decision provides new guidance on how to assess responsibility for concurrent delays in construction projects. In *Schindler Elevator Corporation v. Walsh Construction Co. of Canada*, Master Robinson adopted the approach in a 2006 paper by Glenn Grenier entitled "*Evaluating Concurrent Delay: Unscrambling the Egg*". This approach for assessing concurrent delay has important implications for all members of the construction pyramid.

Women's College Hospital Project Suffers Delays

In 2010, Walsh Construction, in partnership with Bondfield Construction Co. Ltd. (Walsh/Bondfield), began construction for the redevelopment of Women's College Hospital in Toronto. The project involved the phased demolition of the old hospital buildings at the site and the phased construction of new ones.

Schindler Elevator Corporation was among the subcontractors working on site. Schindler was engaged to fabricate, deliver and install all elevators for the new building.

Schindler ultimately brought a claim against Walsh/Bondfield for $952,864 for unpaid services and materials. Walsh/Bondfield counterclaimed for

$2,237,638, primarily for losses arising from delay it alleged Schindler caused to the project.

Walsh/Bondfield submitted that other subcontractors had also caused delays that occurred during the same time as Schindler's delay. Relying on the principle of concurrent delay, Walsh/Bondfield claimed that Schindler was liable for a proportionate share of Walsh/Bondfield's delay losses. Schindler denied liability for those losses.

Court's Analysis of Concurrent Delay

Liability for concurrent delay losses is typically assessed by determining which parties materially caused the delay. In this case, Walsh/Bondfield had the onus of proving that Schindler's delay caused (at least in part) Walsh/Bondfield's losses.

The court acknowledged the difficulty associated with evaluating the effects of concurrent delay. In order to do so, one must separate the overall delay into its individual component parts, and allocate time, responsibility and costs to each component. This is a highly complex and speculative assessment process.

Several opinions were put before the court to assist it in assessing responsibility for delay. Schindler's expert witness opined that concurrent delay requires two co-critical and co-controlling activities, parallel in time, and identical in duration.

The court however disagreed, instead preferring the view that "[i]*t is not necessary for the independent causes of delay to occur exactly at the same time for them to be considered concurrent. Indeed, it is rare that concurrent delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events*".

That approach, the court stated, is more realistic and likely to lead to a fair and just result. Any other method would be too rigid and may unfairly result in holding one party solely responsible for delay on a project.

Schindler Delayed Immediate Successor Activities, but Impact on Overall Project Unclear

In a lengthy decision, the court ultimately concluded that Schindler did breach its subcontract by delayed performance of the elevator installation. The court also held that Schindler delayed certain immediate successor activities to the elevator installation. Walsh/Bondfield was accordingly entitled to set off a portion of the damages it claimed against amounts owing to Schindler. However, the court also held that Walsh/Bondfield failed to prove that Schindler delayed the entire project and that most of Walsh/Bondfield's claimed damages against Schindler were unsupported.

Implications for Construction Industry

This decision affirms that it is often unrealistic to expect a precise quantification of responsibility for delay. Overlapping events on construction projects often make any such measure virtually impossible. Courts may also prefer to split the responsibility for the overall delay to prevent one party from shouldering a disproportionate share of the cost.

Construction industry members can minimize the risks arising from concurrent delay by regularly updating project schedules, diligently following notice provisions in contracts, and keeping careful records of construction activities. In a complex concurrent delay case, these documents can be critical in establishing responsibility for a delay. Without these records, it will be even more difficult to "unscramble" the causes of delay and ascertain who bears true responsibility.

Ontario Superior Court of Justice

Schindler Elevator Corp. v. Walsh Construction Co. of Canada
Master T. Robinson
January 18, 2021

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ONTARIO DIVISIONAL COURT CONFIRMS *CONSTRUCTION ACT* A COMPREHENSIVE SCHEME

The construction industry is underpinned by a complex structure of contractual relationships between owners and contractors, contractors and subcontractors, subcontractors and sub-subcontractors, and so on down the construction pyramid. Ontario's *Construction Act*, R.S.O. 1990, c. C.30 (formerly the *Construction Lien Act*) governs these relationships and sets out the rights and remedies of the various participants in the construction industry.

In *Tremblar Building Supplies Ltd. v. 1839563 Ontario Ltd.*, the Ontario Divisional Court recently upheld the summary judgement dismissal of a subcontractor's breach of trust and unjust enrichment claims against an owner. In doing so, the Divisional Court confirmed that the *Construction Act* is a complete code: remedies not provided for in the Act are not available.

