CONSTRUCTION LAW LETTER

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TRUMP TARIFFS: IMPLICATIONS FOR CONTRACTORS

Shortly after becoming President-elect in November 2024, Donald Trump announced that, on his first day in office (January 20, 2025), he would introduce a 25 per cent tariff on all products from Canada and Mexico coming into the United States. While there has since been much speculation as to the veracity and strategic intent of this announcement, the potential implications to Canada's construction and infrastructure industry are significant as the costs of products essential to construction could immediately increase upon the introduction of any such tariffs.

The question thus arises — will contractors and trades be able to recover these increased costs under their contracts?

Fortunately, unlike construction cost increases caused by inflation or supply chain impacts, standard form stipulated price contracts generally include terms that expressly provide for adjustment to the contractor's compensation when there are changes in taxes and duties. For example, paragraph 10.1.2 of the CCDC 2 – 2020 Stipulated Price Contract (CCDC 2) provides as follows:

> *10.1.2 Any increase or decrease in costs to the Contractor due to changes in taxes and duties after the time of the bid closing shall increase or decrease the Contract Price accordingly.*

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CONSTRUCTION
LAW LETTER

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Similar relief is provided to the Trade Contractor under paragraph 10.1.2 of the CCDC 17 – 2010 Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects (CCDC 17).

Therefore, where a contractor is party to an unamended CCDC 2 or CCDC 17, if Trump's tariffs come into effect (after bid close) and increase the contractor's costs, the Contract Price should be adjusted accordingly in accordance with paragraph 10.1.2.

Contractors should note, however, that this is a double-edged sword — if tariff changes later result in a decrease to the contractor's costs, the owner could then rely on paragraph 10.1.2 to request a decrease to the Contract Price (e.g., if Trump later repeals or reduces the same tariffs).

Not all contracts, however, include terms that directly address what happens if tariffs change. For example, the CCDC 5B – 2010 Construction Management Contract for Services and Construction (CCDC 5B) does not include a clause similar to paragraph 10.1.2 of the CCDC 2 and CCDC 17. Presumably, this is because under the CCDC 5B the construction manager's compensation includes the actual "Cost of the Work", which is defined in Article A-7 to expressly include "*taxes, other than* Value Added Taxes, *and duties relating to the* Work for which the Construction Manager *is liable*".

Therefore, if tariffs increase after bid close under an unamended CCDC 5B, the construction manager will be entitled to recover the full amount of such tariffs as part of the cost of the work to be paid by the owner.

Notably, however, where the cost of the work is subject to a guaranteed maximum price, the CCDC 5B does not provide for this guaranteed amount to be adjusted when tariffs change. As a result, the construction manager could become liable for increased costs caused by tariff increases where these costs cause the guaranteed maximum price to be exceeded. For this reason, it is recommended that, where possible, the construction manager seek to have terms added to the CCDC 5B that provide for adjustment to any guaranteed maximum price upon any change in tariffs after bid close.

In summary, given the potential for tariff changes during Trump's presidency, it is recommended that contractors review their contracts (both existing and future) to determine what, if any, relief is provided to them if tariffs change. Where contracts are silent on the point, it is likely that the contractor will not be able to recover these costs. Therefore, whenever possible, it is recommended that the contractor seek to have terms added that provide for adjustment to the contractor's compensation upon any change in tariffs after bid close, similar to paragraph 10.1.2 of the CCDC 2.

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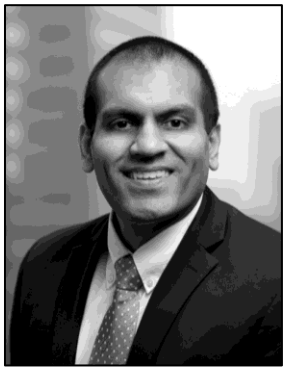

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PRACTICAL CONSIDERATIONS FOR NAVIGATING TARIFF RISK ON CONSTRUCTION PROJECTS

As the second Trump administration begins, developers, contractors, subcontractors and suppliers are evaluating the extent of the construction industry's international ties — and contractual exposure to potential tariff increases. While President Trump has been forthright about his intent to impose and increase tariffs, he has not provided details about which products, goods, and countries may be affected.

This uncertainty leaves many in the construction industry concerned, and both upstream and downstream parties are carefully negotiating contractual risk of changes in tariffs. Broadly speaking, tariffs are typically considered import (or export) taxes imposed on goods and services imported from another country (or exported). In the United States, Congress has the power to set tariffs, but importantly, the president can also impose tariffs under specific laws (most notably in recent years, the *Trade Act* of 1974), citing unfair trade practices or national security.

