CONSTRUCTION LAW LETTER

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CONSTRUCTION ADJUDICATIONS IN ONTARIO: ODACC 2021 ANNUAL REPORT IN REVIEW

Ontario Dispute Adjudication for Construction Contracts (ODACC) was appointed by the province of Ontario to administer adjudications under the *Construction Act*. On November 2, 2021, ODACC released its 2021 Report. Every fiscal year ODACC reports statistics about the adjudications initiated, terminated, determined, and ongoing. It also reports on the adjudicator roster's demographics and coverage available across Ontario.

While the adjudication decisions themselves are not reported, the statistics provide insights for industry stakeholders, adjudicators, and construction lawyers to better understand adjudication's current under-utilization and its opportunity for growth in the future.

Overview of Adjudications

Adjudication applies to prime contracts entered into (or with a procurement process started) on or after October 1, 2019. This means that adjudication will eventually apply to every project in Ontario, but not currently. Large infrastructure projects with long procurement pipelines may not see adjudication for years. Smaller infrastructure projects and residential projects are far more likely to have adjudication available.

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ODACC's second reporting year ended July 2021. At the time of the 2021 Report, a total of 82 notices of adjudication had been submitted in the first 22 months since the adjudication provisions of the Act came into force. As anticipated, the 2021 Report shows an uptick in the use of adjudication in its second year. More projects have adjudication available because they are governed by contracts or procurement processes post-dating October 2019. Familiarity with the adjudication process is also growing, but the overall uptake remains low.

In 2021, 50 notices of adjudication were submitted to ODACC (or an average of just over four notices per month). In the previous year, a total of 32 notices were submitted (or fewer than three per month). Eight adjudications remained ongoing at the time the 2021 Report was published.

As expected, notices of adjudication involving residential projects made up 19 of the 50 notices submitted this year, more than any other sector. That said, collectively, compared to the previous year, adjudications were more frequently initiated by parties to sophisticated public and commercial projects than residential: 10 adjudications were commenced involving commercial projects, 15 in the transportation and infrastructure sector, three involving public buildings, and three involving industrial projects.

Adjudication Determinations

Of the 50 adjudications commenced in 2021, 12 were terminated on consent of the parties and 34 determinations were rendered (including five determinations from adjudications commenced in the preceding year).

Industry sectors: Even though more adjudications were commenced involving residential projects, fewer determinations were rendered in residential disputes than in disputes involving transportation and infrastructure projects. Of the 34 determinations rendered, 14 involved transportation and infrastructure projects, and 11 involved residential projects. Another five determinations related to commercial projects, three involved public buildings, and one involved an industrial project. For comparative purposes, the total number of adjudications and determinations issued in both years in each sector are summarized in **Table 1** below.

Table 1: Adjudications

	July 2020-2021				July 2019-2020			
	Total Claims	Determin-ations	Terminated	Ongoing	Total Claims	Determin-ations	Terminated	Ongoing
Adjudications	**50**	**34**	**12**	**8**	**32**	**3**	**21**	**7**
Residential	19	11			22	3		
Commercial	10	5			5	-		
Transportation & Infrastruc-ture	15	14			3	-		
Public Buildings	3	3			2	-		
Industrial	3	1			-	-	-	-

Types of matters: Most determinations related to "the valuation of services or materials provided under the contract" and "payment under the contract including in respect of a change order" (13 and 14 determinations, respectively). Two determinations involved other matters that the parties agreed to adjudicate.

More notably, in 2021 five determinations were issued in "disputes that are the subject of a notice of non-payment under Part I.1" of the Act. No adjudications in the previous year involved notices of non-payment. This suggests an overall increase in the use of the new prompt payment regime and adjudication provisions to enforce it.

Monetary amounts: The total amount claimed in the notices of adjudication submitted to ODACC was $8,709,658.98, or an average of $174,193.18 per dispute. In the 34 disputes where determinations were rendered, the total amount ordered to be paid was $908,122.83, an average of $26,709.50 per determination. The amounts claimed and ultimately ordered to be paid are summarized in **Table 2** below.

Based on these numbers, the average recovery appears to be 15 per cent of the amount claimed. However, without knowing the actual numbers in each case, it is possible that the figures are skewed by one or more outlier matters where negligible sums were recovered. The numbers in ODACC's first report were problematic for the same reason. The numbers should therefore be treated with caution.

The amounts claimed and recovered are relatively low in general. At the time of ODACC's first report, the numbers were consistent with the fact that only three determinations had been rendered, all involving residential (presumably smaller) projects. In 2021, despite more claims across other industry sectors, the amounts ordered to be paid on a "per claim" basis are still relatively modest: $29,724.09 for commercial, $43,736.00 for transportation and infrastructure, and $13,927.34 for public building projects. In the determination of the single industrial project dispute, no monetary award was ordered.

The relatively low monetary value of both claims and awards indicates that parties are choosing to adjudicate disputes as they arise in the middle or

early stages of a project, consistent with the spirit and purpose of the prompt payment and adjudication reforms.

The wide delta between amounts claimed and ordered to be paid suggests that the strongest adjudication claims may be terminated and resolved outside of the adjudication process, while the disputes with evidentiary problems may be more likely to proceed to determinations. Unlike court or arbitration, adjudications carry relatively little risk of adverse costs awards upon dismissal unless they are "frivolous, vexatious, an abuse of process or other than in good faith" contrary to s. 13.17 of the Act. This makes adjudications relatively low risk for claimants.

Given the relatively limited opportunity to file evidence in adjudications, claimants may be finding it challenging to support claims for change orders or service valuations where documentation is poor or non-existent. As stakeholders become more familiar with the adjudication process, this dynamic may change. Should projects increasingly adopt a culture of prompt payment and adjudication to resolve disputes, contractors will quickly learn how to better support (and win) adjudications.

