CONSTRUCTION LAW LETTER

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FUTURE OF CONSTRUCTION

Construction Set to be a Global Engine for Economic Growth and Recovery from COVID-19

Global construction output in 2020 was US$10.7 trillion and we expect this to grow by 42%, or US$4.5 trillion, between 2020 and 2030 to reach US$15.2 trillion. The global construction industry is set to be a global engine for economic growth and recovery from COVID-19.

Shorter term, global construction output is expected to reach US$13.3 trillion by 2025 — adding US$2.6 trillion to output in the five years from 2020. Asia Pacific will account for US$2.5 trillion of growth in construction output between 2020 and 2030, up by over 50% to become a US$7.4 trillion market by 2030. Construction output in North America will grow by 32%, or US$580 billion, from 2020 to 2030, to US$2.4 trillion in 2030. Western Europe is forecast to grow by 23% between 2020 and 2030 and is expected to push up construction output to US$2.5 trillion in 2030.

Growth in Construction to 2030 Expected to be Higher Than Manufacturing or Services

Growth in construction output is forecast to average 3.6% per annum over the decade to 2030 — higher than either the manufacturing or services sectors.

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CONSTRUCTION
LAW LETTER

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Growth in construction output is forecast to average 4.5% over the five years between 2020 and 2025 — again higher than either manufacturing or services sectors and driven by sharp recovery from the effects of COVID-19 and huge stimulus support by governments. Spending of accumulated excess household savings is expected to contribute to this heightened growth.

Supply chain bottlenecks constraining activity levels and causing inflationary spikes for construction are expected to be transitory but are a risk to our forecasts.

Rising Populations and Permanent Inward Immigration Will Drive Construction Demand

Growth will be driven by rising populations and urbanisation across emerging nations driving demand for infrastructure and residential construction.

Permanent inward immigration into Anglosphere (U.S., U.K., Australia, Canada, and New Zealand) as well as Germany and other OECD (Organization for Economic Co-operation and Development) countries will help to support demand across those developed countries.

Growing Working Age Populations Help Drive Need for Workplace Construction

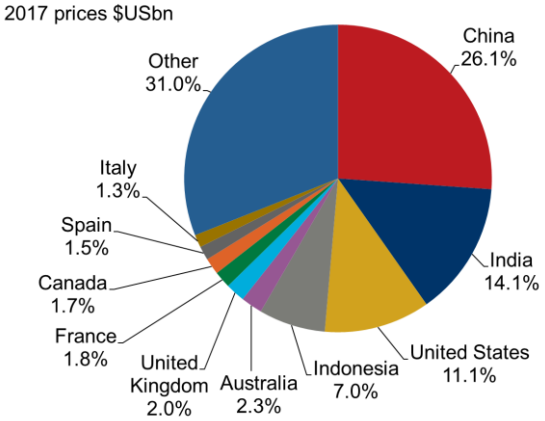
Growth in working age populations in countries such as India and Indonesia as well as Canada and Australia will support demand for workplace construction where we expect higher demand for industrial and logistics space to support growth in online retailing and manufacturing.

Gradual Return to Urban Centres Will Support Growth in Residential Construction

A shift towards urban centres is gradually expected to regain momentum after COVID-19 and will support growth in multi-family residential construction.

Contribution to global construction growth 2020-2030

2017 prices $USbn



Source : Oxford Economics/Haver Analytics

China, India, U.S. and Indonesia to Account for 58.3% of Growth in Construction Output

Growth will be concentrated in a small handful of countries. Just four countries — China, India, U.S., and Indonesia — will account for 58.3% of estimated global growth in construction between 2020 and 2030.

China will account for 26.1% of global growth. India is forecast to account for 14.1% and the U.S. for 11.1%, while Indonesia is expected to account for 7.0% of global growth — almost the same as the combined growth of Australia, U.K., France, and Canada which are the next four largest contributors.

Construction to Reach 13.5% of Global GDP by 2030

Spending on construction accounted for 13% of global GDP in 2020 and we expect this to reach over 13.5% in 2030.

Strong Growth and Recovery from COVID-19 of 6.6% for Global Construction in 2021

In 2021 we expect strong recovery from the COVID-19 pandemic with global construction output growing by 6.6% in 2021.

Higher Growth in Emerging Markets with Near Double-Digit Growth in Latin America in 2021

We forecast emerging construction markets will rebound by 7.2% in 2021 — adding to acceleration in global construction output and with near double-digit growth of 9.6% in Latin America in 2021.

Sub-Saharan Africa is forecast to grow fastest of all regions globally in the longer term with an average annual growth of 5.7% between 2020 and 2030.

Decade of Growth for Construction to 2030 will be 35% Higher Compared to 2010-2020

Global construction output is forecast to be 35% higher over the next decade to 2030 compared to the previous decade to 2020 — a cumulative total of US$135 trillion in construction output is forecast in the decade to 2030.

Residential Construction Driving Short-Term Growth

Residential construction will drive growth in the short-term propelled by the unleashing of excess household savings and demand for residential space. We forecast residential construction output will grow by 7.1% in 2021. Huge levels of excess household savings have built up across advanced economies, reaching more than 10% of GDP in North America.

