CONSTRUCTION LAW LETTER

Volume 40 • Number 1 **September/October 2023**

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BIM: A TOOL FOR SUBSTANTIATING A CLAIM

The use of Building Information Modelling, commonly known as BIM, is becoming increasingly widespread in both public and private construction projects. BIM is traditionally seen as a tool used for the digital representation of various physical and functional aspects of a project. It serves as a communication and coordination tool which promotes increased collaboration between stakeholders and should, therefore, reduce the number of problems encountered during construction projects. Some of the problems that could be avoided with the proper use of BIM include issues stemming from interdisciplinary coordination of drawings and specifications, issues related to *in situ* conditions, issues caused by owner-initiated changes and several other unexpected issues that may arise on-site.

BIM's utility is not only limited to the planning and execution phases of construction projects. BIM can be used in the context of legal proceedings and arbitration as it is a powerful tool for simplifying the demonstration and substantiation of a claim. BIM can also be an effective tool in the context of alternative dispute resolutions such as mediation, which has been gaining popularity.

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CONSTRUCTION
LAW LETTER

Construction Law Letter is published six times a year by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto, Ont., M2H 3R1, and is available by subscription only.

ISBN 0-433-51429-9 ISSN 433500824
ISBN 0-433-51438-8 (Print & PDF)
ISBN 0-433-51439-6 (PDF)

Subscription rates: $396 (Print or PDF)
$528 (Print & PDF)

LexisNexis Canada Inc.
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Outside of the multiple technical challenges of certain projects, the degree of complexity in construction projects often increases due to the number of stakeholders involved, large volumes of documents produced at each stage of the project, and the length of time spent on-site. In the context of these kinds of projects, BIM is an important asset for mitigating these challenges and, as a result, can provide numerous advantages for those who dare to use it.

BIM and digital models can be used in a variety of ways. For the purpose of this article, we have identified the following three use cases:

1. 3D Visualization of Projects

The digital model is a very useful tool to facilitate the understanding of a project and the problems encountered. As a picture is worth a thousand words, the numerical model allows the contractor to offer a detailed and interactive visual of the project, its components, the scope of work and the operational constraints experienced on-site during construction.

2. Simulation of an As-Planned vs. an As-Built Schedule:

4D BIM allows the creation of smart links between the digital model and temporal data (baseline schedule). These links are then used to create a 3D space-time simulation showing the sequence of work. 4D BIM is mostly used by contractors for (i) project phasing, (ii) optimizing the baseline schedule, or (iii) detecting construction conflicts and/or constraints. Furthermore, 4D BIM can also facilitate the demonstration of impacts caused by the owner or a third party. For example, the contractor can show the critical path of a project and can compare the planned sequence of events to the actual sequence of work. To do this, the contractor can simply create a second 3D space-time simulation using the as-built schedule and then compare it to the baseline simulation.

3. Simplification of a Technical Impact:

The digital model can also explain the impacts of changes that arise during the project. By comparing the model of initial design with a model of the modified design (incorporating the proposed changes), the parties can easily visualize the scope and impacts of the changes to the work.

To conclude, we are currently in the midst of a major wave of changes in the construction industry characterized by a digital revolution which many are calling "Construction 4.0". Technological advances, such as BIM, are forcing us to question the traditional means and methods by innovating and reinventing ourselves. The use of digital tools to support the substantiation of claims will become unavoidable in the coming years. It is therefore in the best interest of general contractors to familiarize themselves with these tools and take advantage of their capabilities.

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COMPLYING WITH CONTRACTUAL NOTICE REQUIREMENTS: LESSONS FROM *CROSSLINX TRANSIT SOLUTIONS v. ONTARIO*

The Ontario Court of Appeal's decision in *Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)* emphasized the importance of providing proper notice, pursuant to contractual requirements, to obtain relief for an alleged breach of contract.

The case involved a dispute over a "variation enquiry", which, if granted, could have allowed for an extension of the substantial completion date. The variation enquiry provision in the project agreement stated that the owner had to declare an emergency and provide notice of additional and overriding procedures. The court found that proper notice had not been provided and that the application judge had made a palpable and overriding error.

While the Ontario Court of Appeal's decision highlights the importance of complying with contractual notice requirements, the lower court in *Crosslinx v. Ontario Infrastructure* dealt with an application seeking declarations that the COVID-19 pandemic was an emergency under the project agreement; the Ontario Infrastructure and Lands Corporation and Metrolinx (the owners) required compliance with additional and overriding measures to protect public health, and Project Co. was entitled to a variation enquiry under the project agreement.

FACTUAL BACKGROUND

The Eglinton Cross Light Rapid Transit line (ECLRT) project involves the construction and maintenance of a 19-kilometre light rapid transit line, 10 kilometres of which will be underground.