Table 2: Amounts claimed and ordered to be paid

	July 2020-2021		**July 2019-2020**	
	Total amount	**Average amount (per claim)**	**Total amount**	**Average amount (per claim)**
Amount claimed	**$8,709,658.98**	**$174,193.18**	**$2,906,514.30**	**$90,825.57**
Residential	$508,799.49	$26,778.92	$487,275.20	$22,148.87
Commercial	$996,466.43	$99,646.64	$1,806,746.84	$361,349.37
Transportation & Infrastructure	$3,368,175.48	$224,545.03	$372,143.48	$124,047.83
Public Buildings	$97,895.35	$32,631.78	$240,348.78	$120,174.39
Industrial	$3,738,322.23	$1,246,107.41	-	-
Amount ordered to be paid	**$908,122.83**	**$26,709.50**	**$35,459.40**	**$11,819.80**
Residential	$105,416.40	$9,583.31	$35,459.40	$11,819.80
Commercial	$148,620.47	$29,724.09	-	-
Transportation & Infrastructure	$612,303.93	$43,736.00	-	-
Public Buildings	$41,782.03	$13,927.34	-	-
Industrial	$0	$0	-	-

Settlements and terminations: Overall, fewer adjudications were terminated in 2021 than in the previous year. In ODACC's first year, 21 of the 32 adjudications were terminated; in 2021, 12 adjudications were terminated out of the 50 commenced. Eight of the 12 terminated adjudications were settled by the parties. The 2021 Report also noted three of the terminated adjudications were withdrawn because the contract date pre-dated October 1, 2019 (i.e., the contract turned out not to be subject to the new adjudication regime). This serves as a reminder to parties and counsel to check their contract dates so that adjudications are not commenced by mistake.

Geography: The 2021 Report shows that adjudication is being used for construction disputes across the province. While almost one-third of the completed adjudications involved Toronto projects, determinations were issued in disputes in northern regions, including one in each of Kenora, Algoma and Rainy River, three in the east region including Ottawa, four in the southwestern region, as well as others across the Greater Toronto Area and the Golden Horseshoe (i.e., western end of Lake Ontario).

Adjudicators

Roster: At the time of the 2021 Report, ODACC's roster included 96 adjudicators, which means 31 new adjudicators were added in 2021. The majority of the roster is made up of construction professionals: engineers, project managers, and quantity surveyors. Those in the dispute resolution industry and "professional services" (lawyers, accountants, mediators, and arbitrators) are in the minority. Seven of the adjudicators are bilingual and can conduct adjudications in French. The ODACC statistics do not disclose how frequently adjudicators of various backgrounds are being selected, or how determinations vary across those groups.

Fees: During the 2021 fiscal year, ODACC received $223,335 (plus H.S.T.) in adjudication fees. ODACC kept an administrative fee of $92,309 and paid adjudicators $131,026. Flat rate fees paid to a selected adjudicator range from $800 to $3,000, depending on the adjudication process selected. For large-quantum or more complex disputes, adjudicator hourly fees can range from $250 to $750, with the majority between $250 and $500 per hour.

Timeline for decisions: The 2021 Report suggests that adjudication is more or less meeting its goal of providing an expeditious alternative to litigation. Most matters (76 per cent) were decided within the 30-day timeline. In all cases that were not decided within the timeline, the parties consented to the later deadline. The speed adjudication offers relative to other dispute resolution mechanisms continues to be a core part of its value proposition.

Method of hearing: Under ODACC's system, parties may recommend to the adjudicator one of four pre-designed adjudication processes or a custom adjudication process. Most adjudications are in writing, and ODACC has been conducting any oral components by videoconference during the COVID-19 pandemic. Given the efficiencies inherent in videoconferencing, that practice may very well continue as Ontario resumes in-person business.

Impact of COVID-19

The impact of the COVID-19 pandemic on the use of adjudication is uncertain due to the limited data and information about the circumstances giving rise to claims. Despite the many good reasons to adjudicate, including as an option to avoid pandemic-driven court backlogs, the industry may be more focused on navigating the pandemic rather than experimenting with adjudication as a new dispute resolution mechanism. Perhaps there will be a greater interest in adjudication after the supply chain issues wrought by the pandemic stabilize. That said, it is difficult to tell whether disputes are being diverted from the court to adjudication without province-wide statistics on the number of lien claims commenced in the Superior Court in the comparable time periods.

Looking Forward

As expected, ODACC's first two annual reports suggest that as contracts for projects are increasingly governed by the new regime, the uptake in adjudication will continue to increase. In the residential sector where adjudication is more universally available, lack of awareness may be a factor preventing more contractors and owners from pursuing it. For commercial, public, and industrial projects where adjudication is an option, it may be that a combination of industry conservatism, lack of awareness, inexperience, and the absence of an "adjudication culture" have suppressed interest in ODACC adjudications. Further investigation is required to understand why adjudication has not been more frequently utilized to date.

For now, it continues to be important for lawyers and industry stakeholders alike to understand the adjudication process, including whether their project is subject to adjudication, as well as the parties' rights and obligations under the Act. Lessons learned from the Ontario experience may be applied to construction law reforms as they continue to roll out across Canada.

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SEARCHING FOR EQUITY IN FRAUD'S WAKE – SURETY RESCINDS BOND DUE TO OBLIGEE'S FRAUD

In *Urban Mechanical Contracting Ltd., et al. v. Zurich Insurance Co. Ltd.,* the competing interests of both an obligee under a performance bond (i.e., usually the project owner) and trades under a labour and material payment bond, on the one hand, and those of the surety (i.e., the bonding company), on the other hand, came to a head in the context of a fraud claimed to have been committed by others.