Many different contractual provisions may be impacted by the introduction of new tariffs: tax provisions, *force majeure* provisions, change in law provisions, and price escalation provisions, for example. Procurement contracts routinely rely on Incoterms, which allocate tariff risk to either buyer or seller depending on the selected Incoterm. Negotiating an appropriate allocation of risk of changing tariffs can be as much an art as science and requires consideration of how tariffs are administered and their effects on the market. For example:

- Tariffs are paid by the importer of record to U.S. Customs and Border Protection. If a contractual party is not the importer of record, such party will not be directly liable for payment of tariffs.
- Instead, tariffs raise the ultimate cost of goods or services because importers increase their price to buyers to account for the tariffs.
- Tariffs also tend to indirectly increase the cost of goods or services related or equivalent to the goods or services subject to tariffs by raising demand for domestic or non-affected substitute goods or services.
- Some goods and services are higher risk than others (e.g., goods originating from China, and potentially in a second Trump administration, goods originating from Canada and Mexico). Understanding the extent of the international reach of a construction project's supply chain is key to evaluating exposure, as well as negotiating relief or entitlement to cost increases due to new or increased tariffs.

Having a working knowledge of how tariffs are implemented and their impacts on related markets is key to assessing contractual risk. In traditional risk management theory, the party best able to

control the risk should assume the risk. Here, the imposition of new tariffs by the executive branch is beyond the reasonable control of both parties to a construction or procurement contract; however, each party may have the ability (and should be appropriately incentivized) to minimize and mitigate the negative risk of new or increased tariffs.

A supplier may choose to source goods from less risky countries, even if the cost of such goods is incrementally higher than their Chinese equivalent in the short term. A buyer may choose to enter into a master supply agreement, allowing the buyer to set a long-term fixed price on a guaranteed volume of goods that in turn permits the seller to better forecast its demand and supply chain. Many developers and contractors negotiate shared risk of changed tariffs, establishing a change order threshold or cost-sharing ratio. Parties may also consider circumstances under which changed tariffs could impact project finances sufficient to justify significant delays or even termination. Ultimately, those who consider and carefully negotiate provisions addressing changes in tariffs will be better prepared to face and manage their economic impact.

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GLOBAL VANTAGE: ADJUDICATION IN CANADA – LESSONS FROM ACROSS THE POND

On October 1, 2019, Ontario became the first province in Canada to adopt an adjudication regime comparable to statutory adjudication under the *Housing Grants, Construction and Regeneration Act 1996* (the "Act") in England and Wales. In this article, we consider how the adjudication landscape has developed in Canada over the past five years and what the domestic construction industry can expect moving forwards.

WHAT IS ADJUDICATION?

Adjudication is an interim dispute resolution method, designed to provide a decision by an independent third party that is binding on the parties until the dispute can be determined by court proceedings, arbitration, or settlement. It is often described (with some merit) as a "rough and ready" process, its intention being to help resolve construction disputes cheaper and faster (typically, in 30 days or less) than traditional forms of dispute resolution such as litigation and arbitration.

ADJUDICATION IN ENGLAND AND WALES

In England and Wales, the right to adjudicate on qualifying construction contracts and crystallised disputes "at any time" has been available since the Act came into force in 1996.

While adjudication under the Act was initially designed to help resolve simple payment disputes, over the past two decades (for better or for worse) it has grown in popularity and scope, and statutory adjudication is now regularly used in relation to complex, high-value matters. Statistics from Kings College London's *2023 Report on Construction Adjudication* in the United Kingdom emphasises this point, with a regular flow of approximately 2,000 annual referrals to adjudicator nominating bodies over the past five years.

ADJUDICATION IN CANADA

By comparison, construction adjudication in Canada is a relatively new concept. However, the current direction of travel suggests that there's certainly an appetite for it within the domestic market. Since Ontario introduced its adjudication regime in 2019,

similar legislation has been enacted in the provinces of Saskatchewan and Alberta and, in December 2023, the *Federal Prompt Payment for Construction Work Act* came into force, which introduces adjudication on federal construction projects. Other provinces have also passed similar legislation, albeit this is not yet in force.

Despite construction adjudication in Canada and certain of its provinces being in its infancy, matters concerning adjudication are already finding their way to the courts.