Tremblar Building Supplies had entered into a subcontract to provide construction materials to a contractor, 1830563 Ontario Ltd. As is usually the case, there was no contract between Tremblar and the owner. Following the contractor's filing for bankruptcy protection, Tremblar commenced an action against the owner for breach of trust under the *Construction Act* and for unjust enrichment based on the alleged benefit, to the owner, of Tremblar's unpaid materials and services. Tremblar did not commence a lien action.

The Divisional Court dismissed both claims.

First, the court observed that the *Construction Act* statutory trusts, created by ss. 7 and 8 of the Act, exist only as between the two contracting parties. This means that owners hold funds in trust for contractors, with whom they have a contractual relationship. Since owners have no contractual relationship with subcontractors, they do not hold funds in trust for subcontractors. Section 8 of the Act clearly obliges contractors (not owners) to retain trust funds for the benefit of subcontractors. The court determined that allowing Tremblar's trust claim would create a new remedy not contemplated in the Act and would effectively require owners to ensure that contractors distribute their funds properly. The court was not willing to take this step.

Second, the court upheld the dismissal of Tremblar's unjust enrichment claim not only due to the existence of the contract between the contractor and the owner but also, and more importantly, because the *Construction Act* creates a complete code. To succeed in claiming unjust enrichment, a plaintiff must establish three things: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff, and (iii) an absence of juristic reason for the enrichment. The courts have already held that the contract between a contractor and an owner provided a juristic reason that could prevent unjust enrichment claims by subcontracts against owners. In this case, the Divisional Court went a step further, confirming that the fact that the *Construction Act* does not provide for unjust enrichment claims between subcontractors and owners affords a juristic reason to deny such claims.

Overall, the Divisional Court's decision emphasizes that the *Construction Act* is a complete code,

one based foremost in the complex contractual relationships that underlie the construction industry.

Ontario Superior Court of Justice

Tremblar Building Supplies Ltd. v. 1839563 Ontario Ltd.
H.M. Pierce, D.L. Corbett and F. Kristjanson JJ.
October 13, 2020

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THE FUTURE OF MEDIATION BY VIDEO CONFERENCE

There are two significant ways in which mediation by video conference will change construction law and both are a function of removing the need to travel. First, video conferencing allows more people to attend a mediation without significantly affecting the cost and trouble of the attendance. Second, mediation by video conference opens the doors for mediators to expand a localized mediation practice to a national one. While these two changes may also impact other specialty areas of law, they are particularly relevant to construction law.

Prior to the pandemic, mediation consisted of selecting a local mediator who was available, and with whom you or your colleagues had a previous experience. As the mediation day approaches, a decision has to be made about who will attend the mediation. In some less complex mediations, the issues already have been fully uncovered and disclosed before attending the mediation.

However, in some construction cases, particularly those that are complex with a large number of issues in dispute (such as those with delay and acceleration claims), each side may not have a complete understanding of all of the facts and circumstances. This is especially true when considering that the decision-maker attending the mediation is unlikely to have had the routine interactions on the project to have a good feel for what really happened.

In those instances it can be helpful to bring certain project people, and a scheduling consultant, to the mediation to help provide detail as the parties go back and forth hashing through the issues. Prior to video conferencing that meant bringing everyone physically to the mediators' conference rooms and tying up project personnel all day. For those construction companies with a statewide, regional, or national practice, those project people may be engaged on other projects far from the mediator's office.

Mediating by video conference adds the convenience of pulling various project team members with no travel requirements and limited time impacts. For those complex cases, I think we will see more attendees and perhaps more meaningful factual exchanges which might help facilitate settlements. Given that construction cases typically involve numerous people, and a large volume of documents and specialties, I expect that mediation by video conference will remain a fixture in the practice of construction law.

The second way in which mediation by video conference will change the practice of construction law applies to the mediators. Prior to the pandemic my personal experience was typically, but not exclusively, with the use of local mediators. In cases where there were parties from multiple states you might end up with a mediator from a locale other than near the project site.

Since the start of the pandemic I have participated in several mediations either as a representative of a party or as the mediator where the mediator and the party representatives were located in several different states for the mediation. With that in mind, I believe we will start to see more mediators,

particularly those with significant experience with construction issues, start to shift to a more national reach.

Construction and construction law is fundamentally the same everywhere. There are some differences and nuances to the laws of the various jurisdictions, such as the amount of permissible retainage, lien laws, indemnity, etc., but there are also differences and nuances to the construction contracts that are at the center of the construction disputes.

The mediator can expect to learn of any important issues, including nuances of the law, from the participants' counsel.

Soon I expect we will see mediators, as individuals or groups, who wish to engage in a national mediation practice, sponsoring and attending national conferences standing next to consultants who also have a national reach.

CITATIONS

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