The owners signed a project agreement with Project Co. consisting of four of Canada's largest construction companies, represented by Crosslinx Transit Solutions General Partnership.

The project agreement set a substantial completion date and provided for penalties if the date was not met. The project agreement also allowed the owners to require Project Co. to implement "additional or overriding procedures" in case of an emergency.

In such a scenario, Project Co. was able to invoke a variation enquiry which, in return, lead to an evaluation of whether the implementation of such measures should result in an extension of the substantial completion date.

Following the declaration of a state of emergency by the government of Ontario in March 2020, Project Co. requested that the owners declare an emergency under the project agreement in order for Project Co. to take additional measures to ensure the health and safety of workers at the project site.

The owners responded indicating that they were waiting for the Ministry of Labour's construction protocols and expected Project Co. to implement them. In subsequent correspondence, the owners confirmed that they had not declared an emergency and took the position that they would not declare one because the province had already done so. Project Co. was required to implement the measures under the *Occupational Health and Safety Act* and local laws.

Project Co. then commenced an application in the lower courts seeking declarations that the COVID-19 pandemic was an emergency under the project agreement; the owners were required to direct Project Co. to implement additional and overriding measures to protect public health and worker safety; and the owners have a contractual obligation to provide Project Co. with a variation enquiry under the project agreement.

SUPERIOR COURT'S DECISION

The lower court held that the core issue between the parties was whether Project Co. was entitled to invoke the variation enquiry procedure under the project agreement that could result in an extension of time.

The Motion to Stay

First, the court dealt with the owners' motion to stay the application. The owners argued that the project agreement provided for a stay of all litigation until after the substantial completion date and Project Co. had failed to comply with the variation enquiry process.

Upon review of the case, the Superior Court found that, although the project agreement provided a valid dispute resolution provision that required a stay of litigation, it also contained a number of exceptions for situations where waiting until after the substantial completion date to resolve a dispute would result in irreparable harm to a party.

Additionally, the court referred to a provision that explicitly established a process for Project Co. to modify the Substantial Completion Date. It would not be logical to defer disputes regarding extensions to the substantial completion date until after its achievement. The court found that such a delay would subject Project Co. to detrimental consequences, such as liquidated damages, loss of financing, contract termination, insolvency and damage to its reputation.

Regarding Project Co.'s alleged failure to comply with the variation enquiry process, the court found that Project Co. had indeed followed the appropriate procedure, while the owners were attempting to frustrate the process. Project Co. had served the necessary notices and taken all required steps leading to a variation enquiry. The owners had attempted to slow down the process by demanding excessive documentation before allowing senior officers to meet and discuss the dispute, a mandatory step in pursuing a variation enquiry. The Superior Court concluded that, even if Project Co. had provided the information requested, it would not have facilitated the dispute discussions. Moreover, evidence of an offer to settle by the owners indicated that they had enough information to consider Project Co.'s claims, without requiring further documentation.

In light of the court's findings, the motion to stay was dismissed.[1] The court proceeded with the Project Co.'s application for declarations.

Application for Declarations

In order to receive a variation enquiry, Project Co. was required to demonstrate that an emergency had occurred as defined in the project agreement, and that the owners had requested the implementation of "additional and overriding measures".

The main point of contention between the parties was whether the owners had asked or should have asked Project Co. to implement additional or overriding measures. The owners contended that they did not require Project Co. to implement any measures because Project Co. was already obligated to comply with applicable laws, including construction protocols and public health measures. Any direction from the owners would have been a restatement of Project Co.'s existing obligation. Furthermore, the owners argued that the contract assigned all health and safety risks to Project Co., and pointed to Project Co.'s emergency response plan as evidence that emergencies were under Project Co.'s responsibility.

The Superior Court found that:

- the COVID-19 pandemic qualified as an emergency under the project agreement, and it required "additional and overriding measures";
- the owners notified Project Co. that they required compliance with "additional or overriding procedures" with their email of March 25, 2020;
- while Project Co. had obligations under the *Occupational Health and Safety Act*, this did not imply that Project Co. had accepted all the risks associated with the pandemic when entering into the project agreement. The existence of a mechanism to extend the substantial completion date due to an emergency implied that Project Co. was not anticipated to shoulder all the risk.

Finally, the court held that the Ministry of Labour's construction protocols were not applicable laws that Project Co. was required to follow under the project agreement. Therefore, the owners' requests for Project Co. to comply with new construction protocols were considered "additional and overriding measures" and not a reiteration of existing obligations.

The court granted Project Co.'s application and declared that the owners had a contractual obligation to provide Project Co. with a variation enquiry.

The Court of Appeal's Decision

The issue in the appeal was whether the application judge erred in concluding that s. 62.1(c), the emergency provision of the project agreement, was triggered such that the parties were required to engage in a variation enquiry.