- The recent decision in *Ledore Investments v. Dixin Construction* in the Ontario Divisional Court is one such example, which considers issues of procedural fairness and the availability of judicial review as a means of setting aside an adjudicator's decision. Ultimately, the court in *Ledore* found that there had been a breach of procedural fairness, in that the adjudicator had reached a decision based on an issue that had not been pleaded or relied upon by either of the parties, and judicial review was held to be available in those circumstances.
- Another example is *MGW-Homes Design Inc. v. Domenic Pasqualino* where the Court of Appeal for Ontario was asked to consider the appropriate court in which an appeal of an order vacating a writ of enforcement (i.e., preventing the successful party from enforcing the decision) issued in connection with an adjudicator's decision should be heard. This turned on whether the appealed order constituted a "judgment" for the purposes of s. 71 of Ontario's *Construction Act*. The Court of Appeal in *MGW* found that the relevant order <u>*did*</u> constitute a "judgment" in this context (noting the *Construction Act*'s purpose of promoting efficiency and a trend towards a "broad interpretation" of the term "judgment"), and therefore that the appeal lay to the Divisional Court.

For the time being, the regimes in Canada focus, to varying degrees, on governing issues concerned with prompt payment and protecting cash-flow and, while the different pieces of legislation often do, with the agreement of the parties, allow adjudication to be used to resolve disputes more widely (i.e., other than in relation to payment), there seems to be somewhat of a reluctance to do so. Statistics from *Ontario Dispute Adjudication for Construction Contracts' 2023 Annual Report* (ODACC) demonstrate that of the 161 adjudications completed during the fiscal year, only three related to matters outside of the specific categories identified in Ontario's *Construction Act*. However, as experience of adjudication begins to develop, we expect to see the scope of referrals grow similar to that under the Act in England and Wales.

One of the benefits that the new regimes in Canada have is the wealth of experience on which they can draw from overseas, allowing stakeholders to learn from what has and has not worked in other jurisdictions to make adjudication more user friendly and attractive. One example of this is the way in which ODACC, which is the sole authorised nominating authority for adjudicators under Ontario's *Construction Act*, makes use of a custom computer system to facilitate the administration of adjudications. Those with experience of managing multiple adjudications will appreciate the benefit that having a centralised system such as this offers. Similar "quality of life" improvements could mean that the ceiling for referrals in Canada is perhaps even higher than in England and Wales.

LESSONS FROM ACROSS THE POND

In England and Wales, we have over 25 years' experience of adjudication. While the Canadian regimes are not without their own unique features, we anticipate that many of the strategies that we have witnessed being used with success in England

and Wales will be of similar benefit to Canadian contractors and consultants. With that in mind, points for those considering adjudication to be aware of include:

- Understand the applicable law that governs your contract, and whether adjudication is available in the circumstances in which you find yourself. For example, in each of Ontario and Saskatchewan, unless the parties to the adjudication agree otherwise, an adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed. This is a more restrictive approach than the availability of adjudication "at any time" in England and Wales. Moreover, in each of Ontario, Saskatchewan and Alberta, a provision in a contract or subcontract that names a person to act as an adjudicator in the event of an adjudication is of no force or effect. You do not want to get to the point of referring the dispute, only to find that adjudication is unavailable, or the process is not as you anticipated.
- Given its expedited nature, if you are the party considering launching the adjudication, ensure that as much of the "groundwork" with regards to preparation and production of relevant materials is completed *before* you issue your referral. While there is always the risk that new matters crop up during the dispute, by "front loading" work, you give yourself a better chance of navigating the tight timescales. This offers an immediate upper hand over the opposing party.
- Aim to agree to a timetable as early as possible. In our experience, significant amounts of time can be spent over the course of an adjudication simply going back and forth on the dates for submissions (and subsequent extensions to them). This not only increases the potential costs of the process but also takes away time that could be used scrutinising the more substantive points in dispute. It also runs the risk of creating a negative impression on the adjudicator.
- Avoid tunnel vision. While it may seem obvious, it can be easy to lose sight of the bigger picture and the commercial context when you are amid a dispute and dealing with the pressures of some very serious allegations. However, the decision to adjudicate is not one to be taken lightly and it is important to complete a thorough investigation of the advantages and disadvantages/risks and understand the "end goal" should you be successful (as well as the worst-case scenario).

CONCLUSION

The appetite for statutory construction adjudication across Canada does not appear to show signs of slowing down any time soon. Alongside Ontario, Saskatchewan and Alberta, we understand that legislation is in force, close or being mooted which introduces adjudication regimes in Manitoba, British Colombia, Nova Scotia, New Brunswick, and Quebec. Therefore, forward thinking contractors and consultants could do worse than to familiarise themselves with the basic tenets of adjudication, and how it may be of use for (or against) them on projects in Canada. If our experience in England and Wales serves as a guide, it seems only a matter of when, not if, adjudication comes to a Canadian project near you.