Infrastructure Forecast to be Fastest Growth Sector Due to Levels of Government Stimulus

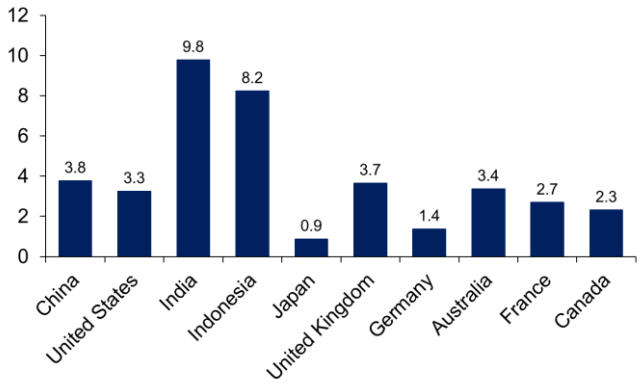
Infrastructure is forecast to be the fastest growth sector for construction over the period to 2030. We forecast annual average growth of 5.1% globally for infrastructure construction output during the period from 2020 to 2025, driven by unprecedented levels of government stimulus and the acceleration of pipelines of global mega infrastructure projects.

The US$1.2 trillion Bipartisan Infrastructure Bill in the U.S. will help push up growth in U.S. transportation infrastructure put-in-place construction to an average of 8.9% over the period from 2020 to 2025 and the European Union €723 billion Recovery and Resilience Facility, which is part of the €806 billion Next Generation EU fund (often reported as €750 billion in 2018 prices) will help support recovery of construction in Western Europe by 7.9% in 2021.

Global Mega Infrastructure Projects will Help Support Growth

Acceleration of infrastructural investment is a focus for governments. The readiness of existing pipelines of infrastructure are key to this acceleration. Shovel ready projects help. The U.K. and Australia are well positioned to accelerate infrastructure development amongst the top 10 global construction markets.

Growth in infrastructure construction 2020-2030
%, CAGR



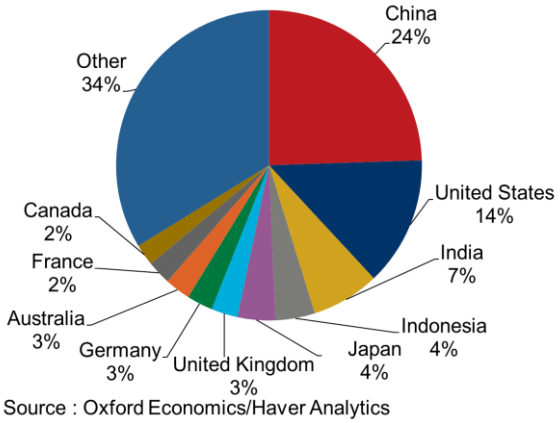
Source : Oxford Economics/Haver Analytics

Growth in U.K. Infrastructure to Rival China Over Next Decade to 2030

Growth in infrastructure construction in the U.K. is expected to rival that of China over the next decade to 2030 with the U.K.'s mega infrastructure projects providing heightened infrastructure construction output.

A significant pipeline of infrastructure in Australia will also see growth averaging 3.4% per annum over the period to 2030.

Top 10 global construction markets 2030
2017 prices $USbn



Source : Oxford Economics/Haver Analytics

Global Top 10 Construction Markets See Continued Shift to Emerging Markets with China and U.S. Clear Leaders In 2030

The global top 10 construction markets are expected to represent two-thirds of total global output in 2030.

India is forecast to become the world's third largest construction market as it overtakes Japan in 2023. Indonesia will become the world's fourth largest construction market by 2030 when it is forecast to also overtake Japan. Indonesia will accelerate to overtake Germany in 2023 and U.K. in 2024. The U.K. will overtake Germany in 2023 to become the world's fifth largest construction market but will be overtaken by Indonesia in 2024 to remain as sixth largest market for the remainder of our forecast to 2030. Germany will be overtaken by both the U.K. and Indonesia in 2023 falling two places to seventh position in the global ranking the same year. Japan will drop two places to become the world's fifth largest construction market in 2030 as it is overtaken by India and Indonesia.

Elevated Levels of Debt to GDP Ratios Will Drive the Need for a New Wave of Public Private Partnerships

The ability of governments around the world to fund infrastructural development in the longer-term will be significantly weakened by elevated levels of debt to GDP ratios, increasing the need for Public Private Partnerships.

Climate Change and the Race to Net Zero are Greatest Challenges for Construction and will Drive New Deconstruction Opportunities

Climate change and the race to Net Zero are arguably the greatest challenges that face the construction industry.

The built environment is responsible for around 40% of greenhouse gas emissions globally. The need to radically reduce the amounts of carbon embedded in new construction is a huge challenge and will drive the growth of a deconstruction industry.

An emerging deconstruction industry that will reuse huge existing urban stockpiles of construction materials could reduce embedded carbon in the construction of new buildings and infrastructure.

The climate crisis is driving huge demand to decarbonise energy networks and develop renewable energy. Saudi Arabia's Giga Projects are leading in Net Zero.

Sustainable and quality infrastructure is a driver of economic growth and social progress and is an enabler to achieving Sustainable Development Goals and Paris Agreement commitments. In 2020, Environmental, Social and Governance related capital for infrastructure grew 28% with a large part of the increase due to a flow of fundraising into sustainability-related strategies.

Modern Methods of Construction Expected to Become New Normal

Modern methods of construction including offsite manufacturing are expected to become the new normal and will radically transform construction productivity. Distributed factories using 3-D printing technologies to make components for construction assembly using advanced robotics are rapidly developing, especially in the residential sector.