In the court's view, to determine the appeal, it was sufficient to consider whether the application judge made a palpable and overriding error in finding that the owners, by their email of March 25, 2020, actually notified Project Co. under s. 62.1(c) that they required compliance with additional or overriding procedures.

The court held that the application judge erred in finding that the owners' March 25, 2020, email was sent to Project Co. There was no dispute that this email was an internal email that was never directed to or sent to Project Co.

Project Co. argued that the application judge's finding that they were notified by s. 62.1(c) can be supported by replacing the March 25, 2020, internal letter with the owners' letter of April 21, 2020.

The Court of Appeal saw several difficulties with this proposition. First, the April 21, 2020 letter was "at best ambiguous". The owners in that letter did not require any "additional and overriding measures" from Project Co., in addition to those already undertaken to comply with health and safety obligations as required by law. Second, Project Co. never stated that the owners' letter of April 21, 2020, or any other correspondence,

constituted actual notification under s. 62.1(c) of the project agreement. Rather, they argued that the owners "should" declare an emergency and direct them to implement additional or overriding procedures.

Finally, the court considered what constitutes notification as required by s. 62.1(c) and whether such notification would constitute notice under s. 61.1(a) of the project agreement. The court held that a notice must be in writing and delivered by registered mail, facsimile transmission followed by registered mail, or personal service. There was no evidence as to whether the April 21, 2020, letter met these requirements.

The appeal was allowed by the Court of Appeal, but the application was not dismissed. Instead, the application was returned to the Superior Court for a rehearing. In doing so, the Court of Appeal referred to the application judge's consideration that the main issue was whether the owners had asked or should have asked Project Co. to implement additional or overriding procedures.

KEY TAKEAWAYS

The importance of giving proper notice in construction projects has been emphasized in court decisions and this ruling from the Court of Appeal reaffirms the significance of adhering to notice provisions in construction contracts. For example, this outcome may have been different had Project Co. responded to the letter promptly and taken the position with the owners that they were interpreting the letter to mean that the COVID-19 pandemic constituted an emergency as defined in the project agreement.

The Superior Court's decision was one of the first to deal with the COVID-19 pandemic and its implications to a large-scale project such as the ECLRT. It indicated that, when it comes to COVID-19, standard contractual terms in relation to health and safety shifting all responsibility to the contractor, may not be seen as effective.

1. The owners' motion for leave to appeal this order was denied by the Divisional Court in [2021] O.J. No. 4663, 2021 ONSC 5905.

Ontario Court of Appeal

Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)
P.S. Rouleau, K.M. van Rensburg and L.B. Roberts JJ.A.
March 7, 2022

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THE LAST DAYS OF CONTINGENT PAYMENTS: PAY-WHEN-PAID CLAUSES AND ALBERTA'S *PROMPT PAYMENT AND CONSTRUCTION LIEN ACT*

On August 29, 2022, the *Prompt Payment and Construction Lien Act* (PPCLA) came into force in Alberta. The PPCLA changed the law governing the construction industry. One such change was the imposition of mandated timelines for payment of invoices. Whether or not these timelines render "pay-when-paid" clauses in contracts ineffective

has been debated since the introduction of the PPCLA. "Pay-when-paid" clauses stipulate that a contractor will only pay a subcontractor's invoice upon receipt of payment from the owner.

In the recent Alberta Court of King's Bench decision in *Canadian Pressure Testing Technologies Ltd. v. EllisDon Industrial Inc.*, the court dealt with a dispute where the services agreement between the parties was enacted prior to the PPCLA coming into force.

BACKGROUND

Canadian Pressure Testing Technologies Ltd. entered into a subcontract with EllisDon Industrial Inc. to provide pressure testing services for piping on a petrochemical plant in Sturgeon County, Alberta. EllisDon paid Canadian Pressure Testing monthly progress payments for the work completed, except for one final invoice totaling $98,301. EllisDon, relying on clause 5.3 of the Services Agreement, took the position that there was no requirement to make the payment until it was paid by the project owner:

> *5.3 [General Contractor] shall pay to the [Subcontractor] monthly progress payments net of any applicable Holdback and such payments shall become due and payable no later than five (5) business days after [General Contractor] receives payment pursuant to the terms and conditions of the Prime Contract from the Owner in respect of such Services…*

Canadian Pressure Testing initiated legal proceedings against EllisDon seeking payment on the final invoice and applied to the court for summary judgment.

EllisDon maintained the position that the clause constituted a valid pay-when-paid clause, meaning that payment to Canadian Pressure Testing was contingent on EllisDon first being paid by the owner. EllisDon was at the same time involved in a much larger ongoing legal dispute with the owner over payments owed, so it argued there was no obligation to provide payment to Canadian Pressure Testing until the dispute was resolved and it received payment.