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CASE NOTE: *IN THE MATTER OF RE CLARKSON ROAD DEVELOPMENTS GP INC.*

The issue of lien priorities versus mortgage priorities under s. 78 of the *Construction Act* (the "Act") was recently reviewed in the case of *Re Clarkson Road Developments GP Inc.* ("*Clarkson Road*").

The Act provides that a lien will have priority over advances made under a mortgage after the lien claimant has given written notice of the claim to the mortgagee, or after a Claim for Lien has been registered on title.

In general, lien claims take priority over mortgages that have been placed after the first lien in connection with improvements to the property (s. 78(1) of the Act).

An improvement is defined in the Act as follows:

> "improvement" means, in respect of any land,
>
> (a) any alteration, addition or capital repair to the land,
>
> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
>
> (c) the complete or partial demolition or removal of any building, structure or works on the land;

A lien arises "*when the person first supplies services or materials to the improvement*" (s. 15).

There are exceptions to the general priority of liens. Specifically, mortgages that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent described in s. 78(3) of the Act.

In *Clarkson Road*, a mortgagee (i.e., CS Capital Ltd.) brought a motion for an order declaring that its mortgage registered on title to a property, located at 1101 to 1125 Clarkson Road North in Mississauga (the "Property"), had priority over all lien claims. The mortgagee's motion was dismissed. Justice Cavanagh found that the services and materials provided by the lien claimant were supplied prior to the registration of the mortgage.

The timeline of events was as follows:

> **2013 to 2016 —** The mortgagee was owned by Al Pace and his wife. Between 2013 and 2016, corporate entities controlled by Al Pace (the "Pace Entities") purchased parcels of land that were assembled into the Property.
>
> **2018** — The Pace Entities obtained a zoning bylaw amendment permitting the construction of 136 four-storey stacked townhouse dwellings and two three-storey commercial buildings on the Property.
>
> **2018 to 2020** — The Pace Entities hired the architectural firm KFA Architects and Planners Inc. to, among other things, work on obtaining zoning and to do design work.
>
> **September 2020** — Work at the Property stopped, and the focus shifted to finding a buyer for the Property.
>
> **2021** — The buyer that the Pace Entities found was 2813427 Ontario Inc. (the "Purchaser").

March 30, 2021 — The mortgagee, the Purchaser and other entities enter into a share purchase agreement (the "SPA").

July 30, 2021 — A sale and purchase transaction was completed, and a mortgage was registered (the "Mortgage").

September 2021 — The Purchaser began the construction of a 176-unit stacked townhouse development. Kenaidan Contracting Ltd. was hired to manage this work. KFA was hired to provide construction drawings, construction review, and as-built drawings for this work. Kenaidan hired all other trades and consultants.

2023 — Due to the Purchaser and others becoming insolvent, corporations working at the Property, including Kenaidan, began registering liens on the Property. All of the liens are for Kenaidan's work or for work done for Kenaidan.

As set out by Justice Cavanagh, in order to determine whether the mortgage had priority over the liens pursuant to s. 78(3) of the Act, it was necessary to decide whether the mortgagee has shown that the first lien (in respect of the improvement under which the liens arose) arose *after* July 30, 2021, when the mortgage was registered. In other words, did the first lien arise under KFA's work that began in 2018 (before work was stopped and the Property sold), or did the first lien arise when the Purchaser began its construction in September 2021? If the former, the liens would have priority over the mortgage. If the latter, the mortgage would have priority over the liens. Justice Cavanagh decided on the former.

Justice Cavanagh found that there was ample evidence that the improvement in respect of which the liens arose related to the same improvement in respect of which liens arose prior to registration of the mortgage. The definition of "improvement" in the Act does not include language showing that services or materials supplied under separate contracts in relation to the same project must be treated as having been supplied in respect of separate improvements.

Justice Cavanagh found that KJA's proposal in 2018 described the same project as its proposal in 2021, i.e., the creation of a four-storey stacked townhouse development, two commercial buildings, and two levels of underground parking.

