CONSTRUCTION LAW LETTER

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THE USE OF A CHESS CLOCK IN CONSTRUCTION ARBITRATION PROCEEDINGS

You could purchase an inexpensive chess clock from Amazon for $20, or an expensive one from e-Bay for $300. Those chess clocks could be precision analog or digital; mechanical or quartz; wood, plastic or steel; and wind-up or battery-operated. Their purpose, of course, is to streamline chess play. But they may also be used to streamline counsel submissions, witness testimony and hearing time in a construction arbitration proceeding.

What Is the Chess Clock Procedure?

Chess clock procedure is a time management technique designed to reduce the cost and length of an arbitration hearing. Where the parties agree to adopt the procedure, the duration of the hearing is strictly prescribed in advance.

Dr. Karl-Heinz Böckstiegel (Professor Emeritus of the Law Faculty of the University of Cologne) has been credited with the development of chess-clock arbitration. His "Böckstiegel Method" contemplated that each party would dispose of a finite amount of time during the hearing, subject to time limits and a few firm rules. As an aside, according to one writer, "*The Böckstiegel Method is for adults only*". The time limits and rules would typically be addressed at the preliminary pre-hearing arbitration conference, at the same time that other procedural considerations are settled.

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Each party is assigned, for their use as they see fit, a fixed equal proportion of the time for both opening and closing submissions, and for the examinations and cross-examinations of both fact and expert witnesses. It is possible that an arbitrator might impose a non-equal division of time, in circumstances where the parties are required to cross-examine different numbers of witnesses. Some time is also allocated for the arbitrator to question parties and witnesses. Once the prescribed time has elapsed, no further submissions or examinations are permitted and time extensions are often not granted, except by agreement between the parties and with the permission of the arbitrator. Counsel are generally reluctant to agree, however, and tend to oppose any order granting a time extension for one party, presumably based on the concern that this would mean that the parties are not treated equally and that both of them would not have the same full and fair opportunity to present their case.

In the "*2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*", conducted by Queen Mary's School of International Arbitration (University of London), respondents reported that arbitrators adopted the chess clock method in 36 per cent of arbitrations, with a further 31 per cent of arbitrators allocating time-limits for specific stages of the hearing.

Some legal writers have opined that the use of the chess clock procedure should be the rule rather than the exception, as it encourages the parties and their counsel to focus on the real issues in dispute.

Strategic Considerations — Planning and Preparation

At the preliminary pre-hearing arbitration conference, the arbitrator will solicit submissions from the parties as to the total time to be allocated for the entire hearing, and the specific time to be assigned to each party. This would assist the arbitrator in crafting the agenda for the hearing. As one legal writer commented, "*Due process demands that these issues be considered well before the hearings so that no party is taken by surprise and each has an adequate opportunity to prepare*".

Furthermore, rules must be established for how time is to be deducted from each party's time on opening and closing submissions, and for the examinations and cross-examinations

of witnesses, to constitute clear uses of the allocated time. However, questions asked by the arbitrator and time spent on administrative matters will generally not be counted against either party. The arbitrator has the authority to determine whose time is used up when an objection is made and time is spent on argument. If the objection were to be successful, then the time would likely be deducted from the party resisting the objection, whereas time taken to make an unsuccessful objection would be allocated against the party who raised the objection. Anticipating that result may drive the decision of counsel as to whether to lead marginally irrelevant or inadmissible evidence which may generate an objection, or alternatively in making unwarranted or borderline objections.

Tracking arrangements must also be made in terms of identifying deductions from each party's time allocation. Those arrangements would be made either by the arbitrator, or by a representative of each party who would typically report to the arbitrator at the end of each day as to how much time has been spent by each party.

Additionally, the collective wisdom is that chess clock hearings absolutely require thorough prior preparation so that the impact of time constraints would not, for example, affect a well prepared cross-examination. Documentary production should be limited to key documents, which would limit the amount of material to be provided to the arbitrator; and counsel, prior to the hearing, should have developed an intimate familiarity with both the substance and location of those essential documents. Additionally, written legal submissions should not be tediously prolix, and witness statements and affidavits should be concise, focused, and somewhat abbreviated.

The parties and their counsel should also be mindful of the fact that imposing strict time limits on the arbitration hearing, through the use of a chess clock procedure, would allow the parties greater control and flexibility over the proceeding; would enable the parties to resolve the dispute quickly with a view to preserving their ongoing business relationship; and would assist in keeping the arbitrator's fees in check.

Denial of Due Process?