The matter arose out of the St. Michael's Hospital public-private partnership redevelopment project and the alleged and highly-publicized fraud committed by Vas Georgiou, the Hospital's Executive Vice-President and Chief Administrative Officer, and John Aquino, the principal of both the construction contractor for the project, Bondfield Construction Company Limited (BCCL), and the "Project Co" entity, which was wholly owned by BCCL. The fraud is alleged to involve Mr. Georgiou illicitly providing Mr. Aquino with information and assistance in the request for qualifications (RFQ) and request for proposals (RFP) processes for the project in exchange for Mr. Georgiou's financial gain. The RFQ and RFP processes were run by the project sponsors, the Hospital and Infrastructure Ontario (IO).

The Bank of Montreal, which was the administrative agent for the syndicate of lenders for the project and a second added obligee under the performance bond, and a number of trades with collective claims on the labour and material payment bond of approximately $80 million, each brought an application against the surety Zurich Insurance Company seeking declarations that Zurich was not entitled to rescind the bonds. Separately, Zurich had commenced an action against Mr. Georgiou, Mr. Aquino, Bondfield, and the Hospital for rescission of the bonds on account of fraud.

Rescission is an equitable remedy that renders a contract void from the beginning. The remedy unwinds a transaction such that parties are put in the position in which they were in before entering into the contract. In the case of the bonds, rescission would have the effect of depriving the bank and the trades the benefits of the performance bond and the labour and ma-

terial payment bond, respectively, for fraud claimed to have been committed by the contractor under the bonds, Project Co, and others.

In dismissing the applications of the bank and the trades, Justice Gilmore found that it would be inequitable to deprive Zurich of any remedies, including that of rescission, without the benefit of a complete factual record, which was unfolding within the rescission action. Significantly, the judge found that the claims of the bank and the trades on the bonds were derived through Project Co and, as such, any fraud committed by Project Co could affect the rights of the bank and the trades under the bonds.

The Financing Arrangement, the Bonds, and BCCL's Insolvency

The bank financed the project by way of a credit facility / construction loan for $230 million. Under the agreement with the bank, Project Co was required to obtain and maintain the bonds. The bonds were intended as a guarantee in the event of Bondfield's failure to complete the project.

Bondfield became insolvent and the project was mired in delays. Accordingly, on November 2, 2018, the Hospital issued a Notice of Default. The Notice triggered a 90-day period following which the Hospital could terminate the project, thereby jeopardizing the bank's recovery on the construction loan. On November 16, 2018, the bank sent a notice to Zurich declaring Bondfield in default of its obligations and made a demand on the performance bond.

Zurich did not recognize the bank's call on the performance bond as valid because the bank had not exercised its available step-in rights. The bank accordingly obtained a court order appointing a Receiver over Project Co. Once appointed, the Receiver called on the performance bond. A year later, on December 20, 2019, a court declared the Demand as valid and ordered Zurich to pay the lesser of (a) the remaining balance of the bond; or (b) the obligee's reasonable estimate of the cost to complete the bonded obligations under the construction contract, less the balance of the contract price. In March 2020, the bank and the Hospital brought a motion requiring Zurich to elect an option and make payment in accordance with the December 2019 court order. The motion was, however, adjourned to April 23, 2020. Within this interim period, Zurich brought the rescission action.

The Rescission Action and the Present Applications

In March of 2020, Zurich discovered emails between Mr. Aquino and an unidentified Bondfield email account at the time of the RFQ and RFP processes. It was later discovered that the Bondfield email account belonged to Mr. Georgiou who had primary responsibility for the Project. Zurich claims that its investigation of these emails showed that Mr. Georgiou received financial benefit in exchange for information and assistance provided to Mr. Aquino and Bondfield through the RFQ and RFP processes. Zurich accordingly commenced the rescission action in which it claimed that, if Zurich had known of such fraud, it would not have issued the bonds. As such, Zurich claimed entitlement to the equitable remedy of rescission.

The bank and the trades brought the present applications to prevent a rescission of the bonds and to retain their rights and remedies thereunder.

The Position of the Bank and the Trades

In support of its applications, the bank and the trades argued that they were innocent third parties to the fraud. They did not know of any violations of fraud either during or after the procurement process. On its own behalf, the bank also claimed that it would never have underwritten the risk involved in the project without the material inducement of the bonds, and that if rescission was granted, the bank stood to

suffer a catastrophic loss of $230 million on the construction loan. The bank also made reference to the December 2019 court order declaring the Receiver's Demand as valid. Zurich was accordingly obliged to pay under the performance bond. A decision to the contrary, the bank and the trades argued, would undermine the foundation of surety law and the purpose of bonding.

Zurich's Position

Zurich argued that rescission is an equitable remedy, which cannot be decided in the abstract — the courts must have the benefit of the full factual record. Zurich also argued that the claims of the bank and the trades were derivative of the rights of Project Co, who were both complicit in the fraud. As such, the fraud committed by Project Co affects any entitlements under the bonds that the bank and the trades have.

The Court's Findings

Justice Gilmore began by explaining that, generally, when the rights of innocent third parties are at stake, courts have refused to award the remedy of rescission leaving the plaintiff to pursue damages instead. However, the judge noted that this practice must be balanced against exceptional cases, such as when contracts arise from unconscionable conduct, like fraud.

Significantly, Justice Gilmore found that the rights of the bank and the trades were derivative of Project Co, with no greater or lesser rights than Project Co under the bonds. Thus, if Zurich were found to have suffered fraud at the hands of Project Co, its available remedies may very well affect the bank and the trades. The court was not prepared to preclude the availability of the remedy of rescission to Zurich, leaving that matter to be decided in the rescission action.