Canadian Pressure Testing argued that the services agreement established the overall obligation to pay, and the clause therefore functioned only as a "pay no later than" clause rather than a pay-when-paid clause. Canadian Pressure Testing asserted that the clause merely fixed an outside date for EllisDon to make payment rather than create a condition on the payment obligation.

Interpretation of the Clause

The court reviewed the precise language of the clause to determine if it was enforceable as a pay-when-paid clause. After reviewing relevant case law across multiple jurisdictions, the court concluded that the clause failed to provide the required clear and unambiguous language necessary to constitute a pay-when-paid clause.

Quoting a decision from the Nova Scotia Court of Appeal, which dealt with the same contractual issue, the court in *Canadian Pressure* highlighted that "*any provision intended to diminish or remove the subcontractor's right to be paid should clearly state that and set out the circumstances in which the subcontractor will not be paid following the completion of his work*".[1] When a contractor intends to include an enforceable pay-when-paid clause in a contract with a subcontractor, the clause must be both clear and specific. The clause must have the specific effect of mandating payment by the contractor when it itself is paid as a condition for subcontractor payment, as opposed to pay-when-paid being an inference in a clause dealing fundamentally with some other principle, such as timing of payments to the subcontractor in relation to the time when the owner pays the general contractor.

Legislation Likely to Reduce Uncertainty

The court's reception of competing interpretations of the alleged pay-when-paid clause in *Canadian Pressure* demonstrates how the previous legislative framework (or lack thereof) in respect of pay-when-paid clauses created uncertainty with respect

to payment rights. The PPCLA is likely to reduce such uncertainty by removing the ability for contractors to withhold amounts payable under a subcontract via pay-when-paid clauses when full payment of a proper invoice has been received by a contractor for materials furnished and work done under such subcontract. Instead, contractors will be required to rely on s. 32.3 of the PPCLA to issue a notice of non-payment to subcontractors in circumstances where the owner has not met their payment obligations.

Where an owner disputes an invoice from the contractor and refuses to pay any portion of the invoice within the time specified by the PPCLA, the owner must provide the contractor with a notice of dispute pursuant to s. 32.2(2). Contractors may thereafter exercise the right to withhold payment to the subcontractors by following the requirements in s. 32.3(5). The contractor must provide the subcontractor with the following:

- a notice of non-payment (within 7 days of the contractor receiving a notice of dispute from the owner) stating that some or all of the amount payable to the subcontractor is not being paid due to non-payment by the owner and specifying the amount not being paid;
- an undertaking to refer the matter to adjudication under Part 5 of the PPCLA within 21 days after giving notice to the subcontractor; and
- a copy of any notice of dispute given by the owner.

The implementation of the PPCLA has made a large splash in construction contracts and the way in which they will be interpreted. Although pay-when-paid clauses such as the one in *Canadian Pressure* have not been rendered invalid explicitly, it remains to be seen whether parties to construction contracts will be able to rely on pay-when-paid clauses to deny payments to subcontractors when their project is governed by a contract subject to the PPCLA. As shown by *Canadian Pressure*, pay-when-paid clauses may not be as ironclad as contractors or subcontractors may expect. As such, a potential benefit of the PPCLA is providing clarity and structure as to when payments must be made and when they can be delayed.

1. *Arnoldin Construction & Forms Ltd. v. Alta Surety Co*, 1995 NSCA 16 at para 33.

Alberta Court of King's Bench

Canadian Pressure Testing Technologies Ltd. v. EllisDon Industrial Inc.
B. W. Summers J.
September 29, 2022

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CORONER'S INQUESTS IN THE CONSTRUCTION INDUSTRY IN ONTARIO

Mediation has become commonplace in the resolution of commercial disputes. Now that restrictions have been lifted following the COVID-19 pandemic, does this mean it is all over for remote mediation?

While there has been a return to the use of in-person mediations, remote mediations remain an alternative option. They continue to result in successful settlements and offer both time and cost savings, in terms of travel costs and the availability of what would otherwise be travel time at the start and end of the day. They are arguably more efficient in terms of the parties' resources. However, there are some downsides.

The act of physically sitting in the same room as your opponent still has a substantial psychological impact. This is especially so where the dispute is difficult to resolve or there has been unreasonable

behaviour in prior discussions. The effort and cost of travelling to the mediation can also make physically walking away a more difficult decision than clicking a button to leave a virtual process.

There is no right or wrong answer — the decision to mediate remotely or in person will depend on each case and remote mediation is likely to remain an option for years to come.

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COMPETING CLAIMS FOR CONSTRUCTION HOLDBACK – WHOSE MONEY IS IT, ANYWAY?