A critic of the chess clock procedure argued that it may possibly deny the parties due process:

> *Firstly, either party may be denied sufficient opportunity to put their case, including the opportunity to present all of their evidence to the tribunal.*
>
> *Secondly, allocating equal time to each party assumes that each case is similarly complex. The perception is that a party with a more complex case is disadvantaged by having less time to present their case in real terms compared to their opponent.*
>
> *Lastly, the chess clock may unduly disadvantage the respondent. Whereas the complainant has many months or years to consider their case before issuing a notice of dispute the respondent is captured by tight time frames in which to rebut claims against them. These risks can be minimized by ensuring that the parties have an adequate opportunity to prepare for the hearing, including marshalling the evidence that they will rely upon*.

Having said that, one arbitrator has stated that:

> *In every case in which I have been involved where a chess clock has been used, the time limit has forced the parties to present only material and relevant evidence, and it has avoided cumulative and unnecessary testimony. Never have I felt that important evidence was not able to be presented to the arbitral tribunal, period.*

Epilogue

In virtually every arbitration over which I have presided, whether in Canada or the United States, I have invited counsel to subscribe to the use of a chess clock as a time management technique to streamline the hearing and make it more cost-effective. In most cases, counsel have resisted this, in part perhaps be-

cause their litigation background has not prepared them yet for the transition to arbitration.

In my view, it is clear that the chess clock procedure should not be imposed upon the parties, and should only be used where counsel feel sufficiently confident that they are able to stickhandle their way through the arbitration hearing in a reasonably efficient manner. And feeling that they will have a full and fair opportunity to be heard.

* * * * *

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AM I COVERED? THE SUPPLY OF PROJECT AND CONSTRUCTION MANAGEMENT AND OTHER CONSULTING SERVICES UNDER ONTARIO'S *CONSTRUCTION ACT*

As the prompt payment and adjudication provisions of Ontario's new *Construction Act* came into force October 1, 2019, it is a good time for industry players to refresh their understanding of the scope of the Act and to determine which aspects of their work are subject to its requirements and protections. In particular, the new prompt payment provisions (which include a new requirement for owners to pay contractors within 28 days of receiving a proper invoice) and the new adjudication procedures (supporting the speedy resolution of disputes during the life of a project) provide significant incentive for stakeholders to be certain whether the Act would apply to a particular project.

Whether the Act would apply, however, is not necessarily clear-cut. One area in which there has been significant debate is with respect to the Act's application to the "supply of services", and, in particular, to the supply of project management and construction management services. The definition of "supply of services" has not changed from that in the *Construction Lien Act*, and the previous case law will continue to be relevant.

The key considerations for any service provider will be: (1) the degree of connection between the services and the improvement, and (2) the extent to which the services were necessary for the project.

Supply of Services — Generally

The basic test for application of the Ontario Act is tripartite: there must be (1) a supply of services or materials, which are (2) supplied to an improvement, for (3) an owner, contractor, or subcontractor. This test is found in s. 14 of the Act, which states:

> *A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.*

Each of the test's elements is defined in s. 1(1) of the Act, including "supply of services":

> *"supply of services" means any work done or service performed upon or in respect of an improvement, and includes,*
>
> *a) the rental of equipment with an operator, and*
>
> *b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification*

> *that in itself enhances the value of the owner's interest in the land.*

This broad definition of "supply of services" has remained unchanged and subject to relatively little discussion over the years, despite much of the Act recently undergoing significant amendment.

The reason for this could be that the definition generally achieves the protective, ameliorative purpose of the Act. As noted by the authors of *Striking the Balance* in response to a stakeholder's concern about clarity of the definition:

> *The definition of "supply of services" appears sufficiently broad so as to address the concerns raised by stakeholders, particularly given that courts have held that consultants can make lien claims where the value of the land is enhanced as a result of their services.*

In other words, the definition, as interpreted by the courts, provides the requisite degree of clarity. As Justice Gordon J. stated in the 2005 decision *1353025 Ontario Inc. v. Walden Group Canada Ltd.*, the traditional perceptions of who is entitled to a lien have been expanded somewhat by judicial precedent to include services that are for the "direct" purpose of enabling the owners to proceed with construction. The judge's views in that case were based upon a number of prior decisions that permitted liens for surveying work and architectural services, including *Smith & Smith Kingston Ltd. v. Kinalea Development Corp.* and *1246798 Ontario Inc. v. Sterling*.