Ontario Superior Court of Justice

Urban Mechanical Contracting Ltd., et al. v. Zurich Insurance Co. Ltd.
C. Gilmore J.
March 18-19, 2021

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THE SUPREME COURT OF CANADA PROVIDES CLARITY TO THE INTERPRETATION OF RELEASES

In *Corner Brook (City) v. Bailey* ("*Bailey*"), the Supreme Court of Canada recently considered whether special interpretive principles apply to releases. The Court unanimously held that they do not, finding that the general interpretive principles set out in *Sattva Capital Corp. v. Creston Moly Corp.* ("*Sattva*") apply to releases as with other contracts. Although *Bailey* involved a motor vehicle accident scenario, it is likely to have meaningful implications for the construction industry, where broadly-worded releases, including those covering unknown and third party claims, are often used.

Facts

In 2009, Mrs. Bailey, while driving her husband's car, struck Temple, an employee of the City of Corner Book. The Baileys sued the City for property damage to the vehicle and for injuries suffered by Mrs. Bailey. In March of 2011, Temple commenced his own action against Mrs. Bailey seeking damages for his injuries.

In August of 2011, the Baileys signed a release in favour of the City in exchange for a payment of $7,500. The release provided that the Baileys discharge the City from "*all actions…claims and demands whatsoever, including all claims…past, present or future…foreseen or unforeseen*…[and]

of any kind or nature whatsoever arising out of or related to the accident...".

In 2016, Mrs. Bailey brought a third-party claim against the City for contribution and indemnity in respect of Temple's action against her. In turn, the City brought a summary application to dismiss Mrs. Bailey's third-party claim on the basis that it was barred by the release. Mrs. Bailey argued that her claim was not barred, as the third-party claim was not specifically contemplated by the parties at the time the release was signed.

Application and Appeal Court Analyses

The application judge concluded that the release barred Bailey's third party claim against the City. In reaching this conclusion, the judge applied the "Blackmore Rule", an interpretive principle requiring the court to consider what was within the contemplation of the parties at the time the release was signed. The application judge found that Mrs. Bailey was aware of the action commenced by Temple; that she was aware of the facts that could form the basis of a third party claim against the City; and that numerous potential claims were being contemplated in relation to the accident. Given these circumstances, the release operated to bar the third-party claim.

The Court of Appeal of Newfoundland and Labrador allowed the appeal and overturned the application judge's decision. The Court unanimously concluded that the application judge made errors of law such that the Court was required to review the decision on a correctness standard. The court interpreted the release as only applying to the Baileys' claims in the action against the City. As such, Mrs. Bailey's third-party claim against the City could proceed.

Supreme Court of Canada Analysis

The Blackmore Rule

On appeal, the Supreme Court of Canada undertook an in-depth analysis of the "Blackmore Rule", a longstanding interpretive rule originating from a 19th century House of Lords decision in *London and South Western Railway v. Blackmore*. In that case, Lord Westbury held that general releases operate to extinguish only those claims specifically within the parties' contemplation at the time the release was made. Thus, disputes that had not yet arisen would not be extinguished by a general release. Narrowly interpreted by Canadian courts over the years, the Blackmore Rule prevented the Court from considering the parties' subjective intentions in entering into a release; however, the rule did not preclude the parties from releasing as yet unknown claims provided that they used sufficiently clear language.

The Court concluded that in light of its landmark decision on contractual interpretation in *Sattva* there was no longer any practical need for the Blackmore Rule. The guiding principle from *Sattva* is that *all* contracts must be read as a whole, with the words given their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time the contract was formed. Although the Blackmore Rule was not inconsistent with this principle, its role had entirely been subsumed by the contemporary approach to contract interpretation set out in *Sattva.* As such, it was no longer necessary or desirable to have a special rule of interpretation only for releases. The Supreme Court of Canada noted that the Blackmore Rule (and the surrounding case law) should no longer be referenced by courts.

The Narrow Interpretation of Releases

The Supreme Court of Canada also observed, however, that there may be tension between the plain meaning of the wording of a release and the surrounding circumstances for two reasons:

(1) The broad wording used in many releases, if interpreted literally, would bar the releasor from suing the releasee for any reason whatsoever, forever. The surrounding circumstances, however, may suggest that this was not the parties' intended result; and

(2) A claim, which may not be contemplated by either party, may arise. The question is whether the surrounding circumstances would suggest a narrower interpretation of a generally worded release.

As a result of the foregoing, the Supreme Court of Canada observed that courts may be inclined to adopt a narrower interpretation of releases to resolve this underlying tension between a broadly worded release and the context in which the release arose.

The Court noted that a distinction can be drawn between claims based on facts known to both parties (as in *Bailey*) and those based on facts unknown to either party. This factor may be relevant in determining if the claim at issue falls within the type of claims the parties intended to release. What matters, in the Supreme Court of Canada's view, is whether the claim is the kind intended to be targeted by the release. This inquiry will take into account both the wording and the context in which the release arose. As such, the Court noted that a tendency to adopt a narrow interpretation of a broadly worded release is largely due to the circumstances in which releases arise. As a result, the principles of interpretation set out in *Sattva* apply to releases, as they would to other kinds of contracts.

The Judgment

Referring to *Sattva* and the fact that the release at issue was not a standard form contract, the Supreme Court of Canada determined that the appropriate standard of review was one of mixed fact and law (absent an extricable question of law).