Justice Cavanagh found that extensive work was done for the project prior to the registration of the mortgage on July 30, 2021. At paras. 44-45, Justice Cavanagh stated:

> *The fact that there were several contracts in respect of this project does not support the conclusion that the supply of services or materials under separate contracts, including construction contracts, were in respect of separate improvements. I find that the services and materials supplied by Kenaidan in respect of which its lien arises were in respect of the same improvement as the improvement in respect of which the KFA lien arose for services supplied prior to registration of the Mortgage.*
>
> *I conclude that the Mortgage was not registered prior to the time when the first lien arose in respect of the improvement from which Kenaidan's, and the other lien claimants', liens arise. As a result of this conclusion, s. 78(3) of the Act does not apply….* [the mortgagee] *has a subsequent mortgage which is governed by s. 78(5) and s. 78(6) of the Act.*

SECTION 78(6) OF THE ACT: VENDOR TAKE-BACK (VTB) MORTGAGES VS. COLLATERAL MORTGAGES

Section 78(6) of the Act provides that:

> *Subject to subsections (2) and (5), a conveyance, a* ***mortgage*** *or other agreement…****that is registered after the time when the first lien arose*** *in respect to the improvement,* ***has priority over the liens*** *arising from the*

> *improvement* ***to the extent of any advance*** *made in respect of that conveyance, mortgage or other agreement, unless,*
>
> > *(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or*
> >
> > *(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.*
>
> (emphasis added)

Another issue presented in *Clarkson Road* was whether there was an advance in respect of the Mortgage.

Under the SPA (see timeline above), the purchase price was to be paid, as to an amount equal to $20 million, by the Purchaser making payments of principal pursuant to the terms of the "VTB Mortgage". Justice Cavanagh found that the "VTB Mortgage", as defined in the SPA, and the mortgage were one in the same. There was a VTB Mortgage Agreement dated July 30, 2021, which provided that the repayment of the mortgage shall be secured by, among other things, a "[f]*irst-priority charge registered in favour of the Mortgagee against the Property securing the Principal Amount (the 'Mortgage')*".

The mortgage was registered on July 30, 2021and provides in article 1.01:

> **1.01 Collateral Charge**
>
> This Charge is a collateral charge…in connection with a VTB Mortgage Agreement dated July 30, 2021.

The mortgagee argued, citing *Scott, Pichelli & Easter Ltd. v. Dupont Developments Ltd*. ("*Scott*"), that the mortgage is a VTB Mortgage in respect of which an advance was made. In *Scott*, a VTB Mortgage was given by the purchaser of the land to the seller as partial payment of the purchase price of the land. In *Scott*, Lauwers J.A., writing for the court, held, at para. 11, that a VTB Mortgage is the equivalent of an advance for the purposes of the Act. Justice Cavanagh would be bound by *Scott*.

The question in this case was whether the mortgage is a true VTB Mortgage given in partial payment of the purchase price for the conveyance of the beneficial ownership of the Property, or whether it was a collateral mortgage in respect of which no advance was made.

After reviewing the details of the SPA and related agreements, including article 1.01 of the mortgage itself, Justice Cavanagh held that it was the latter, i.e., the mortgage was a collateral mortgage.

Justice Cavanagh concluded that, "[as] *a result, there was no advance made in respect of the Mortgage within the meaning of s. 78(6) of the Act. The Mortgage does not have priority over the* [Liens] *under s. 78(6) of the Act*". *Clarkson Road* is a refresher in lien priorities under the Act and offers insight into when funds advanced by a lender to a borrower will be considered an "advance" for the purposes of s. 78 of the Act.

Ontario Superior Court of Justice

Clarkson Road Developments GP Inc. (Re)
P.J. Cavanagh J.
August 20, 2024

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ARE YOUR INVOICES FOR CONSTRUCTION SERVICES AND/OR MATERIALS SUPPLIED TO AN IMPROVEMENT "PROPER"? LESSONS FROM *ARCAMM v. AVISION*

Contractors supplying construction services and/or materials to an improvement must render "proper invoices" to rely on and take advantage of the "Prompt Payment" regime set out in Part I.1 of Ontario's *Construction Act*.

A "proper invoice" is a written bill or other request for payment for services or materials in respect of an improvement under a contract which meets the requirements listed in s. 6.1 of the Act, and, subject to the prior certification of a payment certifier or on the owner's prior approval, as contemplated by s. 6.3(2) of the Act, meets any other requirements that the contract specifies.

Arcamm v. Avison, et al., is a reminder that contractors need to be cognizant of the new requirements applicable for their invoices given the "strict definition" of proper invoices under s. 6.1 of the Act to capitalize on the Prompt Payment regime.

By way of example, and as highlighted in the *Arcamm* case, a contractor's reliance on, and ability to take advantage of the Prompt Payment regime under the Act, will be impacted by:

- the contractor's failure to clearly set out the period during which the services and materials subject of the invoice were supplied. In particular, the contractor's invoice(s) cannot simply refer to the end date of the supply of the services and materials;
- the contractor's failure to identify in its/her/his invoice(s) the authority under which the services or materials were supplied. That is, the proper invoice regime under the Act requires that a contractor's invoice(s) reference the governing contract or other authority that the services or materials were being supplied under; and
- the contractor's failure to specify in an invoice(s) the name, title, telephone number and mailing address of the person to whom payment is to be sent.