Since 2005, the courts have found additional services to come under the protection of the Act, including landscaping work in *US Steel Canada Inc., Re*, while other less direct services such as legal work and liaising with investor groups have been found to be outside the scope of the Act in *Oliver v. Muer Construction Ltd.* and *Torold Management Inc. v. 1317621 Ontario Inc.* respectively.

Supply of Services — Project Management and Construction Management

While architectural and design work related to an improvement clearly falls within the scope of the Act, there is less clarity for those consultants who provide "project management" and "construction management" services. The confusion is exacerbated by these terms sometimes being used interchangeably by the courts, yet "project management" services are not the same thing as "construction management" services.

Construction management is the management of the construction process itself and is focused heavily on the supply of labour, services and materials to an improvement. A description of the kinds of services comprising construction management can be gleaned from Schedule A-1 to both the CCDC 5A and CCDC 5B standard form contract documents governing construction management delivery. Project management on the other hand covers a broad range of services directed to the overall program of delivering the project, including strategizing delivery methods, securing the site and getting approvals, and procuring the design and contractor teams, and so on. Given its broader scope, there is greater uncertainty as to whether project management services fall within the purview of the Act.

Among the reasons for this confusion is a line of cases stemming from the Ontario Superior Court's 1989 decision in *697470 Ontario Ltd. v. Presidential Developments Ltd.*, where a supplier of construction management services was denied protection under the Act on the basis that the services provided were too remote (*i.e.*, disconnected) from the project itself. *Presidential Developments* was then cited by Justice Sharpe in *Tamma Construction Co. v. Brault* for the proposition that project management (as opposed to construction management) services were not lienable *per se*, *i.e.*, simply for being project management services.

The Ontario Superior Court later revisited this interpretation in *Metron Construction Inc. v. Belleville Racetrack Development Corp.*:

> *… the Presidential case stands for the proposition that the work performed by the lien claimant there "was not so directly related to the construction of the improvement" because the lien claimant "acknowledged that he did not do any site work on [the property liened] and he did not superintend any of the construction at the Stouffville project" ... this is actually what the Presidential case decides.*

Subsequent decisions by the court in *Marino v. Bay-Walsh* and *B.I.L.D.O.N. Construction Inc. v. Project 801 Inc.* came to similar conclusions as to the impact of *Presidential Developments*.

In *Marino*, the court held that project management and site supervision fees were eligible for a lien claim when incurred as "an integral and necessary part of the actual physical construction of the project". The court supported this finding in both *B.I.L.D.O.N.* and *Torold Management Inc. v. 1317621 Ontario Inc.*, and adopted the following test for determining when the Act would apply to project management work:

> *Project managers whose responsibilities, whether on site or off site, contributed "in a direct and essential way to the construction of the improvement" are persons who have supplied services "to the improvement" whether or not the services are supervisory, managerial, physical or manual.*

Project management work will therefore be subject to the protections of the Act where:

(1) it contributes to the improvement,

(2) in a direct and essential way,

(3) regardless of whether such work is performed on or off site.

The applicability of this test to construction management services became an issue before the court in *B.I.L.D.O.N.*, a 2011 decision that dealt with a lien claim for construction management of a condominium building. In that decision, Master Polika described the plaintiff's work as being "no different from that of a general contractor providing services to an improvement", but also described those services as both "project management" and as "construction management" at different points in his decision.

In his holding, Master Polika re-endorsed the test for determining the lienability of project management services as stated in *Marino* and found it "*to be equally applicable to the issues before [him]*". *B.I.L.D.O.N.* therefore shows that the same basic test is to be applied to both project management and construction management services, being the test originally stated in *Marino*, focused upon the degree of connection between the services and the improvement.

Regardless of how the services are characterized by the parties, it appears that, in each case, the court will focus on the connection between the work and the improvement to assess whether the services are lienable.

The Supply of On-Site, Non-Construction Services: The Functional Nexus Test

A further area of debate has been whether the Act ought to apply to the supply of on-site, non-construction services. In such cases, the focus is on the meaning of the words "upon or in respect of" in the definition of "supply of services", which words have been held, in *Toronto Dominion Bank v. 450477 Ontario Ltd*., to broaden the Act's application.

In order to determine whether on-site, non-construction services are sufficiently connected to an improvement to qualify for protection under the Act, the court will apply the "functional nexus" test, as endorsed in the *Toronto Dominion Bank* decision. The test turns on whether the subject services were viewed by the construction parties, particularly the owner, as being necessary for the completion of the construction, and whether all of the construction parties benefited from the services. This test has been used to uphold the lien rights of a contractor who provided security ser-

vices for a construction site in *M.W.M. Construction of Kitchener Ltd. v. Valley Ridge Inc.*, and for the supply of "heavy equipment general contracting services" in *Toronto Dominion Bank*.