In a recent decision of the Ontario Superior Court of Justice in *Northwest Angle 33 First Nation v. Razar Constructing Services Ltd*., Justice Fregeau reviewed the applicability of the *Construction Act* trust provisions to a dispute over holdback amounts in connection with a project on federal lands, as well as a claim by the Canada Revenue Agency (CRA) to a priority over same.

The decision illustrates the importance of a careful analysis of the applicable contract provisions and the law in determining entitlements that, at first blush, may appear uncontroversial.

FACTS

Northwest Angle 33 First Nation contracted with Razar Contracting Services Ltd. in February 2020 for the construction of a water system for its residents. First Nation and Razar agreed that First Nation was entitled to retain a holdback of 10% for the benefit of subcontractors and suppliers to Razar plus an additional maintenance holdback of 3% from progress payments otherwise payable to Razar.

In May 2022, First Nation took the balance of the work out of Razar's hands and engaged other forces to complete. Under the contract, this extinguished Razar's right to any further payments. The total holdback amount retained from progress payments at that point was $1,204,516.55.

First Nation brought an application under rule 43 of the *Rules of Civil Procedure* seeking an interpleader order to pay the holdback into court. First Nation wished to establish a process for the orderly and equitable distribution of the holdback among the numerous subcontractors and suppliers who had gone unpaid, as well as the CRA, with claims exceeding $2 million.

Pro-Gen (Thunder Bay) Inc., a subcontractor of Razar, had obtained a default judgment against Razar and had issued garnishment. The CRA had also issued a Requirement to Pay seeking payment owing by Razar for unremitted payroll source deductions. Both Pro-Gen and the CRA opposed the interpleader application on the basis that each was entitled to be paid in priority to the other claimants to the fund.

ARGUMENTS OF PRO-GEN AND THE CRA

Pro-Gen argued that s. 8 of the *Construction Act* (regarding trust funds) did not apply to First Nation. It took the position that the imposition of a trust under the *Construction Act* was the equivalent of seizing "*the personal property of an Indian or a band situated on a reserve*" which is prohibited by s. 89 (1) of the *Indian Act*. Pro-Gen argued that the holdback was not a trust fund but rather an amount payable to Razar pursuant to the contract, thereby permitting Pro-Gen to realize upon its judgment obtained against Razar in priority to other potential claimants to the fund whose rights had not crystallized by judgement.

The CRA argued that source withholding amounts were deemed to be held in trust for the Crown pursuant to s. 227 (4) of the *Income Tax Act* (ITA). It also argued that under s. 227(4.1) of the ITA, the Crown now beneficially owned the holdback to the extent of CRA's claim as the source withholding amounts had not been paid. Accordingly, its position was that s. 227 of the ITA gave the CRA priority over the holdback.

The other subcontractors and suppliers disagreed with both Pro-Gen and the CRA, submitting that the positions of each were improperly premised on the holdback being characterized as the property of Razar.

DECISION OF THE COURT – THREE PRINCIPLES:

1. The legal characterization of funds retained under a construction contract will determine the right to priority over it in the case of a dispute

The court began its analysis by examining whether the holdback was indeed the property of Razar or a debt payable to it. If not, the priority claims of Pro-Gen and the CRA would fail. To determine whether this was the case, the court closely examined the contract between the First Nation and Razar in assessing the intent of the parties.

The contract stipulated that as a pre-condition to the holdback being payable to Razar, the project must be substantially complete. Substantial completion had not occurred. Further, the contract provided that if the project was taken out of Razar's hands, its right to payment from the holdback would be extinguished. In May 2022, the project was taken out of Razar's hands. The court determined that given the plain words of the contract, the parties never intended that the holdback be the property of, or a debt payable to, Razar under these circumstances.

Following *Northwest*, parties to a construction contract would be well advised to turn their minds to the contract's characterization of statutory and contractual holdbacks, as that characterization may determine which party has a property interest in the funds.

2. The *Construction Act* may impose a trust on funds connected to projects on federal lands, including First Nations land

The court held that the holdback is properly a trust fund for the benefit of unpaid subcontractors and suppliers under s. 8 of the *Construction Act* and rejected the argument that s. 8 does not apply to the project because it was located on federal lands reserved for First Nations.

Despite the *Construction Act* being provincial legislation, the court held that it is still of general application, and thus applicable to First Nations under s. 88 of the *Indian Act*, which provides that "…*all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province*…". Justice Fregeau also looked to prior jurisprudence to uphold the principle that a trust claim may be advanced in relation to an improvement that is on federal lands, including First Nations land.

The court also rejected Pro-Gen's argument that the imposition of a trust on the holdback under the *Construction Act* is inconsistent with s. 89(1) of

the *Indian Act* as it amounts to a seizure of property of an "Indian or band". Since First Nation expressly disclaimed an interest in the holdback, it could not be "seized" as First Nation's property. Additionally, the court again referred to the intention of the parties under the contract, which was to establish the holdback for the benefit of the unpaid subcontractors and suppliers of Razar — there was never an intention for the holdback to be attributable to First Nation.