TAKEAWAY: INVOICES FOR CONSTRUCTION SERVICES AND MATERIALS MUST COMPLY WITH THE ACT

Adapting to change can be challenging and daunting, but, based on the *Arcamm* decision, maintaining outdated invoicing practices will lead to complications with contractors receiving payment under the Prompt Payment provisions in respect of invoices for construction services and materials supplied to an improvement.

Although many successful contractors have likely maintained consistent invoicing practices for years regarding their construction services and materials supplied to improvements, the reality is that the Act

now mandates specific elements for proper (monthly) invoicing. Compliance with these specific elements is necessary to benefit from the Prompt Payment regime, which legally requires payment by an owner to a contractor unless a notice of non-payment is given within the prescribed timeline.

Ontario Superior Court of Justice
Arcamm v. Avision
E.C. Sheard J.
February 17, 2023

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SASKATCHEWAN COURT OF KING'S BENCH AFFIRMS PURPOSE OF LIEN PAYOUT PROVISION IN *THE BUILDERS' LIEN ACT*

The Saskatchewan Court of King's Bench recently released its decision for *DW Earnshaw Excavating v. 7-Eleven Canada Inc.*

The matter involved an application by DW Earnshaw Excavating to the court under s. 56(9) of *The Builders' Lien Act* (the "BLA"). A lien claimant, whose registered claim of lien or written notice of a lien has been vacated *but who has not been able to prove his claim*, may apply to the court under s. 56(9) of the BLA (the "Lien Payout Provision"), after notifying any affected persons, for an order requiring the money paid into court be paid out to the person(s) who are found entitled to receive the funds. DW Earnshaw relied on this section in its application.

The issues addressed by the court included the following:

1. Does the Lien Payout Provision of the BLA authorize the court to determine the validity of liens and order payments to the entitled person(s)?
2. Did the claim have to be served on the contractor?

FACTUAL BACKGROUND

7-Eleven Canada Inc. had hired the contractor BLS Asphalt Inc. in 2016 to build a convenience store in Weyburn, Saskatchewan on a property owned by 7-Eleven. It was agreed between 7-Eleven and BLS that the project would cost $1,657,499. BLS hired multiple subcontractors to work on the project, and DW Earnshaw was one of them. 7-Eleven paid BLS the amount of $1,520,653, and BLS issued a Certificate of Substantial Performance on November 29, 2016, meaning that the contract between the owner and the contractor had been completed. The amount of $136,846.45 remained outstanding as part of a holdback agreed to as per the terms of the contract between 7-Eleven and BLS.

Between November 21, 2016 and February 16, 2017, six subcontractors registered claims of lien which were all paid out by BLS by March 6, 2017. On March 9, 2017, after 7-Eleven approved contract changes totalling $59,903, two more

subcontractors registered their claims of lien on March 9, 2017 and April 6, 2017 respectively. On March 29, 2017, 7-Eleven released the holdback on the understanding that BLS would use it to discharge the first lien registration and to pay any other claims of lien.

7-Eleven then applied to the court to vacate the last two liens on payment into court of the full amount claimed plus security for costs. The amount of $59,903 plus GST was paid into court by 7-Eleven in accordance with an order that was made pursuant to s. 56(2) of the BLA. By doing so, the liability of 7-Eleven became limited to the affected lien claimants, thus vacating all liens from 7-Eleven's property, and leaving the lien claimants to apply to the court for money owed.

APPLICATION FOR PAYOUT OF LIEN FUNDS

DW Earnshaw, as one of the lien claimants, applied for payment of the funds out of court, relying on the Lien Payout Provision of the BLA, and asked that the funds be paid out on a *pro-rata* basis to all lien claimants with a valid claim. DW Earnshaw also asked for the court's directions about the process for lien claimants to prove their lien claims. All other lien claimants argued that no such instruction was necessary because they had already filed with the court sufficient evidence showing the validity and amount of their lien claims.

JUDGMENT FROM THE COURT OF KING'S BENCH

The court was unable to grant the order that DW Earnshaw was seeking and dismissed the application without limiting the ability of the remaining lien claimants to bring further applications that would be supported by evidence validating their lien claims — provided that advance notice was given to the affected parties.

The court acknowledged that the amount of the funds in court was limited. However, while the BLA directs that the procedure is to be summary (or simplified) in nature to reduce expenses related to the enforcement of liens, the Lien Payout Provision of the BLA did not apply in the circumstances before that court. The provision was intended for lien claimants who could not prove their claim in situations where liens had been vacated. The provision did not provide a mechanism for the court to determine the validity of lien claims.