The functional nexus test is focused upon the parties' perception of the necessity of the services to the project:

> *… the importance of the work's function to the project, namely whether the construction parties, particularly the owner, considered the subject services necessary for the completion of the project and whether the services benefitted the majority of the contractors and subcontractors…*

It would seem, therefore, that the level of importance of those services, as well as owners' views of the necessity of those services, will play a significant role to such findings, and will impact both contractors and owners alike.

Resulting Costs & Expenses — Too remote?

While services that meet the above-noted tests may be captured by the Act, not all related costs or expenses are necessarily lienable, as they may still be considered too remote. For example:

- In *Selectra Inc. v. Penetanguishene (Town)*, a contractor's general overhead expenses were held not to be "*so directly related to the construction of the improvement*" to be protected by the Act.
- Costs incurred offsite such as administrative overhead and onsite office overhead costs have similarly been held not to be lienable.
- As established in *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, contractors' costs for delay are only lienable in prescribed situations, and require proof that the delay was isolated and defined, not excusable or the responsibility of the contractor and that notice of the delay was provided if required by the contract. See also the definition of "price" in the Act, which includes "*any direct costs incurred a result of an extension of the duration of the supply of services or materials for which the contractor or subcontractor, as the case may be, is not responsible*".

The court has also found that the compilation and coordination of work of other professionals fails to qualify as a "supply of services" in its own right, and as such, is not protected by the Act. For example, in *Lewis Builds Corp. v. Printing Factory Lofts Inc.*, a 2008 decision of the Ontario Superior Court, the lien claimant had organized, collated and co-ordinated a wide range of design plans to ensure that they fit together into a cohesive document to be used in the tendering process. While the court found that this work constituted the provision of pre-construction management services, it was held not to be a supply of "designs, plans, drawings or specifications" as required by the Act.

Conclusion and Practical Implications

Whether or not the Act would apply to the supply of certain services and the resulting costs and expenses is a context, fact-driven consideration which should be undertaken carefully. The new provisions of the Act heighten the importance for all parties to be clear as to whether services supplied to an improvement fall within the scope of the Act. Consultants, project managers and construction managers in particular should discuss with clients and review contracts and proposals to ensure that it is clear, one way or the other, whether they will be protected by the Act, as it will have a number of significant impacts, including on the timing of payment and whether adjudication is available. Where there is express agreement between the parties as to the direct and essential contribution of the supplied services to the improvement and to the necessity of the supplied services for completion of the improvement, consultants, project managers and construction managers will be in a stronger position to claim application of the Act.

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CONSTRUCTION LAW ISSUES IN MEXICO: HIGHLIGHTS FOR FOREIGN LAWYERS AND CONTRACTORS

One of the things that I hear often from foreign contractors that work in Mexico is: "*This is not how we do things in my country"*.

Working away from home is always challenging, but more so when language, culture and practices are quite different from what we are used to in our own country. In these cases, it is necessary to take some time to learn as much as possible about the new environment, to understand that things are done in a different way, and that it is important for us to adapt as much as possible, without losing the compass of our own values and needs. Unfortunately, there is not always time to know from the outset and we have to keep learning as things evolve.

As a construction lawyer, I have worked in several countries in Latin America for many years now and, even with the same language, same legal tradition, and similar practices, I often find strong differences with the countries of the region. Thus, I can perfectly imagine and understand how different it is to work in a place where your language, customs and traditions are very distant from those where you live. This is the case for U.S. and Canada contractors.

Mexico is a Civil Law Country

When I was in law school, I viewed the "civil law vs. common law" difference as a perfect subject for a dissertation. However, in practice, due to the more active interconnection between countries and businesses, the differences generate very practical considerations that can really affect decisions to people who manage a construction project.

In a civil law jurisdiction, all regulations are established by writing in constitutions, laws, and statutes. In fact, the principle that applies, in general, is that anything that is not established in these written instruments will not be considered "legal", or possible to be done from a legal point of view. In this order of ideas, the courts' decisions impact only the parties involved in the litigation, and may work for the purpose of orienting the resolution of other cases, but will not determine them. In the practice of construction law this creates some important effects. One of them is that contractors can read the content of the laws, but expect to have interpretations and cases that support other positions. However, it is very difficult in Mexico, even with a law interpreted by a court, to be able to ascertain whether a case will be won or not with case law since, according to the Mexican principles, even when a case is founded on a decision recognized as case law, the court may change the criteria of the case during the trial. This is absolutely legal and can be done. We call it Retroactivity of the Jurisprudence. This is an impossible task for American and Canadian lawyers.