Drivers Shaping Future of Construction will Have a Profound Effect on the Construction Industry

The key drivers shaping the *Future of Construction* will have a profound effect on the construction industry — not only the massive influence exerted by emerging Asia, but also the significant changes that we expect from Net Zero and climate change. The rapid digitalization and use of modern methods of construction will also have far-reaching consequences for the industry and its major players. These forces are changing risk profiles for the sector in ways that will require the sector to adapt to harness the massive growth potential for construction. Those companies that are positioned to harness these drivers of change will flourish and are likely to lead the industry towards a completely different *Future of Construction.*

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CONSTRUCTION PROGRESS BILLINGS AND DEADLINES TO SUE

In large construction projects, many contractors and subcontractors issue progress billings over the course of the project. For particularly long and complex projects, a single contractor may issue progress billings for many years. As a result, many questions can arise:

- How long do you have to sue for non-payment of invoices?

- Can you wait until the end of the project to sue, or must you sue during the life of the project?

Alberta's *Limitations Act* establishes a two-year window to sue. According to s. 3(1) of the Act, the limitation period begins when the plaintiff knows, or ought to know, that the damage or loss has occurred and that the damage or loss was caused by the act or omission of the defendant.

The key question becomes: When does the limitation period begin regarding progress billings?

For large construction projects with progress billings, the answer can be complicated, but the limitation period generally starts after work is complete and the final invoice has become due. While it is expected and likely necessary for progress billings to be paid promptly, the law generally does not expect a subcontractor to sue while a multi-year construction project is still under construction.

For smaller construction jobs where a single invoice is issued, the limitation period usually starts within two years of when the invoice comes due.

In Ontario, Justice Arrell of the Ontario Superior Court in *Newman Bros. Ltd. v. Universal Resource Recovery Inc*. looked at when the limitation period began to run. The defendant-owner argued that the limitation clock began to run for each individual invoice shortly after each invoice was issued. The court rejected this argument, stating the idea was:

- not commercially reasonable;
- unduly onerous on the parties; and
- a potential waste of judicial resources.

The court held that the limitation period began to run from the date of the last partial payment made by the defendant-owner.

Further, s. 8 of the *Limitations Act* provides that the limitation period restarts whenever the liable party acknowledges the debt or makes a partial payment on account of the debt. As such, if you receive a payment of some but not all of your outstanding invoice, that payment may restart the two-year clock. It is advisable to keep all records in respect of promises to pay and partial payments in the event that a limitations defence is advanced.

In Alberta, the Court of Queen's Bench in *Royal Well Servicing Ltd. v. Murphy Oil Company Ltd.* held that the two-year limitation period began after the work was completed, and the invoice became due. In this particular case, the plaintiff should have commenced an action within two years and 45 days from completion of work because it was a term of the contract between the parties that invoices would be paid by the defendant within 45 days of receipt.

Key Takeaway: If you are issuing progress billings, your two-year window to sue for unpaid work likely begins very soon after you finish the work. It is important not to delay for too long. If payment is not forthcoming after several months, you should question the benefit gained by waiting any longer to press for payment. Further, keep track of all partial payments or promises to pay, as these may possibly restart the clock.

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WHEN DOES THE LIMITATIONS CLOCK BEGIN TO RUN IN CONSTRUCTION DISPUTES?: *INFINITI HOMES LTD. v. GAGNON*

Construction disputes often drag out far longer than anticipated by the parties. In the normal course of a construction dispute, a Statement of Claim (in Alberta) must be filed within six to eight months of the dispute arising because lien claims are typically involved. However, if the dispute proceeds as an ordinary debt or breach of contract claim outside of the *Builders' Lien Act* (Alberta) it is important to be

mindful of the ticking of the two-year limitations clock. This importance was underscored in the recent Alberta case *Infiniti Homes Ltd. v. Gagnon*, where Justice Graesser considered various arguments about when a limitation period started to run in a contractor's bid to preserve its debt claim against owners of a construction project.

The underlying dispute in *Infiniti Homes* arose out of a contract by which the defendant owners, Robert and Susan Gagnon, had hired the plaintiff contractor, Infiniti Homes Ltd., to build a custom home. Near the end of the project, the owners alleged there were various deficiencies, but nevertheless moved into the home and changed the locks on August 4, 2015. The dispute continued for several years, during which time the contractor filed two liens, a subcontractor filed a lien, two of the liens were discharged, the respective counsel for each party exchanged various letters, and the owners made a breach of warranty claim. The Statement of Claim in *Infiniti Homes* was filed on February 20, 2018, well past two years from the owners' move-in date, so the question before the court was when the limitation clock began to run.

It is trite law that, without more, the limitation period within which a claimant must file a claim is two years from the date on which the claimant first knew or ought to have known that the claimant had suffered an injury attributable to the conduct of the defendant (s. 3(1) of the *Limitations Act* (Alberta)). There were two potential limitation period start dates advanced by the contractor and considered by the court:

1. The date the warranty work was completed in early January of 2017; or
2. January 6, 2017, the date of a letter that the contractor argued was an acknowledgement of the debt.

The owners argued that the two-year limitation period began to run on August 4, 2015, and therefore the contractor had initiated its claim against them many months outside of the limitation period.