The court explained that the relief sought by DW Earnshaw could only be granted after the court determined who was entitled to the funds and what the proportionate share was between the entitled persons. Further, DW Earnshaw could apply for a relatively quick determination of the matter by bringing a summary judgement application before the court. None of the lien claimants had made such an application, and only DW Earnshaw had provided evidence of the amount it was owed by the contractor.

Further, the contractor had not been properly notified of the application. Therefore, even if the Lien Payout Provision of the BLA had applied in the circumstances, the court would not have granted the remedy sought.

KEY TAKEAWAYS

The decision in *DW Earnshaw Excavating v. 7-Eleven Canada Inc.* affirms that the purpose of the Lien Payout Provision of the BLA is to provide a mechanism for the payout of funds paid into court in order vacate lien registrations, not to determine whether the liens were valid in the first place. Further, in situations where the provision applies, the decision underscores the necessity of ensuring that all procedural requirements for seeking a remedy have been met.

Saskatchewan Court of King's Bench

DW Earnshaw Excavating v. 7-Eleven Canada Inc.
P.T. Bergbusch J.
November 27, 2023

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APPEAL OF AN ARBITRATION AWARD IN ALBERTA: A PRINCIPLED TWO-STEP FRAMEWORK

In its recent decision in *Quanta Canada Holdings II ULC v. Bremar Construction Ltd*., the Alberta Court of King's Bench established a principled framework for considering an application for permission to appeal an arbitral award under ss. 44(2) and 44(2.1) of the *Arbitration Act*. In Alberta, if the governing arbitration agreement does not provide a broader right of appeal, permission to appeal under s. 44 is limited to questions of law where the importance to the parties of the matters at stake in the arbitration justifies an appeal and the determination of the question of law at issue will significantly affect the parties' rights.

The court canvassed inconsistent caselaw interpreting these requirements and the scope of available appeals of an arbitral award, largely hinging on a particular judge's sense of what is important to the parties. To promote certainty, the court set out a more principled two-step framework focused on materiality.

The court's decision provides a helpful and objective guide for appellants wishing to appeal arbitral awards under s. 44(2) of the Act, as well as to respondents looking to uphold an arbitral decision without resort to appeal.

BACKGROUND

Quanta Canada Holdings II ULC entered into a prime contract with ENMAX for the design, materials, construction and installation of a 1.5 kilometre underground duct bank and manhole system beneath the streets of downtown Calgary. The duct bank and manhole system was to be made up of concrete encased pipes or conduits containing electrical transmission cables.

Quanta subsequently entered into a subcontract with Bremar Construction Ltd. using the Canadian Construction Association (CCA) 1-2008 Stipulated Price Subcontract for the installation of the duct bank. Quanta and Bremar agreed to submit all disputes arising from the subcontract to arbitration pursuant to the CCDC 40 Rules. The subcontract did not provide for the appeal of arbitral awards.

Quanta required Bremar to remove and replace the sections of duct bank and held back a significant portion of the subcontract price, so Bremar commenced an arbitration against Quanta seeking the cost of performing the work and the holdback. Bremar claimed that, among other things, Quanta had caused delays and failed to perform its work properly, which caused defects in sections of the duct bank. Quanta defended, asserting that Bremar was the cause of delays and failed to perform its work diligently.

The arbitrator ultimately found against Quanta and awarded Bremar $8,137,116 plus 80 per cent of its reasonable legal fees, plus disbursements and arbitration expenses.

SEEKING PERMISSION TO APPEAL

Quanta applied for permission to appeal the arbitral award under s. 44 of the Alberta *Arbitration Act*. The court noted that s. 44 limits appeals of arbitral awards to questions of law unless the parties agree to a broader right of appeal. The relevant portions of s. 44 provide:

> *1. If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.*
>
> *2. If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law.*
>
> *2.1. The court shall grant the permission referred to in subsection (2) only if it is satisfied that:*
>
> *(a) The importance to the parties of the matters at stake in the arbitration justifies an appeal, and*
>
> *(b) The determination of the question of law at issue will significantly affect the parties.*
>
> *3. Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.*

Because the subcontract did not provide for an appeal on a question of law, fact or mixed law and fact, permission to appeal could be granted only if the appeal (a) concerned a question of law, and (b) satisfied the two-part test set out in s. 44(2.1).

The court noted that the s. 44(2.1)(a) requirement has not been interpreted consistently. Candidly, the court acknowledged that previous decisions have lacked a principled framework and have instead hinged on the particular judge's own "idiosyncratic senses" of what was important to the parties.