Do not fall, however, into the "this is not the way it happens in my country" mind trap. One has to learn, understand and ask how things are done and try to adapt in the best possible way. Understand which are the applicable codes, how to interpret them, and what works and what does not, according to the Mexican law and practice, and accept them as they are in Mexico.

Construction Law in Mexico is Not as Developed as In U.S./Canada

While there are several rules in connection with construction law in Mexico, construction law itself is not recognized nor known. Construction regula-

tions are often included either in the public works laws and other governmental regulations, as well as the Commercial and Civil Codes, in the case of private construction contracts. Therefore, cases will be often counseled by civil or commercial lawyers, without real knowledge of the sector. This is due to the refusal of Mexican engineers and contractors to ask lawyers to assist them, relying instead on direct negotiations or other practices to solve their problems. Due to the complexity of cases, and the need to solve problems, this has been changing and is expected to develop over the next few years.

How to deal with this: It is important to look for people who know the industry and understand the legal effects of the industry to deal with complex cases.

There Are No Model Contracts in Mexico

"How can you live without model contracts?" was the question that a U.S. lawyer once asked me. Well, we do. We have in general bespoke contracts prepared by in-house counsel or their external counselors. Contractors prefer to have their own models and generate the final versions after long discussions. Sometimes, ironically, contracts are signed just before the project completion since parties have decided to start without them and need to have a document for administrative or tax purposes. This is not a good practice in fact.

The fact of not having model contracts generates a lot of discussions in practice: for example, what are practices that are considered real practices and not one contract's provision? What is acceptable in the market and what not is not if there are no common criteria?

It is important to make clear and realistic contracts in Mexico even from scratch. Lawyers know that if we start from zero in a contract, all our wishes may be included in the first draft, but they may not be practical and realistic. It is clearly possible to use foreign model contracts in Mexico, since it is not forbidden, but absolutely impractical if you have a local party signing it since, unless it is sophisticated, translation, uses of the model contract and other foreign mechanisms will be difficult to administer. Thus, if you represent a general contractor you may need a bespoke well done contract that reflects local language, local practice and satisfaction of local needs.

Beyond Construction: Labour and Tax Issues

Tax and labor matters are very sensitive in the construction industry. As an example, the construction of certain activities is considered a possible "money laundering activity" due to several construction activities being created as a way to invest dirty money. It is very important for foreign contractors to have well oriented advice on tax matters. One of the recent changes in the government was to consider that "organized crime" may issue or pay fake invoices, even if a contractor did not know the invoice was fake. This is a matter of absolute concern for good faith payers.

In connection with labour, employers that are not correctly advised may find themselves troubled by a series of issues in connection with their workers, subcontractors and sub-subcontractors, as well as with tax and social security obligations.

How to deal with this: It is important to analyze the tax and labour implications of the company, and to look for ways to comply and avoid unnecessary risks.

Public Works and Private Construction Contracts

A few years ago, one of our clients was looking for assistance for a public works contract bid process. While we put all our effort into assisting them in the best way, I told the legal counsel: "I sincerely hope you don't win". I said this since the government entity was complex, the political environment

of the project was not good, and I did not want this for my client. The client submitted the bid, and "unfortunately", lost. Months after, one of the leaders of the bid told me "you were right, it was good to lose". Although this is a very specific story, it is clear that public works in Mexico is a complicated area and venturing into it is no joke. It requires a lot of knowledge of the law, the formalities, the politics and many other matters. I always say to local and foreign contractors that you need to be very brave to work in public work contracts, however, public works have been a fantastic business for many foreign companies in general, and that is why they are here.

On the other side, private projects are directed through the will of the parties. By this I mean that parties can agree on whatever they decide, including foreign law.

Foreign contractors need to know if the projects are public or private, and how much of the public issues they will encounter.

The Shame of Corruption and The Participation of Foreign Contractors

Foreign contractors are always worried about corruption in Mexico, and this is not a hidden situation. Several things need to be said about this: First, the new government has a no-corruption, zero-tolerance policy. While corruption may be difficult to eradicate in the short term, it is clear that the message is there, and we citizens hope to have a better environment in the coming years with the help of new anti-corruption laws enacted in Mexico.