Contractual Limitation Periods

A provision in the contract between the owners and the contractor stipulated that payment of the balance owed by the owners to the contractor was due on the earlier of: (i) the completion of the work by the contractor, or (ii) the possession of the home by the owners. The owners took possession on August 4, 2015, and that date was the last date the contractor performed work on the property aside from minor stonework completed three days later. Therefore, Justice Graesser determined that the limitation period for any claims the contractor had against the owners for payment of monies owed to it under the contract began running on the possession date, August 4, 2015. That date was held to be when the contractor knew or ought to have known the owners owed them funds and the contractor had suffered an injury because the funds remained unpaid.

Moreover, Justice Graesser stated that "*the applicable limitation period for work and materials supplied commences when* [such materials are] *supplied, not when they* [are] *invoiced (but for agreements to the contrary)*". The court held that neither deficiencies in the work nor any failure by the contractor to complete the work in accordance with the contract had any impact on when the limitation clock began to run.

Justice Graesser also held that any warranty work performed on the project was relevant only to the owners' claims against the contractor. Warranty work performed was irrelevant to the contractor's claims against the owner in the absence of evidence to suggest that the contractor put its claim on hold pending the resolution of the warranty work. Therefore, the initiation of the limitation period was not extended by the completion of the warranty work by the warranty provider.

Another possible start date for the limitation clock considered by Justice Graesser was the date on which the owners were to release the holdback to the contractor. The contract stated that so long as title to their property was free of liens, the holdback was releasable 45 days after the Certificate of Substantial Completion was issued — which was September 2,

2015. No subcontractors had liened the land within the 45-day period. Justice Graesser held that the contractor could not itself extend the operation of the applicable limitation period by liening the land:

> *[62] As between the owner and the contractor, there is no reason why the contractual limitation period should be affected by the filing of a lien by the contractor. The purpose of the lien holdback and the 45-day wait period is to protect those who work for the contractor or for subcontractors, not the contractor. A contractor has a lien against the lands for 100% of the value of the work done on the lands, and the value of the contractor's lien claim is unaffected by holdbacks.*
>
> *[63] An owner who does not maintain an appropriate holdback runs the risk of paying whatever should have been held back to the subcontractors, suppliers and workers, even if the owner has fully paid the contractor the contract price, or worse yet for the owner, overpaid the contractor.*
>
> *[64] I do not see that the fact that the contractor had a builders' lien against the property at the expiry of the lien period for the major lien fund has any relevance to the normal limitation period for the contractor suing the owner in debt. I interpret the builder's lien provisions of the Agreement to refer to builder's liens filed other than by the contractor itself. Any interpretation to the contrary fails to recognize the business realities of builder's liens filed against the owner's property and the obligations of the contractor to discharge those liens.*

Accordingly, the lien provision in the contract had no effect on the commencement of the limitation period.

Section 8 of the *Limitations Act*

The contractor argued that a letter sent by the owners' counsel to the contractor's counsel on January 6, 2017 qualified as an acknowledgement of the debt owed by the owners to the contractor within the meaning of s. 8 of the *Limitations Act*. The relevant portions of that section read:

> *8(1) In this section, "claim" means a claim for the recovery… of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.*
>
> *(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.*
>
> *(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective*
>
> > *(a) whether or not a promise to pay can be implied from it, and*
> >
> > *(b) whether or not it is accompanied with a refusal to pay…*

In the January 6, 2017 letter, the owners' counsel noted that not all defects and deficiencies had been remedied and, as such, the cost to fix those items was unknown but would need to be "*set off against any amounts that* [the contractor] *would otherwise be entitled to under the terms of the contract with* [the owners]". The owners' counsel further advised that they were of the view that the contractor's lien was improperly registered, but would refrain from taking steps to remove the lien until after the owners had delivered a complete list of costs and damages they alleged the contractor had caused to them. The letter was marked "Without Prejudice" but the court held that the letter was not truly in furtherance of settlement and thus was not privileged.

To determine whether the January 6, 2017 letter was an acknowledgement of the debt that would restart the limitations clock, Justice Graesser extracted the following principles from the jurisprudence:

1. No particular form of acknowledgement is specified in s. 8 of the *Limitations Act* [*John Barlot Architect Ltd. v. 973189 Alberta Ltd.*];
2. The words in a purported acknowledgement must either expressly or by implication amount to an unconditional acknowledgement of a debt or a promise to pay [*Re Heffren*]; and
3. From *Twinn v. Sawridge Band*:

- "claim" is defined in s. 8(1) as being an "accrued liquidated pecuniary sum";
- for the purposes of s. 8, an acknowledgement need not refer to the specific amount of the debt;
- the acknowledgement must be in writing; oral promises to pay are not sufficient;
- the words used must expressly or by implication amount to an unconditional acknowledgement of the debt; and
- the limitation period may be extended by either an acknowledgment or a partial payment.

Justice Graesser evaluated the language used by the owners in the January 6, 2017 letter in light of the above principles and determined that, at most, the owners acknowledged that they might owe the contractor some funds, depending on the unknown cost of remedying deficiencies and defects. This acknowledgement was conditional and as such did not fulfil the jurisprudential requirement that the acknowledgement be unconditional, therefore, Justice Graesser held that the January 6, 2017 letter had no effect on the limitations period.

Conclusion

Ultimately, Justice Graesser held that, with the exception of a trust claim that he could not evaluate on the evidence before him, the contractor's claims were out of time.