The Court found that the application judge's holding was owed deference as it was a "*fact-specific application of the principles of contractual interpretation*". In particular, the application judge held that even if the parties did not expressly consider a particular type of claim (such as Bailey's third-party claim), it was enough that the parties had considered "any and all" types of claims arising from the accident. The Supreme Court of Canada agreed that both parties knew, or ought to have known, that Temple might bring a claim against either Bailey or the City (such that Bailey and the City would want to claim for contribution/indemnity as against each other). As such, Bailey's third-party claim was in reasonable contemplation at the time the release was made and there was no tension between the words of the release and the surrounding circumstances.

Moreover, the Court found no reviewable error with the application judge's conclusion that the use of the wording "*all actions, suits, causes of action ... foreseen or unforeseen ... and claims of any kind or nature whatsoever*" was sufficient to capture Bailey's third-party claim. The Supreme Court of Canada rejected the notion that the parties must specifically identify a particular claim in order for it to fall within the scope of a release.

Takeaways

Up until the Supreme Court of Canada's decision in this case, the Blackmore Rule was cited regularly by the courts. The leading case in Ontario was *Biancaniello v. DMCT LLP* ("*Biancaniello*") (which relies on the Blackmore Rule), and both that case and the Blackmore Rule were referenced by the Ontario Court of Appeal as recently

as last year in *IAP Claimant H-15019 v. Wallbridge*.

Within the construction context, both the Blackmore Rule and *Biancaniello* were cited in a 2018 decision of the Ontario Superior Court of Justice in *Crosstown Transit Constructors v. Metrolinx* ("*Crosstown*"). At issue in that case was whether a contractor was still obliged to pay certain insurance deductibles even though the contractor had signed a release with the project owner. The release at issue covered present or future claims related to five disputed items listed in the release, none of which had any relation to the insurance deductibles.

In *Crosstown*, the motion judge held that, in making the release, the parties did not contemplate the contractor's responsibility to pay the deductibles, nor would such an interpretation make commercial sense as there was no rational connection between the five disputes addressed in the release and the deductibles at issue. The Court of Appeal upheld the motion judge's decision, noting that they would have reached the same conclusion on the fact that the release's terms clearly indicate that they are not meant to affect the parties' rights with respect to the insurance policies. The Court of Appeal held that, even if the language of the release were ambiguous, it did not find any errors in the approach taken by the motion judge such that it was afforded deference.

It seems likely that the motion judge in *Crosstown* would have reached a similar conclusion, even if he had had the benefit of the Supreme Court of Canada's decision in *Bailey.* Although the Court's decision in *Bailey* effectively dispenses with the Blackmore Rule, the practical consequences of the decision may not be as wide-ranging as one might think. As the Court noted, the narrow interpretation of the Blackmore Rule adopted by Canadian courts was in line with the modern approach to contractual interpretation set out in *Sattva*. That said, the motion judge in *Crosstown* did rely on the parties' pre-contractual negotiations to aid its interpretation of the release, whereas the Supreme Court of Canada in *Bailey* did not address whether such evidence would be admissible in light of the *Sattva* framework. This leaves the door open for another court to clarify if and when such pre-contractual negotiations can be considered.

Furthermore, in *Bailey*, the Supreme Court of Canada did not address what consequences might arise if a releasee intentionally failed to disclose the existence of a potential claim to a releasor. Specifically, within the construction context, where the releasee might have knowledge or suspicions of a latent defect but deliberately failed to disclose the same to the releasor, it remains to be seen if the releasor might have some other remedy available at law.

In sum, the *Bailey* decision does provide useful clarity on the interpretation of releases. Most significantly, there are no longer any special rules of interpretation applicable only to releases. Furthermore, the decision provides comfort that broadly worded releases can cover a wide array of claims, especially where the subject matter of the release is narrowed to claims arising out of a particular set of circumstances. Such an approach is often seen in the construction context where broadly worded, full and final releases are provided on a project-by-project basis. The decision in *Bailey* tends to affirm the viability of this approach.

Supreme Court of Canada

Corner Brook (City) v. Bailey
R. Wagner C.J., R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.
March 23, 2021

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PLEASE PAY ASAP: SASKATCHEWAN'S PROMPT PAYMENT LEGISLATION

Saskatchewan's *Builders' Lien (Prompt Payment) Amendment Act, 2019* was proclaimed in force on March 1, 2022. The Act received Royal Assent in 2019 but was not immediately proclaimed in force due to logistical and administrative preparations that had to be set in place. The Act is accompanied by a set of regulations, The Builders' Lien Amendment Regulations, that offer detail and elaboration to many of the new provisions. The legislation has two main purposes:

(1) Ensuring prompt payment to contractors and subcontractors; and

(2) establishing an efficient adjudicative process to resolve disputes between owners, contractors, and subcontractors.

Key Features – Prompt Payment and Invoices

The Act requires that owners pay contractors within 28 days of receiving a "proper invoice". It also requires that contractors pay their subcontractors who supplied services or materials that were included in the "proper invoice" within seven days of receiving payment from the owner. The same seven-day deadline applies to payment of subcontractors by subcontractors. A "proper invoice" is an invoice that satisfies certain conditions outlined in s. 5.1 of the Act and must be rendered to the owner on a monthly basis unless the contract states otherwise.

If a payer disputes an invoice, they may refuse to pay all or a portion of the amount payable under the "proper invoice". The payer must however give written "notice of non-payment" to the payee no later than 14 days after receiving the "proper invoice" and, according to the Act, must "[*specify*] *the amount of the proper invoice that is not being paid and* [*detail*] *all of the reasons for non-payment*". The dispute may then be resolved through "adjudication". Any undisputed amount is to be paid within the 28-day period.

If a contractor or subcontractor does not receive payment from the level above, they must still pay their subcontractor(s) within defined deadlines, unless they undertake to refer the matter to adjudication within 21 days, after giving the Notice of Non-Payment to the subcontractor(s).