Second, fortunately foreign contractors have enough reasons to not fall into corruption actions, due to national regulations such as the *Foreign Corrupt Practices Act* in the U.S., the *Corruption of Foreign Public Officials Act* in Canada, the 2010 *Bribery Act* in the U.K. and the *Sapin II* in France.

Third, more than ever before there is a clear environment within companies to fight corruption. One will find efforts made by leading organizations, top level companies and others promoting integrity and anti-corruption so that contractors will not feel intimidated by trying to promote their own integrity.

How to deal with this: Use and implement the anti-corruption practices and regulations that apply in your country and use them strictly. It will be recognized and respected. Also promote training programs to your company members in Mexico to show that local laws apply.

The Cultural Challenge of Working in Mexico

While some countries such as America and England are very straightforward, in Mexico we live with strong emotional bonds. While a U.S. lawyer can see a negotiation as a simple business, Mexicans may transform professional and working relationships as friendship bonds. In many cases, this "sensitivity" may cause affect the relationship between owners, contractors, subcontractors, and suppliers who are friends and may feel that legal actions are literally personal aggressions, and not the exercise of a right. Mexicans enjoy a good lunch, instead of sandwiches in the office, taking some time to chat during working hours and joking with each other. While other countries may see this as time that is lost, Mexicans see our friends to the north as workaholics who don't enjoy life. Our northern neighbors cannot understand the "Mañana".

From my experience, I have learned that Americans and Canadians learn how to enjoy life more in Mexico, and Mexicans understand more the sense of time of work when working together. The effect is fantastic, and I hope that it can be experienced by all. We have to understand and accept each other to work better.

Of course, working in Mexico represents more than all the things that I have mentioned. I hope this contribution is of use for any lawyer, person or company working in Mexico to generate better conditions for a project and have win/win situations for all involved.

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SUPERIOR COURT SAYS MASTERS "JUST AS CAPABLE AS JUDGES", BUT LACK CERTAIN STATUTORY AUTHORITY ON SUMMARY JUDGMENT

In a construction lien reference report penned prior to her retirement, Master Albert of the Ontario Superior Court of Justice wrote:

> *as a reference master, I have all of the powers of a judge to determine this summary judgment motion.*

This was not the first time that Master Albert had made this finding. In an earlier decision, she wrote:

> *I have all of the powers of a judge on a summary judgment motion, including the powers conferred by Rule 20.04(2.1).*

In the case of the report containing the first of those quotes, a motion was brought before a judge of the Superior Court who was asked to consider, in the context of the report, whether construction lien masters actually do have "all of the powers of a judge" in a reference such that they are entitled to use the enhanced powers under Rule 20.04(2.1) of the Ontario *Rules of Civil Procedure*. "Enhanced powers" refers to the court's abilities to weigh evidence, evaluate the credibility of a deponent, and draw reasonable inferences from the available evidence on a summary judgment motion.

On the motion, Justice Belobaba held that masters *do not* have all of the powers of a judge on summary judgment motions, but only for reasons of a lack of statutory jurisdiction, as opposed to any lack of institutional capability. Justice Belobaba expressly stated that he did not question the capability of masters, but found that the Enhanced Powers under Rule 20.04(2.1) are expressly limited to "judges" and do not extend to masters. This distinction is important in the context of the manner in which the motion came to be before him.

The matter originally stemmed from a motion for summary judgment by a defendant in a construction lien reference. Master Albert ruled in favour of the plaintiff and made the earlier-captioned statement assessing that she had "all of the powers of a judge".

On the motion before Justice Belobaba, the parties agreed that Master Albert had, in fact, used the enhanced powers of Rule 20.04(2.1). They disagreed, however, about whether she was entitled to.

It appeared that Master Albert founded her position in subsection 58(4) of the Ontario *Construction Lien Act*, which states:

> *Powers of master on reference*
>
> *58(4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.*

On a plain reading of the words "*all matters and questions arising in connection with the action*", many readers would likely share the view that s. 58(4) was intended to attract the sort of expanded powers that Master Albert believed she had.