Infiniti Homes is an illustration of the importance of filing a Statement of Claim or Civil Claim within two years from the earliest date on which the two-year limitation period could begin to run. When engaged in a lengthy dispute over a construction project gone bad, the end of that two-year period can arrive quickly, and as happened in *Infiniti Homes*, there may not be a way to resurrect your case. On the other hand, when drafting correspondence in the context of a dispute over unpaid funds, counsel must be cognizant of the risk that they may inadvertently restart the limitations clock by acknowledging the debt, explicitly or impliedly, by unconditionally affirming that it is owing.

Alberta Court of Queen's Bench

Infiniti Homes Ltd. v. Gagnon
R.A. Graesser J.
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OFFSHORE WIND PROJECTS: DELAY DURING CONSTRUCTION

The offshore wind sector continues to grow at an unprecedented rate, particularly in Europe, and increasingly in Asia and North America. The construction phase of any project is vulnerable to delay. That is particularly the case when construction is taking place in a challenging offshore environment. How, in legal terms, are delays addressed? Who takes the risk of delay?

The Risk of Delay in Offshore Wind Farm Construction

There are many factors that, individually or in combination, may cause delay to the construction phase of an offshore wind project. Some of the major factors are the following:

- Interface co-ordination: The standard procurement route for offshore wind projects, following the approach adopted for offshore oil and gas projects, further developed in Europe and, since deployed in other markets, is a multi-package or multi-contract approach with increasing numbers of packages or contracts being let within each project. This provides for various and separate contracts to be entered into by the owner/developer entity allowing specialist turbine manufacturers, cable suppliers, foundation fabricators and transportation and installation contractors each to focus on delivery in their specialist area. This approach drives competitive pricing including by way of eliminating an "EPCI wrap" risk premium but does give rise to a number of design, construction and programming interfaces that inevitably generate co-ordination issues, such as the risk of knock-on delays to other packages.

Contractual approaches to mitigating the risk of interface co-ordination delays include obligations for all contractors to participate in the preparation of a detailed interface matrix and to attend regular interface meetings as well as early warning notice and risk register obligations. Practical or commercial mitigants include, perhaps most importantly, the establishment of an experienced project development and management team and close project management by sponsors experienced in the offshore (wind) sector such as the major sponsors active in the U.K. and European market.

- Seabed conditions: Accurately predicting the seabed conditions into which the turbine tower foundations will be driven, or export cables buried, is notoriously difficult. Seabed surveys are costly and time consuming and may only provide a rough indication of actual conditions. Few contractors are able to accept the legal risk of encountering unexpectedly poor conditions, and for this reason contracts commonly confer upon contractors an entitlement to an extension of time and compensation for additional costs arising from unexpected seabed conditions. To reduce the scope for disagreement over what seabed conditions could have been expected, contracts may include a baseline of anticipated conditions, based on surveys and any other relevant information available at the time of entering into the contract.
- Weather and sea conditions: Rough seas and high winds frequently cause delay and/or disruption during transportation and installation. The anticipated downtime from inclement weather can be modelled and predicted to an extent. This enables risks, within a predicted range, to be allocated typically in one of two ways. The first is to place risk of those matters entirely on the relevant contractor(s) and for the contractor(s) to price accordingly. The second is for the contractor(s) to bear the risk up to an agreed threshold defined either by reference to an expression such as "adverse" or "exceptionally adverse" weather, or to seasonal wave height and wind speed models derived from meteorological records.
- Design defects: Delays may arise both during and after the construction phase from defects in the design of the structures, including their foundations. Under some contracts, the contractor may take the risk of problems with the design used for the project, even if the design was prepared or specified by or on behalf of the employer. However, if this is the agreed allocation of risk, it needs to be made clear in the contract, e.g., by including an overriding "warranty of performance" from the contractor. But there is no established industry practice as to risk allocation for errors in an owner's design or specification, and outside of Engineering, Procurement and Construction contracting arrangements, the appetite of contractors to accept such design risk may be small or non-existent.
- The knock-on consequences of delay: As with any construction project, a delay to one phase or package of works may impact subsequent phases or packages. However, two factors unique to the offshore construction environment may magnify the consequences of even a relatively minor delay on an offshore wind project. First, installation is likely to depend on a range of vessels many of which will be on time charter. If a delay pushes an activity beyond the extendable date of the charter party (that is, the contract by which the owner of a

ship lets it to others for use in transporting a cargo), this may cause further delay waiting for future availability of vessels. Over recent years there has been a shortage of such vessels in the market, so much so that a number of owners/developers have commissioned their own vessels to be used for major maintenance during the operational phase as well as construction. The same principle applies to weather windows. Even a relatively minor delay may push installation work into a period of greater downtime, or one during which no work can be carried out at all.

Contractual Mechanisms for Dealing with Delay

(i) Extensions of time: Extension of time (EOT) clauses offer contractors more time to perform the works and protection against liability for delay liquidated damages, during periods of delay which are not at the contractor's risk. Depending upon the agreed risk allocation, the contractor may also be entitled to prolongation costs.

Even where contractual risk allocations are clear, disputes can arise over the cause(s) of delay. This is particularly the case where a project is being executed on a multi-contract strategy where contractors may be able to point the finger of blame at each other, as well as at the owner/developer. Contractors who claim EOTs are required to put forward evidence that the event (or events) they rely upon caused the period of delay in question. There may be a number of elements to proving delay, including showing the impact of the event on the contractor's critical path of the works, evidencing the steps taken in mitigation of delay, and the elimination of other causes of delay for which the contractor may take the legal risk.