3. The CRA does not have priority or a trust in respect of funds in a construction project unless those funds are the property of the CRA's debtor

The court also rejected the CRA's argument, finding that the holdback cannot be characterized as the property of Razar or a debt payable to it. The court found that the deemed trust only gives the CRA a beneficial right to the funds that the contractor (Razar) actually holds, and not funds over which the contractor has no claim. Accordingly, the deemed trust under the ITA could not apply to give the CRA priority.

This conclusion was further supported by the fact that, pursuant to the terms of the contract, First Nation had exercised its right to take the work out of Razar's hands, which extinguished any right Razar had to the holdback.

In the end, the court granted the interpleader order, and permitted First Nation to deposit the holdback with the court. The relative entitlements of the various claimants to the fund are being determined among them in a summary proceeding to follow.

KEY TAKEAWAYS

Key takeaways for the construction industry include these:

(i) A trust claim under the *Construction Act* may be advanced in connection with an improvement on federal or First Nations lands by subcontractors and suppliers;

(ii) The intention of the parties to the contract, and the characterization of holdbacks or other funds, is critical and may be determinative of who has priority or an interest in those funds;

(iii) If an owner disclaims an interest in funds held back, those funds may not be properly characterized as the property of the owner, thereby immunizing the owner from disputes among other claimants to the fund; and

(iv) The CRA's entitlement to statutorily or contractually retained funds only applies if the funds can be characterized as the property of the CRA's debtor or a debt payable to it.

Ontario Superior Court of Justice

Northwest Angle 33 First Nation v. Razar Constructing Services Ltd.
J.S. Fregeau J.
February 21, 2023

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WHAT IS PROGRESSIVE DESIGN-BUILD?

Progressive Design-Build (PDB) emerged as a project delivery model in Canada when many owners, consultants and contractors sought to mitigate cost and schedule risks resulting from the COVID-19 pandemic. PDB has quickly gained traction, particularly in complex and high-risk transit projects. This article provides an overview of the PDB process and looks at key factors when considering this project delivery model.

Most are familiar with Design-Build, whereby the design and construction services are contracted to a single entity known as the design-builder. The design-builder is responsible for all work on the project, often providing a turnkey solution for the owner. Although the use of subcontractors to complete more specialized work is common, the design-builder remains the primary contact and primary force behind the work.

The common challenge with this approach lies in the transfer of risk from the owner to the design-builder after the Request for Proposal (RFP) is awarded. Contractors are often hampered in their execution of the work by unknown conditions, which often result from inadequate access to the project site before submitting their response to the RFP. Considering these inconveniences, a new project delivery method emerged in the market — the PDB method.

The PDB model features a collaborative approach between the owner and its contracting partner during the early work of projects such as project requirements and design work. It introduces additional steps that enable the owner and design-builder to progressively develop a design solution before jumping directly into detailed design and construction.

The owner selects the design-builder largely based on expertise through a Request for Qualifications (RFQ). The primary driver of this process is not necessarily price competition on the overall design-build contract price, but rather on the value the contractor can provide. Once the design-builder is chosen, the design-builder delivers the project in two distinct phases.

First is the Preconstruction Services stage, whereby the design-builder collaborates with the owner and its consultants to create or confirm the project's basis of design, and then advances that design. Decisions are based on cost, schedule, operability, life cycle and other considerations, with the design-builder providing ongoing, transparent, cost estimates to maintain the owner's budgetary requirements. When the design has achieved an appropriate level of definition adhering to the owner's needs, the design-builder will provide a formal commercial proposal for Phase 2 services.

Phase 2 only commences once the owner and design-builder agree upon commercial terms (including the price and timeline). This is often called the Final Design and Construction Services stage, and generally also includes any testing, commissioning, and other services that have been agreed upon.

According to the Design Build Institute of America, if, for any reason, the parties cannot reach agreement on the Phase 2 commercial terms, then the owner may have the right to exercise an "off-ramp", where it can use the design and move forward with the project through a design-bid-build procurement, with another design-builder, or any other way it deems appropriate.

PDB OFFERS SEVERAL KEY ADVANTAGES.

1. **Collaboration and risk transfer.** The owner(s), consultants, and contractors have an opportunity to work more collaboratively to develop design, reduce risk and finalize pricing before contracting for project implementation. A significant benefit is that the creativity and expertise of design-builders is promoted, and the project's value is maximized as early as the design phase. Working collaboratively during the design phase facilitates efficient risk transfer to the party best placed to manage that risk. Collaboration can reduce project costs and disruptive delays or claims compared to a standard Design-Build approach.
2. **A short procurement cycle.** A PDB model saves the design consultants time and money putting together a submission that may never move past the RFP stage. Additionally, they can better understand project requirements, as well as owner and stakeholder expectations —

enabling them to tailor the design to meet project needs while understanding or minimizing risks.