Key Features – Exemptions

The Regulations exempt the following professionals from the prompt payment and adjudication regime:

(1) Persons supplying services or materials in relation to a mine or mineral resource (other than oil and gas);

(2) architects, engineers, and land surveyors; and

(3) persons supplying services or materials in respect to an improvement related to infrastructure for the generation and distribution of electrical energy by SaskPower.

Key Features – Adjudication

The Act establishes an adjudicative body and procedure to resolve certain disputes between owners, contractors, and subcontractors. This avenue is intended to offer an efficient and cost-effective means for dispute resolution.

The adjudicative regime is to be administered by the "Adjudication Authority" which is to be designated by the Ministry of Justice. The Saskatchewan Construction Dispute Resolution Office has been designated as the Adjudication Authority. To serve as an adjudicator, the Regulations require that an individual must have 10 years of relevant experience in the construction industry and must have completed a training program specified in the Regulations, in addition to other conditions.

The disputes that are covered by this regime include: valuation of services or materials, payment disputes, disputes about the failure or refusal to issue a certificate of substantial performance, and anything else the parties agree to address. Parties may set their own adjudication procedure in the contract or subcontract, so long as the procedures comply with the requirements of the Act. If the parties did not agree to a procedure, or the procedure to which they agreed does not meet the requirements of the Act, then the procedure set in the Act and Regulations would apply.

The adjudication process includes six steps:

(1) The Notice of Adjudication is served.

(2) An adjudicator is appointed, either by consent of the parties or by the Authority.

(3) Within five days after the appointment of the adjudicator, the moving party must provide to the adjudicator and the other party a copy of the notice, contract or subcontract, and any other documents they wish to rely on during the adjudication.

(4) Within the following five days, the responding party may serve the adjudicator and the moving party with a written response and any documents they wish to rely on.

(5) The deadline for the adjudicator's determination is 30 days after receiving the moving party's documents, although this deadline may be extended. The determination must be delivered in writing and, if filed in court, is enforced like a court order.

(6) Each party to an adjudication is to bear his/her own costs unless the adjudicator orders otherwise.

An application to the court to set aside the adjudicator's determination may be made within 30 days of the determination and can be made on various grounds enumerated in the Act. Those grounds include a reasonable apprehension of bias on the part of the adjudicator; the contract or subcontract is invalid; or that the procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject pursuant to the legislation.

Key Takeaways

The implementation of Saskatchewan's prompt payment legislation has been highly anticipated by the province's construction industry. The objective is that the new regime will enhance fairness in the payment of contractors and facilitate access to efficient adjudication in the construction industry. Whether those objectives have been attained in other jurisdictions where prompt payments regimes have already been effected, such as Ontario, is not yet clear. Time will tell the extent to which the prompt payment regime will impact the construction industry in Saskatchewan, and extent to which owners, contractors, and subcontractors will develop new practices in order to comply with the regime.

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STAY OF PORTION OF COUNTERCLAIM NOT "IMPROPER BIFURCATION" OF DISPUTES UNDER ARBITRATION AGREEMENT

In *Mazzei Electric Ltd. v. Western Canadian Construction Co. Ltd*., the Plaintiff Mazzei Electric applied to stay a portion of the counterclaim brought by the Defendant Western Canadian Construction on the basis that it was covered by the parties' arbitration agreement. Justice W.A. Baker granted the stay while permitting the remainder of the counterclaim to proceed. In reaching her decision, she interpreted and applied a detailed and industry-specific dispute resolution clause, which allowed the parties to commence court proceedings to preserve a lien right. Justice Baker found that the Mazzei Electric's lien action did not prevent it from seeking to have Western Canadian Construction's counterclaim on other issues in dispute stayed in favour of arbitration.

The dispute arose out of a condominium construction project in Langford, British Columbia. The project entailed construction of two towers. Mazzei Electric was a subcontractor, and Western Canadian Construction was the general contractor. Two of Western Canadian Construction's related corporations were the owners/developers, one in charge of each tower.

Mazzei Electric and Western Canadian Construction entered into a standard form contract which provided a detailed, multi-tier dispute resolution process. It began with a timely filed notice, followed by a series of internal dispute resolution steps and culminated in arbitration. Importantly, the dispute resolution provisions permitted the parties to commence court proceedings to preserve a lien right. This was deemed not to waive the right to demand arbitration to resolve any other disputes.

In October 2019, Mazzei Electric made a delay claim, triggering the dispute resolution process. Western Canadian Construction rejected the claim and Mazzei Electric advised it would commence arbitration "if required". A month later, the parties had a further dispute over how to interpret certain terms in the contract governing, among other things, schedule changes and change orders. Mazzei Electric made several other claims during the following months.

In January 2021, Mazzei Electric commenced an action to preserve its lien rights in conformity with the dispute resolution provision. Initially, Western Canadian Construction was not a party to the lien action, which was filed against its related developer corporations since they held title to the land. Western Canadian Construction was added as a party to the action, on consent, to stand in place of the owner/developer corporations. It posted security for the lien, allowing the owners/developers to be discharged.

Western Canadian Construction filed a defence to the lien claim and commenced a counterclaim seeking damages for Mazzei Electric's alleged delay in performing the subcontract and filing improper liens. Mazzei Electric moved to stay the delay/breach of contract aspect of the counterclaim on the grounds that it fell within the arbitration agreement's scope.