One of Master Albert's colleagues in the masters' court, however, did not share her view. Master McLeod (as he was then) considered the same jurisdictional question in *90 George St. v. Reliance Construction* and, with reference to the earlier *Combined Air* decision from the Court of Appeal, wrote:

> *If there is a genuine question of fact or of mixed fact and law then the master must ap-*

> *ply the full appreciation test and may grant summary judgment if the question can be determined without a trial. This will seldom be the case for the master because the powers added to the rule in Rule 20.04(2.1) … are not accessible to masters.*

Similarly, the Ontario Divisional Court had previously considered whether masters had the standing or powers of judges on construction lien references and found that they did not, stating:

> *The section does nothing other than provide for the conduct of the reference. It does not change the position of the referee within our judicial structure. The Master continues to have the status and place that comes from being a Master. He does not, for the purposes of the reference, obtain the standing of or become a judge.*

Notwithstanding the sentiments expressed by the Divisional Court and Master McLeod, it was argued before Justice Belobaba that to deny masters the jurisdiction to use the enhanced powers of Rule 20.04(2.1) was inconsistent with the remedial purpose of the Act, which is intended to provide an efficient and inexpensive way to resolve construction lien litigation. Justice Belobaba agreed that was the purpose of the Act, but pointed out that the Act only expressly states that purpose to exist in the context of an *action*, as opposed to expressly stating that it could also apply to *motions*. Justice Belobaba further held that if subsection 58(4) of the Act was meant to bestow upon masters all the powers and authority of a judge when hearing motions for summary judgment, it could have expressly stated that intention.

Justice Belobaba also considered Rule 37.02(2) of the *Rules of Civil Procedure*, which provides that a master can hear any motion in a proceeding, but not a motion where the power to grant the relief sought is expressly conferred on a judge. Since the enhanced powers of Rule 20.04 (2.1) are expressly stated to apply to "judges", he found that the legislature intended not to extend the ability to use the enhanced powers to masters.

Ultimately, Justice Belobaba cannot be faulted for this literal interpretation of the available legislation. After all, the intent of the legislature is always to be considered when interpreting a statute. If it *was* the intention of the legislature to limit masters' powers on summary judgment motions, that intention should perhaps be revisited given the current scarcity of judicial resources. It may well be time to accept that the skill, specialization, and institutional capability of masters should justify legislative amendments to allow masters to exercise the enhanced powers under Rule 20.04(2.1) in construction lien references.

As a champion of the construction lien court and the efficient use of judicial resources, Master Albert likely knew that her interpretation(s) of the reference provisions of the Act were important and hoped that they would stand without the need for legislative intervention.

Ontario Superior Court of Justice

R & V Construction v. Baradaran
Edward P. Belobaba
February 6, 2019

John Dowse
Driver Trett Canada Ltd., Toronto

PROTOCOLS AND PRINCIPLES: WHY EXPERT DELAY ANALYSIS IS UNDER SCRUTINY

Construction and infrastructure projects often present technically and factually complex scenarios and it is regularly found, some would say invariably found, that the projects are adversely impacted by unexpected events occurring during the con-

struction phase, resulting in delays and claims from the contractor for disruption and extension of the time for completion.

More and more frequently a defensive response from the owner is that it is not to be blamed entirely; that the contractor was responsible for delays also and the owner is afforded a significant if not complete defence against liability for the totality of the claimed delays; or that the contractor has failed to prove its claim.

In such situations, the claim and defence arguments are often supported by detailed analysis of the impact on the sequence and timing of work operations, prepared by expert delay analysts, using sophisticated computer planning, programming and scheduling software. Furthermore, as the industry has grown to rely more and more upon computerized delay modelling, there has been debate over the reliability and value of such models.

This was the essence of the issue before the New South Wales Supreme Court, in the case of *White Constructions Holdings Pty. Ltd. v. PBS Holdings Pty. Ltd.*

Background

White Constructions Holdings Pty. Ltd. was the developer of a housing development, for which it engaged SWC (a water servicing co-ordinator) and IWS (a sewer designer) as designers of the sewerage solution for the development. Considerable delay was suffered in having the designs approved by the relevant public authority and White subsequently sued both SWC and ILS alleging a defective design, the consequences of which were delay in approving a revised design and domino-like knock-on delays to the development.

White's claim was for common law damages for breach of contract. At the forefront of the dispute was the causation element; but for the design issues, would the project have been completed on time?

In seeking to prove their respective cases, each side brought forward evidence from a delay expert. Each expert had adopted a different methodology of analysis to support their evidence and each expert proceeded to criticize the methodology adopted by the opposing expert.

The adopted analysis methods were well known and widely used throughout the construction industry globally, and both methods were referenced by the Society of Construction Law (UK) in its *Delay and Disruption Protocol* (2nd Edition). The object of the Protocol is to "*provide useful guidance on some of the common delay and disruption issues that arise on construction projects*". The guidance includes consideration of six forms of delay analysis commonly used in construction projects, together with recommendations for determining the most suitable analysis method. Whilst the Protocol is well known globally, contracting parties very rarely adopt it as part of the contract/contract administrative mechanism.

