

SUBCONTRACTORS' BREACH OF TRUST ACTIONS – TIME MAY BE SHORTER THAN YOU THINK

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You could run out of time to sue for breach of trust earlier than you may think. The decision in *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* ("*Steel Design*")^[1] affirms that the two-year limitation period can begin to run before a subcontractor actually discovers a breach of trust. In fact, the limitation period may begin to run as soon as a payment is missed if the subcontractor could have discovered the breach of trust by making an information request under section 39 of the *Construction Lien Act* ("*CLA*").^[2]

Steel Design is an important reminder to track invoice due dates and payments, make timely requests for information under section 39 of the *CLA*, and take immediate action to preserve your trust and other rights if payment is not received when due. It also reinforces the importance of knowing about your rights and remedies under the *CLA*. Ignorance of the *CLA* may not be an excuse if you fail to take reasonable steps to protect yourself.

Different Limitation Periods for Trust and Contract Claims

In *Steel Design*, the plaintiff provided labour services to the defendant, Steel Design and Fabricators (SDF) Ltd. ("*SDF*"). The plaintiff issued numerous invoices under which payment was due before March 26, 2012. The invoices were never paid and SDF ultimately declared bankruptcy. However, the plaintiff did not sue the directors and officers of SDF for breach of trust until March 26, 2014, more than two years after the payments were due under the invoices.

The directors and officers argued that the breach of trust claim should be dismissed because it was brought after the two-year limitation period expired. They argued that as a principle of law the limitation period is always the same for breach of contract and breach of trust claims. Since the limitation period for each breach of contract claim began to run the day after payment under each invoice was due (i.e. before March 26, 2012), the same timeline should apply to any breach of trust claim. In other words, the breach of trust claims were out of time.

The Court disagreed that a breach of trust claim would always have the same limitation period as a breach of contract claim. This would be contrary to the *Limitations Act, 2002*,^[3] which provides that the two-year

limitation period for each claim begins to run when the plaintiff knew, or when a reasonable person ought to have known, that he had a claim. There are times when a breach of contract claim could arise before a breach of trust claim. For example, a subcontractor cannot have a breach of trust claim unless the monies have been received by the contractor. Accordingly, if there is a breach of contract claim because payment on an invoice is overdue, but the contractor has not received any monies, there can be no breach of trust claim at that time.

Subcontractors Expected to Make Timely Section 39 Requests

Importantly, the Court did not disagree with an earlier decision that put the onus on a subcontractor to make timely information requests under section 39 of the *CLA*. In *Carmen Drywall Ltd. v. BCC Interiors Ltd.*,^[4] the issue was when a subcontractor knew or ought to have known that it had a breach of trust claim. The Court held that a reasonable subcontractor would have made a *CLA* section 39 information request once payment was overdue, and that the request would have led to the discovery of the breach of trust claim. As a result, the subcontractor in that case ought to have known about the breach of trust claim as of that date and the limitation period began on that date. The fact that the subcontractor did not actually discover the breach until much later was irrelevant.

Always Act Quickly to Preserve Rights

In *Steel Design*, the directors and officers did not succeed in having the claim dismissed because they failed to show that the plaintiff would have discovered the breach of contract if it made the section 39 request. However, the directors and officers could reargue the point at a later time with proper evidence.

Steel Design illustrates the importance of tracking invoice due dates and payments to ensure that you know when it may be advisable to make a section 39 information request to check on possible trust claims. *Steel Design* also reinforces the importance of knowing your rights under the *CLA*. Even if you are not aware of your rights, a Court may find that you ought to have known and should have taken steps to investigate or protect yourself under the *CLA*.

In 2002, the *Limitations Act, 2002*^[5] shortened the basic limitation period from six to two years. This shorter time period can expire sooner than you may realize. If you ever suspect that you may have a claim, you should immediately consult your legal counsel to ensure that your trust and other rights are preserved.

By Laura Brazil

¹ 2016 ONSC 1722, 2016 CarswellOnt 3930.[ps2id id='1' target='']

² R.S.O. 1990, c. C.30.[ps2id id='2' target='']

³ S.O. 2002, c. 24, Sched. B.[ps2id id='3' target='']

4 2013 ONSC 4644, 2013 CarswellOnt 9692.[ps2id id='4' target='']

5 S.O. 2002, c. 24, Sched. B.[ps2id id='5' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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