The stay application was heard by Justice W.A. Baker, who began by setting out the well-established test for a stay under s. 7 of B.C.'s *Arbitration Act*:

> *In Prince George (City) v. McElhanney Engineering Services Ltd. (1995), 9 B.C.L.R. (3d) 368, the court of appeal set out a three-part test for granting a stay under the Arbitration Act current at that time:*
>
> > *(a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;*
> >
> > *(b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and*
> >
> > *(c) the application must be brought timely, i.e. before the applicant takes a step in the proceeding.*

Justice Baker noted that this test continues to apply under the new B.C. Act, which recently replaced B.C.'s former domestic arbitration statute in force when the Court of Appeal for British Columbia decided *Prince George (City) v. McElhanney Engineering Services Ltd.*

On the first limb, Justice Baker summarily determined that Western Canadian Construction was a party to the arbitration agreement and that the counterclaim was a "*legal proceeding*" commenced "*against another party to that arbitration agreement*".

On the second limb, Justice Baker was likewise satisfied the delay aspect of Western Canadian Construction's counterclaim fell squarely within the range of disputes the contract required the parties to arbitrate.

On the third limb, Justice Baker addressed Western Canadian Construction's argument that Mazzei Electric took steps in the court proceeding such that it could not now rely on the arbitration agreement to obtain a stay. The argument was two-fold: (1) Mazzei Electric failed to explicitly reserve its right to arbitrate in its Statement of Claim in the lien action, thus taking a step in the litigation; and (2) Mazzei Electric's counsel sent letters to Western Canadian Construction's counsel about resolving the lien claims. Western Canadian Construction said this correspondence evidenced an intention to pursue the lien claims in court by way of summary judgment. This, Western Canadian Construction argued, amounted to conduct inconsistent with a plea that the counterclaim should be stayed in favour of arbitration.

Justice Baker rejected these submissions.

With respect to Western Canadian Construction's first argument, Justice Baker found the dispute resolution provision's plain language preserved Mazzei Electric's right to insist that any non-lien disputes be arbitrated. She also observed that the consent order adding Western Canadian Construction to the court proceeding provided this was without prejudice to Mazzei Electric's ability to pursue claims in arbitration. In light of these conclusions, Mazzei Electric had no obligation to again reiterate its intention to arbitrate disputes other than the lien claims in its pleading.

Justice Baker dismissed Western Canadian Construction's second argument because the correspondence forming the basis of its objection had to do with prosecuting aspects of the lien claim, not the counterclaim. In other words, Mazzei Electric stated its intention to move *its own* claim forward in litigation by way of summary judgment, not portions of the counterclaim that it said should go to arbitration. Justice Baker concluded that any steps taken in respect of the lien claims were irrelevant as only the counterclaim was the subject of the stay motion. This meant that although Mazzei Electric might have taken steps in its own claim inconsistent with arbitration (of *those* claims), the "proceeding" for the purpose of the stay motion analysis was the counterclaim. The evidence showed Mazzei Electric took no steps in that aspect of the litigation. On the con-

trary, it served a notice of arbitration for resolution of the delay issues.

Justice Baker also distinguished two cases Western Canadian Construction relied on for the proposition that Mazzei Electric's counsel's correspondence amounted to taking steps in the court proceeding that waived the right to demand arbitration: *Larc Developments Ltd. v. Levelton Engineering Ltd*. and *Fofonoff v. C and C Taxi Service Ltd.*

Those cases were different, she held, because the conduct at issue — sending formal demands for particulars under the Rules of Court — "*necessarily indicated the intention to proceed with the claim in court and not in arbitration*". Here, the correspondence related only to resolving the lien claim. As noted, this was not the aspect of the litigation which Mazzei Electric sought to refer to arbitration.

After finding the three aspects of the s. 7(1) stay analysis were met, Justice Baker assessed whether the arbitration agreement was "*void, inoperative or incapable of being performed*". Western Canadian Construction argued that the arbitration agreement was inoperative. It asserted that "*allowing the arbitration to proceed would allow for an improper bifurcation of* [the Plaintiff's] *claim, which is not an outcome contemplated under the* [Act]". Western Canadian Construction paired this with a statutory interpretation argument that s. 7 of the Act pertained to staying "legal proceedings", not portions of them.

In rejecting these arguments, Justice Baker observed that the contract expressly foresaw and allowed for some matters to be arbitrated and others litigated. She referred to the court's previous decision in *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc*. That case similarly dealt with a lien action and a parallel arbitration. The court in *Sandbar* held that the substance of the claim could be decided in arbitration, with the award determining whether the lien action related to the underlying arbitrated dispute could be maintained. Justice Baker found this reasoning compelling and consistent with the court's other comments in *Sandbar* (and the jurisprudence generally) that parties should be held to their arbitration agreement.

In the result, Justice Baker granted the partial stay with costs to Mazzei Electric on the application.

Author's Notes

First, the court noted the trite but important point that the jurisprudence under the B.C. Act's previous iterations continues to apply to the test for stay motions. Although the stay provision's wording has changed over the years, with the newest iteration closely tracking the language in article 8 of the *UNCITRAL Model Law on International Commercial Arbitration*, its substance has remained largely the same. The B.C. courts have not altered the analysis originating in *Prince George*.

Second, this case shows the variability in arbitration agreements and ways in which parties may order their dispute resolution process. It is common to find all-encompassing arbitration agreements employing broad scoping language, such as the classic "*any and all disputes arising out of or in connection with…shall be finally determined by arbitration*", or similar words. This is often appropriate, especially where avoiding a multiplicity of proceedings is a priority.

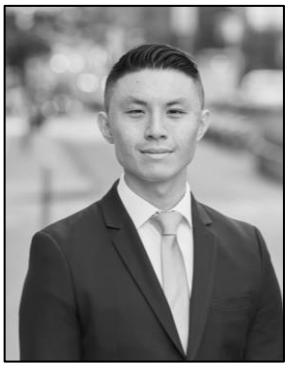
This case is one of many examples in which the parties opted for a more nuanced dispute resolution process, one entailing not only several pre-arbitral steps (preliminary decision by general contractor, good faith negotiations, mediation, etc.), but also an express right to commence court proceedings for limited purposes. Such dispute resolution protocols demonstrate two of arbitration's greatest strengths: party autonomy and flexibility. One size does not fit all, and unlike court proceedings, parties may select from various pre-made dispute resolutions processes, or design one all their own with very few statutory limitations (e.g., maintaining procedural fairness).