3. **Increased competition.** With inflation and supply chain issues impacting the delivery of many construction projects, owners need to focus on ensuring optimum value for their capital investments. By reducing risks and eliminating the time and cost required to prepare an RFP response, more contractors and consultants will be willing to participate, thereby increasing the quality and size of the competition. Beyond the owner's target price, the final pricing is developed gradually over the development phase.

Despite these positive attributes, there are several reasons that an owner may not be interested in, or even able to use, PDB. These include the following considerations:

1. **Awarding without full competition.** Some owners find awarding a construction contract without full price competition on the overall design-build contract price to be politically impractical and prefer to have price factored into the selection process. They may also feel uncomfortable in negotiating the commercial terms of the arrangement.
2. **Subcontractor procurement challenges.** Procurement regulations may require subcontractors to be procured competitively. This can take away from the collaborative benefits of the PDB model and deprive the project of valuable subcontractor input during the design process.
3. **Exercising the off-ramp.** Owners may be uncomfortable in exercising the "off-ramp" in the event the parties cannot reach commercial agreement on the design-builder's proposal.

Once an owner has decided to proceed with the PDB model, the next consideration is the form and content of the contract. While PDB contracts are similar to Fixed-Price Design-Build contracts, there are some important differences. A few key considerations of contract issues in a PDB model include:

- **Cost estimating.** The contract should specifically state what work the design-builder will perform for the Preconstruction Services stage, including the extent and frequency of cost estimating and modeling.
- **Ability of the design-builder to access and rely upon owner-provided information.** Due to the design-builder's early involvement in the design process, there is a question as to how to treat information obtained by the owner before the design-builder was involved (e.g. geotechnical reports). Owners and design-builders should make informed decisions about the cost-benefit of the design-builder's access and reliance on previously completed studies.
- **Early work packages.** The contract should address the processes for the owner's development and authorization of early work packages. This includes procuring subcontractors and evaluating self-performance of the design-builder.
- **Subcontractor and vendor procurement.** The contract should address how subcontractors and vendors will be procured and the owner's role in that process. Likewise, the parties need to address the role that these parties may play in the Preconstruction Services stage and how this relates, if at all, to their involvement in the Final Design and Construction Services stage.
- **Commercial Proposal.** The form and content of the commercial proposal should be thoroughly addressed in the contract.
- **Off-ramp.** This should be clearly addressed in the contract. In particular, the rights of the owner to use information from the first stage for subsequent procurements associated with the project should be clearly established. Finally,

the parties need to determine the process for obtaining bonds from the design-builder.

CLOSING THOUGHTS

PDB is an excellent option for complex projects with design and/or construction challenges, where the design-builder can provide very early input on design or constructability issues. Complex projects also benefit from high level, intense collaboration and teamwork. As complex projects are difficult to price, PDB's collaborative, open book pricing allows the parties to make more realistic pricing assumptions with a better understanding of the risks involved. Despite these features, there are key contextual factors and contractual issues involved in proceeding with the PDB model.

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APPELLATE RESTRAINT AND COMMERCIAL REASONABLENESS IN COMMERCIAL ARBITRATION

The British Columbia Court of Appeal's recent decision in *Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.* highlights three important aspects of commercial arbitration appeals:

- First, *Spirit Bay* clarifies that commercial reasonableness is an important interpretative aid in contractual interpretation but is neither determinative of a contract's meaning nor a standalone requirement that overrides other considerations.
- Second, *Spirit Bay* illustrates a restrained approach to appellate review of arbitral awards: even if an arbitrator misstates the law, an appellate court generally will not intervene unless the error affected the award.
- Third, *Spirit Bay* leaves open the issue of whether *Canada (Minister of Citizenship and Immigration) v. Vavilov* changes the standard of review on a statutory appeal of an arbitral award. A majority of the Supreme Court of Canada has yet to resolve this issue.

BACKGROUND

Spirit Bay concerned a commercial dispute between a builder, Scala Developments Consultants Ltd., and the developer of a large residential development project, Spirit Bay Developments Limited Partnership.

In 2015, Spirit Bay and Scala signed a contract whereby Scala would construct houses on lands leased by Spirit Bay and would receive a series of fixed payments upon achieving certain construction milestones. The contract provided that either party could terminate on 60 days' notice and that, upon termination, Spirit Bay would pay "all moneys owed" to Scala.

In 2018, Spirit Bay terminated the contract and asked Scala to complete its work-in-progress. Within a few months, the parties reached an impasse on payment, and Scala stopped work.