On this last point, concurrent or parallel delays for which the contractor is responsible may reduce (or even eliminate) a contractor's EOT entitlement, especially if there is a clear proviso in the EOT clause which disentitles the contractor from an EOT to the extent of any concurrent delay. The inclusion, or otherwise, of a so-called "concurrency clause" will be a matter of commercial negotiation. Where included in a contract, provisions of this nature have been upheld by the English courts.

(ii) Liquidated Damages: The consequence of a contractor being in culpable delay is usually that it becomes required to pay liquidated damages for delay, at a rate specified in the contract. Where wind farm projects are concerned, it is usually possible, before entering into a construction or supply contract, to model likely losses should there be delay in the turbines being able to produce power. Setting the rates for delay of liquidated damages is more complicated where a project is being procured via a multi-package strategy. A delay caused by any single package contractor could delay the entire project. It is unlikely to be commercially viable for an individual package contractor to compensate the owner/developer for such delay to the project but as a whole, the rate of liquidated damages still needs to provide such contractor with a strong commercial incentive to avoid or minimise delay.

So long as a liquidated damages provision may be seen as protecting the owner's legitimate commercial interests, without imposing an exorbitant or manifestly excessive penalty on a contractor, the provision will be upheld. The risk of a liquidated damages clause being unenforceable, or "struck down as a penalty", is heightened where the amount payable is not linked to the extent of the default and the loss. For example, if a contract provides that a fixed daily rate of liquidated damages per day are payable whether one turbine is brought into operation late, or whether all the turbines are brought into operation late, the provision may be open to attack due to its non-discriminatory application.

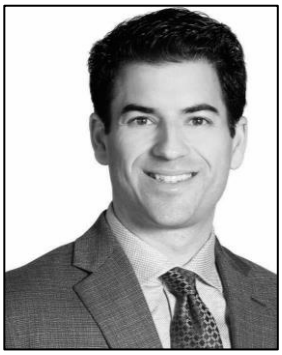
The Future: Floating Offshore Wind

The offshore wind sector has been characterised by a tremendous pace of technological advance, including a relentless increase in turbine size, matched by advances in tower height and blade length. The next frontier is floating offshore turbines designed to be placed in deep water, where they are not fixed into the seabed. There are numerous advantages to floating offshore power being developed, including time and cost savings

associated with avoiding the need to construct foundations, reduced environmental impacts and the ability to locate wind farms in previously inaccessible, high wind-speed locations.

This next generation of turbines has the potential to significantly reduce the time and cost of construction. The absence of foundations reduces the risk of poor seabed conditions delaying completion, although that risk will be replaced by those accompanying the need for mooring cables and anchors to tether each turbine in place.

Constructing offshore wind farms involves numerous risk variables, and therefore potential causes of delay. Eliminating the risk of delay is impossible. But through a combination of understanding the site and environmental conditions, the development of knowledge of optimum construction methods from experience, and identifying, engaging with and managing risk issues as-and-when they arise, the impact of potentially delaying events can be substantially reduced.



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WATCH AS THAT CONSTRUCTION TRUST IS SWEPT AWAY

Suppliers and subcontractors in the construction industry should be mindful of a recent decision of the Ontario Superior Court of Justice. In *Carillion Canada Holdings Inc. (Re)*, the court held that an automatic cash sweep of Carillion's Ontario bank account rid the funds of their trust character leaving Carillion's subcontractors in Canada with no proprietary claim to $22 million sitting in an overseas bank account maintained with a global bank.

[*Editor's note: A "cash sweep" is the use of a company's excess cash to pay outstanding debts ahead of the scheduled payment date instead of giving it to investors or shareholders*].

Carillion's Monitor, appointed further to Carillion's insolvency proceedings in Ontario, argued, without success, that the swept funds were the subject of a trust under the provisions of the *Construction Act* and therefore not available to Carillion's parent, the owner of the bank account, or to the bank in satisfaction of a set-off claim. The result is that Carillion's subcontractors in Canada are left only with an unsecured claim for breach of trust and breach of contract against Carillion Canada.

Background

The applicants in these proceedings under the *Companies' Creditors Arrangement Act* (CCAA) were part of a global construction and facilities management services conglomerate (the "Carillion Group"). The respondent on the Monitor's motion, the bank, provided certain banking services to this group, including a pooling and cash sweep service.

Carillion Construction Inc., operated the Carillion Group's construction business in Ontario and was the general contractor for several significant construction projects. In this role, Carillion Construction received payment from project owners for improvements made to their properties from which Carillion Construction was obligated to pay the suppliers of materials and the subcontractors that performed work on the relevant construction project.

Pursuant to an agreement between Carillion Construction and the bank, the funds paid for these projects were regularly swept from Carillion Construction's Canadian bank account and held in the bank account in the name of Carillion Canada Inc., a sister corporation of Carillion Construction. Shortly after one such cash sweep, a British parent of the Carillion Group commenced insolvency proceedings in England that were followed by CCAA proceedings in Ontario. While the pooling arrangements and cash sweep options between Carillion and the bank ceased as a result of these proceedings, the

funds paid to Carillion Construction for construction projects in Ontario remained in the bank account.

When Carillion filed for protection under the CCAA, the Monitor maintained that $21.7 million of the held funds were subject to the statutory trust provided for under the *Construction Act* and belonged to various unpaid suppliers and subcontractors of Carillion Construction. The bank disagreed, maintaining that they held a contractual right of set-off as part of the pooling arrangement with Carillion Group and would hold onto the money until a decision on entitlement was reached.