Third, Justice Baker's decision, together with the decision in *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc*., exemplify how arbitration and court proceedings can work in tandem (arbitration first and court second, or as needed) to provide a holistic dispute resolution solution. This most obviously happens when formal enforcement is required, or when a party seeks interim measures in aid of the arbitration. But there are other ways in which the arbitral tribunal and court might find themselves as dispute resolution dance partners.

Sometimes, as in this case, the court will retain exclusive jurisdiction over a certain subject-matter or remedy with other aspects of the dispute proceeding to arbitration. Another context in which this could arise is oppression matters. This is because some relief affecting third parties generally available to remedy oppression falls outside the arbitral tribunal's remedial toolkit (see for example: *Farah v. Sauvageau Holdings Inc*.; *Woolcock v. Bushert*; and *Randhawa v. Randhawa*).

British Columbia Supreme Court

Mazzei Electric Ltd. v Western Canadian Construction Company Ltd.
W.A. Baker J.
May 17 and 18, 2021



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CAN'T HAVE YOUR CAKE AND EAT IT TOO: THE IMPORTANCE OF FOLLOWING YOUR CONSTRUCTION CONTRACT TERMS

All too often during a construction project issues arise with respect to delays or extras. *Conwest Contracting Ltd. v. Crown and Mountain Creations Ltd.* affirms the importance of developers and contractors following their contracts to the letter in navigating these issues. If parties do not strictly follow the terms of the contract and disputes arise, courts may rely on party conduct as an interpretive guide — including pre-contract conduct that a party may not have fully considered when signing the contract.

In *Conwest*, the contractor claimed for extras and progress payments owing under a CCDC-2 contract for excavation and shoring work performed for a residential construction project owned by Crown and Mountain Creations Ltd. The owner counterclaimed for delay and the cost of completing the excavation work with another contractor. The subcontractor responsible for the shoring work claimed against the contractor for unpaid invoices.

While performing the excavation work, the contractor and the subcontractor experienced delays and incurred extra costs as a result of unanticipated soil conditions and adverse winter weather. The contractor submitted work orders to the owner for the extras on the basis of "unknown conditions",

but did not give formal notice of "unknown conditions" as required by the contract. The owner acknowledged the contractor's performance of extra work but did not valuate the work orders for extras.

The contractor discontinued the excavation work after completing approximately 80 per cent of it because the owner had failed to make two progress payments and refused to approve further work orders for extras.

The owner issued a notice of default to the contractor for failure to complete the excavation work. The contractor refused to return without payment. The owner then terminated the contract and retained a new completion contractor. The owner claimed for completion costs against the contractor and rejected the extras, arguing they were "baked" into the fixed-price contract and the contractor simply underbid and mismanaged the excavation work.

Decision

In deciding the issues, the court noted that none of the parties followed their contract terms fully, or at all, but each party sought to rely on particular contract terms to their benefit. This made the dispute more difficult to resolve, and critically, it meant the court had to rely more on the parties' conduct to determine their intentions behind the contract terms.

The court granted the contractor's claim on a *quantum meruit* basis, observing that the contract allowed for legitimate extra work to be completed and paid, which did not turn the contract into a cost-plus contract as the owner suggested. The contractor was entitled to the extras because the soil conditions were "unknown". Further, despite the contractor's failure to give proper notice of the delay, the court recognized that the contractor provided supporting documentation for the extras at the request of the owner who had acknowledged the extra work.

The court relied, in part, on the parties' conduct during tendering and the project, which included the owner signing a proposal that specifically excluded the work upon which the extras were based. The court also found that the contractor did not cause the delay — it was caused by the unknown conditions and in part by the owner in its attempts to adjust them.

However, the court went on to also allow the owner's counterclaim for completion costs. The owner's termination did not follow the contract termination requirements and the contractor had not fundamentally breached the contract. Nonetheless, the court found the termination was lawful in common law as the owner had a right to terminate for repudiation. The contractor's refusal to return to work demonstrated an intention not to be bound to the contract, which amounted to repudiation. Notably, the court also commented that the contractor should not have unilaterally halted the work by leaving but rather should have fulfilled its obligations and sought payment thereafter in negotiations or through a legal claim.

Insights for Owners and Contractors

Conwest reaffirms that all parties to a construction project should strictly follow the terms of their contract if they wish to rely on those terms when a dispute arises. Failing to do so means the disputes are likely to be more complicated and expensive, and the outcome less certain. If litigation arises, a court may rely on the conduct that the party did not intend to or think, would inform their contractual terms.

For contractors, this case emphasizes the importance of strictly following the notice provisions of their contract when seeking to claim extras or anticipating a delay. Further, contractors should be aware that an owner's failure to make payments does not necessarily mean the contractor can or should unilaterally abandon the work. Rather, the contractor should fulfill its obligations, give notice

that it is doing so under protest, and seek payment at a later date, through negotiations or legal action. Failure to do so may result in a repudiation of the contract and trigger the owner's right to terminate in contract or common law.

For owners, this case emphasizes the importance of strictly complying with their contract termination provisions. Failure to do so could result in an unlawful termination and liability for resultant damages. Owners should also make clear at the outset of a project the responsibilities and risks they wish to allocate between the contractor and themselves.

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Conwest Contracting Ltd. v. Crown and Mountain Creations Ltd.
E.M. Burke J.
October 28, 2021

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