The New South Wales Supreme Court accepted the criticisms brought by each of the delay experts in respect of the opposing experts chosen analysis methods. Justice Hammerschlag opined that, while both experts could not be right, it was not inevitable that either one of them was right. The court then proceeded to reject the evidence of both delay experts and appointed its own. On the advice of that expert, the court preferred an approach that was not constrained by any specific delay analysis methodology and declined to give special standing to any of the methods set out in the Protocol.

Based upon general legal principles, the onus was on White to prove that the alleged delay to the project was in fact caused by the sewerage design issues and that it had suffered a loss as a result of that delay. The court held that White failed to satisfy that burden on the balance of probabilities.

Amongst the court's findings was that White's expert evidence "*assumes causation rather than*

identifies actual evidence of it"; that is, the expert's evidence was insufficient to prove the causal link.

The court considered that a close examination of the facts, as they happened "*on the ground*", was required. In effect, the court should apply "*the common law common sense approach to causation*".

White relied on affidavit evidence from one of its site foremen of "*delayed, piecemeal and disrupted*" works; however, this was considered to be too general and lacking sufficient proof of the cause of the overall delay, including by reference to relationships between the relevant activities of the construction programme/schedule.

A comprehensive site diary was taken as the primary evidence as to what was happening at the time, but even the diary was deemed insufficient as it did not "*identify the activities, if any, which were being adversely affected by the wait*".

Commentary

There are three important points to be taken from this judgment, applicable equally to contractors, owners and consultants.

1. The mere presence in the Protocol, or otherwise, of a method of delay analysis should not determine its appropriateness for any given claim situation;
2. Expert programming analysis by itself is insufficient if it is not fully supported by witness of fact evidence or contemporaneous records; and
3. Factual evidence establishing the delay is essential, including to support any assumptions that delay experts rely upon.

The Protocol is a useful industry guide to good practice; however, it generally has no contractual standing. Each of the several analysis methods referenced by the Protocol are widely used in the construction industry, including by delay experts; however, the Protocol recognizes that not one of those methods is perfect and, therefore, it must be inferred that each and all methods should be approached with caution.

When programming analysis is performed, it is based upon a pre-existing programme/work schedule. The baseline schedule represents the proposed sequence and timing of the work to be performed. It is a best estimate by the contractor, made at the commencement of the project or very soon thereafter, and most forms of construction contract recognize it as such. Indeed, in the majority of cases, a detailed review by a delay analyst (as opposed to a planner) will find the baseline to be lacking reliability. Further, most forms of construction contract require that baseline programme/work schedule to be updated, revised and corrected as necessary as the project proceeds.

While delay experts will be cautious to assess the validity of the baseline schedule, it is unrealistic to expect that any subsequent delay analysis considers every event occurring on each day. The factual records from the project are not sufficiently comprehensive or complete to permit that level of analysis. By extension, the result of the delay analysis is then incomplete; but it is a best assessment made after the event.

Given this background and the fact of there being multiple alternate methodologies by which an analysis might be performed, all of which have received acceptance by the construction industry, it is imperative that a delay analysis should be reconciled with factual records. However, as pointed out in the judgment in *White*, the quality of those records should be assessed also, and rigorously questioned.

In *White* it seems, without more, that the delay analysts had assumed that a delay in finalizing a design had delayed construction. The court considered, however, that the contemporaneous records were inadequate to support such an assumption. Without a full consideration of all the evidence, it is difficult to understand precisely where and how the records failed to meet the standard the court

was expecting. As a take-away point, it shows that where records are to be relied on, they will not necessarily be interpreted so as to fill in any gaps. Construction contractors, in particular, should be mindful of this point, as the duty to write the daily records often falls to the site foreman or others whose interest is more to getting the work done than writing about it.

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Harvey J. Kirsh is a recognized authority in construction law, and has over 40 years of experience in the arbitration, mediation and litigation of complex construction claims and disputes arising out of infrastructure, energy, transportation, industrial, commercial, and institutional projects. He is certified by the Law Society of Upper Canada as a Specialist in Construction Law. Harvey has also been designated as a Chartered Arbitrator (C. Arb.), is included in the *Chambers Global* list of Canada's top arbitrators, and is the recipient of the Ontario Bar Association's Awards of Excellence in both Alternative Dispute Resolution and Construction and Infrastructure Law. Harvey is the Founding President and Governor of the Canadian College of Construction Lawyers, and also has the distinction of having been elected a Fellow of both the American College of Construction Lawyers and the College of Commercial Arbitrators.

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