The central question for the court was, therefore, whether the funds in question satisfied the three certainties required to exclude them from Carillion Construction's estate and consequently from the purview of the bank's right to set-off.

Construction Trusts and Insolvency

The *Construction Act* provides for a statutory trust for the benefit of unpaid suppliers and contractors. In particular, funds paid by an owner to a general contractor in connection with a given construction project are subject to a trust pursuant to ss. 7 and 8 of the *Construction Act* for the benefit of any unpaid contractor or subcontractor that supplied goods or services to the project. The purpose of these trust provisions is to protect these amounts from outside creditors and ensure that each party be paid for the work or supplies provided.

The circumstances in which funds arguably subject to a *Construction Act* trust will qualify as trust funds for the purposes of the *Bankruptcy and Insolvency Act* (BIA) are set out in a recent line of jurisprudence in Ontario. Where such circumstances are satisfied, the money in question will no longer be considered property of a bankrupt contractor available for distribution to creditors but rather will constitute funds that are reserved for beneficiaries of the trust.

In *Guarantee Company of North America v. Royal Bank of Canada,* the Ontario Court of Appeal affirmed that any trust established by provincial legislation or statute must meet three general principles to qualify as a trust for the purposes of the BIA: (i) certainty of intention, (ii) certainty of object, and (iii) certainty of subject matter. For certainty of intention to be satisfied, a court must find an obligation to hold property in trust for the benefit of another. The *Guarantee Company* decision confirmed that the trust provisions in the *Construction Act* satisfy this requirement. For certainty of object, the beneficiaries of the trust must be ascertainable. Finally, for certainty of subject matter, both the property and funds that are subject to the trust must be identifiable.

Notably, the Court of Appeal in *Guarantee Company* held that the comingling of funds in a single account from different construction projects may still satisfy the required certainty of subject matter where these funds remained identifiable and traceable. Relying on similar principles, the court in *Urbancorp. Cumberland 2 GP Inc. (Re)* held that proceeds from the sale of a condominium property deposited into different accounts also containing amounts from other construction projects satisfied the three certainties of a trust. The court held that comingling payments from different projects in a single bank account did not by itself eliminate the certainty of subject matter where the amounts could still be separately accounted for and readily identifiable.

The Decision

In *Carillion Canada Holdings Inc. (Re)*, CCAA Justice Hainey found that certainty of subject matter, with respect to the *Construction Act* trust that might otherwise apply to funds Carillion received from various project owners, was lost. The funds paid had been comingled in the bank account and were then divided and converted by Carillion into nine bank accounts that were held by seven different entities. These steps served to eliminate any certainty of subject matter causing the funds to lose their character as trust funds.

The court also took issue with the fact that these funds had been used in part to pay debts owed by Carillion Construction. Accordingly, these funds had not been "separately accounted for" and could not be traced. This was an important difference distinguishing the facts from those in *Guarantee Com-*

pany, where payments from multiple construction projects that remained in a single account, and had not been "converted to other uses", were still considered identifiable for the purpose of a trust. As such, the funds paid to Carillion in the bank account were no longer subject to the *Construction Act* trust for the benefit of subcontractors and Justice Hainey dismissed the Monitor's motion.

The Proposed Appeal

The Monitor brought a court motion for leave to appeal this decision. The central question behind the proposed appeal was when statutory trusts pursuant to the *Construction Act* arise so as to exclude the trust assets from the estate of the applicant in a CCAA proceeding. The Monitor sought clarification on the circumstances in which certainty of subject matter exist where trust assets are deposited into a bank account also containing non-trust assets, and the circumstances in which a beneficiary might trace funds that were transferred to another account.

In argument on its motion, the Monitor submitted that the Motions Judge erred in law by conflating ascertainability with the ability to trace funds. Specifically, the Monitor differentiated between the two concepts by explaining that ascertainability is the initial process of identifying the trust funds, while the tracing process allows trust beneficiaries to keep track of the trust funds to ensure that they are not converted and do not fall below the original amount.

In a unanimous decision, the Ontario Court of Appeal dismissed the motion for leave (see *Carillion Canada Holdings Inc. (Re)*). The court observed that tracing at common law and in equity fails where identification of trust property is not possible. Accordingly, the motion judge's finding that funds in the bank account had been irreconcilably commingled was fatal to the Monitor's claim.

Take-Away

Despite the existence of cases over the last few years upholding *Construction Act* trusts in the context of an insolvency, this case shows potential limits of such trust claims and has significant ramifications for those operating, and providing financing to parties, within the construction sphere. Those expecting to be paid for services rendered or supplies provided during the course of a construction project ought to take note that the protection afforded by the trust provisions of the *Construction Act* only go so far where a general contractor is also being pursued by other creditors. The Superior Court ruling of *Carillion Canada Holdings Inc. (Re)*, now final, suggests that these funds may lose their trust character merely by operation of common banking arrangements.