The court held that s. 44(2.1) is a materiality test, meaning that to justify an appeal being heard by the court, it must have a significant effect on the parties' rights in a way that is important to the parties. To promote certainty, the court established a two-step principled approach for the application of s. 44(2.1)(a):

1. Where the determination of rights, not the value of the dispute, is asserted to satisfy the importance requirement, the appellant bears the burden to establish that the proposed appeal's impact on the parties' rights alone is important to the parties. This can be accomplished by showing that the decision has a material effect on the conduct of a party's business or by demonstrating the proposed appeal's precedential value to the parties or the public. Public in this sense includes a sub-set of the public such as participants in an industry.
2. Where an impact on rights is established and where the value of the dispute is alleged to be the basis that the proposed appeal is important to the parties, the appellant must first establish that the value of the appeal is material to the dispute. If the proposed appeal has the potential to reverse a significant part of the arbitral decision measured in money terms, then it is material to the dispute. For this purpose, it is useful to adopt an informal guideline as to materiality. For present purposes, in our view, an appeal must be credibly valued at 25 per cent or more of an arbitral decision to qualify as material. If the appellant establishes that the value of the appeal is material to the dispute, the court may consider evidence of the size and financial capacity of the parties to determine whether the appeal is nevertheless unimportant to the parties.

Since the proposed appeal in *Quantas* concerned $5,121,518 (63 per cent of the total $8,137,116 arbitral award), the court held that the value of the appeal was material to the dispute, and therefore important to the parties. Further, when considering whether the size and financial capacity of the parties renders the appeal unimportant, courts must respect the separate corporate personality principle and focus only on the parties to the dispute. As a result, the fact that Quanta was part of an international corporate group with a parent company with over $15 billion in assets was irrelevant to whether the dispute was unimportant to Quanta.

In this case, the proposed appeal concerned the interpretation of a widely used standard form construction contract. Because the parties were involved in the construction industry, the court held that both parties had an interest in settling its meaning. Accordingly, the court found that there was precedential value and that the proposed appeal was important to the parties and the broader construction industry.

After concluding that s. 44(2.1) was satisfied, the court proceeded to determine whether the grounds of appeal were questions of law that could be appealed under s. 44(2). The court concluded that even though the subcontract was a standard form contract, the dispute was not about the interpretation of the standard subcontract terms, but about the arbitrator's fact finding and application of the subcontract terms to the facts of the case. The court found that these grounds of appeal were questions of mixed fact and law, which could not be appealed, and dismissed the application for permission to appeal.

CONCLUSION

The court's decision in *Quanta* provides a helpful framework to govern the application of s. 44(2.1)(a) and the availability of appeals of arbitral awards. The decision also carries important implications for solicitors. In particular, it is more important than ever to discuss appeal rights from the start and expressly address the issue when drafting arbitration agreements. If the arbitration agreement does not include a clause permitting the appeal of an arbitral award, parties to the agreement will be limited to appeals on questions of law even if the materiality test set out in s. 44 is satisfied. Parties can expect courts to continue to be cautious in identifying questions of law, consistent with the principles laid down by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*.

In the context of potential appeals, parties also need to be mindful in selecting the legal seat of arbitration. *Quanta* is currently the law in Alberta, but rules governing appeals from domestic arbitral awards are different in other provinces across Canada. That said and as noted by the court in *Quanta*, similar "importance to the parties" language is also found in appeal provisions of arbitration statutes of other provinces. Ontario courts, for example, have yet to develop criteria similar to that set down in *Quanta* to guide the application of the "importance to the parties" limb of the permission (leave) to appeal test in s. 45 of the *Arbitration Act*, having been satisfied to date where parties agree or do not contest that a matter is important to them and where some evidence is adduced of the financial significance of the dispute.

Alberta Court of King's Bench

Quanta Canada Holdings II ULC v. Bremar Construction Ltd.
C.C.J. Feasby J.
May 29, 202

CITATIONS

Arbitration Act, R.S.A. 2000, c. A-43

Arbitration Act, 1991, S.O. 1991, c. 17

Arcamm v. Avison, et al., [2023] O.J. No. 863, 2023 ONSC 1151

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DW Earnshaw Excavating v. 7-Eleven Canada Inc., [2023] S.J. No. 421, 2023 SKKB 252

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Scott, Pichelli & Easter Ltd. v. Dupont Developments Ltd., [2022] O.J. No. 4879, 2022 ONCA 757

The Builders' Lien Act, S.S. 1984-85-86, c. B-7.1