Scala commenced an arbitration seeking damages for unpaid invoices. Spirit Bay commenced a counterclaim seeking damages for negligent construction work.

THE ARBITRATOR'S DECISION

The arbitrator ruled in Scala's favour, awarding it over $1.7 million for unpaid invoices and lost profits, and dismissing Spirit Bay's counterclaim.

In reciting the law on contractual interpretation, the arbitrator stated that the parties' post-

contractual conduct may be considered "*regardless of whether there is ambiguity in the contract*". The arbitrator also stated that "*a contract must be interpreted … in a commercially reasonable manner*". The arbitrator also referred to and applied principles of unjust enrichment.

On the evidence, the arbitrator found that the parties had entered into a second contract whereby Scala would complete the houses it was still working on at the time of termination, and Spirit Bay would pay for that work. The arbitrator also found that this contract ended when Spirit Bay improperly appropriated money that should have been paid to Scala.

THE B.C. SUPREME COURT'S DECISION

The B.C. Supreme Court allowed Spirit Bay's *Arbitration Act* appeal in part. The court held that, although the arbitrator had misstated the law on contractual interpretation, these errors did not affect the award. However, the court also held that the arbitrator had erred by applying principles of unjust enrichment in a contract dispute.

THE B.C. COURT OF APPEAL'S DECISION

The Court of Appeal dismissed Spirit Bay's appeal, allowed Scala's cross-appeal, and restored the arbitrator's award. In doing so, the Court of Appeal reached four main conclusions.

First, the Court of Appeal held that the arbitrator misstated the law on post-contractual conduct. Post-contractual conduct may be considered only if the contract contains ambiguity — not, as the arbitrator stated, "*regardless of whether there is ambiguity*". But the Court of Appeal held that this misstatement did not affect the award, so it declined to intervene.

Second, the Court of Appeal held that the arbitrator "*somewhat overstated*" the law on commercial reasonableness. The Court of Appeal clarified that commercial reasonableness is an "*important interpretive aid*" — even a "*crucial consideration*" — in interpreting a contract, but it is not "determinative" or a "*standalone requirement overriding other considerations*". But the Court of Appeal again held that this misstatement did not affect the award, so it declined to intervene.

Third, the Court of Appeal held that the arbitrator's references to unjust enrichment principles were "*unnecessary*" and "*potentially confusing*" because his award was rooted in contract. Again, the Court of Appeal held that these references did not affect the award, so it declined to intervene.

Fourth, the Court of Appeal left open the issue of whether *Vavilov* changes the standard of review on a statutory appeal of an arbitral award. The Court of Appeal held that, since the outcome of the appeal did not turn on the standard of review, it would leave the issue for another day.

KEY TAKEAWAYS

- **Commercial reasonableness.** Commercial reasonableness is an important interpretative aid in contractual interpretation but is neither determinative of a contract's meaning nor a standalone requirement overriding other considerations. The guiding principle of contractual interpretation remains constant: a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of contract formation.
- **Appellate restraint.** Even if an arbitrator misstates the law, an appellate court generally will not intervene unless the error affected the award. *Spirit Bay* continues a broader trend of appellate restraint in Canada on review of commercial arbitral awards.
- **Standard of review.** The issue of whether *Vavilov* changes the standard of review on a statutory appeal of an arbitral award remains unsettled.

Although three concurring justices in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* stated that the *Vavilov* framework applies on a statutory appeal of an arbitral award — and therefore questions of law are subject to correctness review — the majority in *Wastech* declined to resolve the issue. Absent a majority ruling, the issue remains unsettled.

British Columbia Court of Appeal

Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.
S. Stromberg-Stein, J.J.L. Hunter and L. Marchand JJ.A.
December 7, 2022

CITATIONS

Canada (Minister of Citizenship and Immigration) v. Vavilov, appeal from Federal Court of Appeal dismissed: [2019] S.C.J. No. 65, 2019 S.C.C. 65, [2019] 4 S.C.R. 653

Canadian Pressure Testing Technologies Ltd v Ellis-Don Industrial Inc., [2022] A.J. No. 1169, 2022 ABKB 649

Construction Act, R.S.O. 1990, c. C.30, s. 8

Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure), [2022] O.J. No. 1044, 2022 ONCA 187

Crosslinx v. Ontario Infrastructure, [2021] O.J. No. 2819, 2021 ONSC 3567

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Indian Act, R.S.C. 1985, c. I-5, s. 89(1)

Northwest Angle 33 First Nation v. Razar Constructing Services Ltd., [2023] O.J. No. 1296, 2023 ONSC 1233

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Prompt Payment and Construction Lien Act, R.S.A. 2000, c. P-26.4

Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd., [2022] B.C.J. No. 2357, 2022 BCCA 407

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, [2021] S.C.J. No. 7, 2021 SCC 7