Ontario Court of Appeal

Carillion Canada Holdings Inc. (Re)
E.E. Gillese, M.H. Tulloch and L.B. Roberts JJ.A.
June 28, 2021

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WORDS MATTER, EVEN WHEN ABSENT: B.C. APPEAL COURT CONFIRMS UNLIMITED INSURANCE FOR CONSTRUCTION MITIGATION EXPENSES

The British Columbia Court of Appeal recently held that a professional liability insurance policy provided potentially unlimited coverage, at least in

respect of one area of coverage. In *Surespan Structures Ltd. v. Lloyds Underwriters*, the Court of Appeal found that the limits applicable to certain coverages available under the policy did not extend to loss mitigation coverage.

Background

This case arose out of a multi-party construction project concerning hospitals and associated parking structures on Vancouver Island. As part of the project, the Vancouver Island Health Authority contracted with THP Partnership, which then entered into a design services agreement with Graham Design Builders LP. The design services agreement required Graham to obtain professional liability insurance which covered consultants providing services to Graham. The policy in question was issued by Lloyds (the insurer). Amongst other things, this policy provided mitigation of loss coverage, which protects the insured against losses it incurs in fixing defects discovered during construction, which would result in claims against the policy if left unaddressed.

Graham entered into an agreement with Surespan Structures Ltd. under which Surespan was to design, supply, and install the precast concrete components for the parking structures. Surespan, in turn, contracted with HGS Limited, which provided professional services for the project.

Before the project was completed, load-bearing precast concrete structures supplied by Surespan began to crack. Ultimately, Graham demanded that Surespan correct these defects. Surespan undertook the work and sought indemnity for this loss mitigation work under Graham's professional liability policy.

In *Surespan Structures Ltd. v. Lloyds Underwriters*, the British Columbia Supreme Court held in a summary trial that Surespan was entitled to indemnity for the loss mitigation work. The court also found that there was no limit on the amount of the available loss mitigation coverage.

The Court of Appeal Decision

The court unanimously dismissed the appeal, upholding the lower court's decision that the policy provided unlimited loss mitigation coverage on a project valued at $400 million.

First, the court confirmed that the applicable standard of review was a palpable and overriding error. In reaching this conclusion, the court distinguished *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* on the basis that the policy at issue in this case was not a standard form contract but the product of negotiation between the parties. In doing so, the court implicitly acknowledged that its interpretive exercise did not necessarily have precedential value and that the factual matrix might be of assistance in the interpretation process.

Second, the court concluded the language of the policy was unambiguous, and therefore based its analysis on the wording of the policy with little emphasis on other interpretive considerations.

The policy conferred four distinct coverage grants, including one for loss mitigation. Critically, while the other coverage grants were expressly subject to a limits of liability clause of $10 million, the mitigation of loss coverage did not contain such wording. Similarly, the limits of liability clause referred to each of the other coverages, but not to loss mitigation, which the court found suggested the limits of liability clause did not apply to that coverage. Further, the court noted that the limits of liability clause expressly provided that it applied with respect to "CLAIMS made against the INSURED" and reasoned that this did not encompass the loss mitigation coverage, which did not require a third party "claim" to be made, and indeed was intended to avoid such claims entirely.

The insurer argued that other language in the policy declarations, to the effect that insurance was only provided for coverages subject to a specific limit of insurance, implicitly limited the loss mitigation coverage. The court agreed the declarations had contractual force, but held that the more spe-

cific terms found elsewhere in the policy took precedence over this more general language.

In a similar vein, the insurer argued that a limit was imposed by a chart in the declarations which stated that there was a limit on "[a]*ny one claim and in the aggregate including costs and expenses*". The court held that "claim" in this provision, while not capitalized, should be interpreted in the same way as the defined term "CLAIM", and so found that this provision did not apply to the loss mitigation coverage for the reasons discussed above. The court also concluded that the phrase "in the aggregate" modified the noun "claim", and therefore did not extend the aggregate limit to coverage not contingent on a "claim".

The insurer also argued that it was inconsistent with commercial reality to accept that the parties would have intended a policy based on a fixed premium to confer unlimited mitigation of loss coverage for a $400-million construction project. At trial, the insurer had offered evidence from one of its underwriters as to its commercial expectations in support of this argument. The Court of Appeal noted that this evidence had been admitted but given little weight, and went on to question — without deciding the point — whether such evidence was admissible in the absence of ambiguity.

The Court of Appeal rejected this argument in any event, concluding that, since the policy language was unambiguous, relying upon commercial context as an interpretive aid would not inform the interpretation of the policy language but would "transform its meaning". The court also noted that the insurer made no argument of mistake or claim for rectification.

Surespan offers an interesting approach to appropriate contractual interpretation for insurance policies. It also highlights the importance given to policy language in the interpretation of the coverage afforded and suggests that courts may be receptive to arguments based on the plain reading of a policy, even where such positions lead to results which insurers protest are commercially unrealistic.

British Columbia Court of Appeal

Surespan Structures Ltd. v. Lloyds Underwriters
P.M. Willcock, L.A. Fenlon and P.G. Voith JJ.A.
November 27, 2020

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John Barlot Architect Ltd. v. 973189 Alberta Ltd., [2008] A.J. No. 833, 2008 ABQB 458, aff'd [2009] A.J. No. 1027, 2009 ABCA 307

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Surespan Structures Ltd. v. Lloyds Underwriters [2021] B.C.J. No. 243, 2021 BCCA 65, affg [2020] B.C.J. No. 33, 2020 BCSC 27

Twinn v. Sawridge Band, [2017] A.J. No. 580, 2017 ABQB 366

Urbancorp Cumberland 2 GP Inc. (Re), [2020] O.J. No. 1082, 2020 ONCA 197