CONSTRUCTION CASE LAW UPDATE

WED, JUN 22, 2022

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CASES TO REVIEW

- ***Crosslinx v. Ontario (Economic Development, Employment and Infrastructure)*, 2021 ONSC 3567**
- ***Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)*, 2022 ONCA 187**
- ***BCIMC Construction Fund Corp et al. v. 33 Yorkville Residences Inc. et al.*, 2022 ONSC 2326**
- ***Tower Restoration v. Attorney General of Canada*, 2021 ONSC 3063**
- ***Elite Construction Inc. v Canada*, 2021 ONSC 562**
- ***SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254**
- ***H.R. Doornekamp Construction Ltd. v. Canada (Attorney General) (Department of Public Works and Government Services)*, 2022 ONSC 2247**

Crosslinx v. Ontario (Economic Development, Employment and Infrastructure), 2021 ONSC 3567

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CROSSLINX V. ONTARIO INFRASTRUCTURE, 2021 ONSC 3567

Facts

- The Ontario Infrastructure Lands Corporation and Metrolinx (“Owners”) entered into an agreement with Crosslinx Transit Solutions General Partnership (“Project Co”) to build the Eglinton Cross Light Rapid Transit line (“ECLRT”).
- Provision 62.1(c) of the Project Agreement allowed the owners to require Project Co to implement “additional or overriding procedures” in the event of an Emergency.
- In such a case, Project Co could trigger a Variation Enquiry to determine whether the implementation of these measures should lead to an extension of the Substantial Completion date.

CROSSLINX V. ONTARIO INFRASTRUCTURE, 2021 ONSC 3567

Facts continued…

- In March 2020, Project Co wrote to the owners asking them to declare an emergency and direct Project Co to take “additional and overriding measures”.
- The owners took the position that they would not declare an emergency and that they had not required any measures to be implemented.
- Furthermore, the owners relayed that Project Co was already required to implement Protocols and public health measures to comply with all their obligations under the Occupational Health and Safety Act (“OHSA”).

CROSSLINX V. ONTARIO INFRASTRUCTURE, 2021 ONSC 3567

Issue

1. Was Covid-19 Pandemic an emergency under the project agreement so that owners required compliance with additional and overriding measures to protect public health?
   a. If so, was Project Co entitled to a variation enquiry under the project?

CROSSLINX V. ONTARIO INFRASTRUCTURE, 2021 ONSC 3567

Analysis

- Covid-19 was an Emergency under the terms of the contract that defined an Emergency as requiring “additional and overriding measures”.
- Ontario notified Project Co that compliance with the COVID Protocols was required.
- While Project Co had obligations under the *OHSA*, this did not mean Project Co had accepted all the risks of the pandemic when they entered into the agreement.

CROSSLINX V. ONTARIO INFRASTRUCTURE, 2021 ONSC 3567

Significance

- Contractors should give as early notice as possible and follow applicable contractual procedures, rather than waiting until the end of the project to raise claims related to the pandemic.
- The court refused to allow a narrow reading of the project agreement, which stipulated that all health and safety risks were allocated to contractors.
  - Public health measures arising in response to the pandemic cannot be said to already be contemplated within the *OHSA*.

Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure), 2022 ONCA 187

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

This Appeal concerns Notice requirements in Section 62.1(c) of the Project Agreement which reads:

- If, **in respect of any Emergency**, HMQ Entities ("Ontario") **notify Project Co that they require compliance with any additional or overriding procedures** as may be determined by HMQ Entities or any other statutory body, **then Project Co shall, subject to Schedule 22 - Variation Procedure** (if compliance with such procedures constitutes a Variation), **comply with such procedures** (whether such procedures are specific to the particular Emergency or of general application and on the basis that such procedures shall take precedence to the extent that they overlap with the procedures mentioned in Section 62.1(a) or (b).[2]

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

Appellant's position:

- Application judge erred in interpreting an internal email by MetroLinx's Chief Safety Officer on March 25, 2020 that read:
  - "Once we have [the governments COVID protocols] we will include adoption of the requirements in our site visit observations, whilst respecting social distancing and the need to protect our teams and our contractors also".
- Application judge erred in finding that the appellants' email was sent to Project Co and as such, constituted notification under s. 62.1(c).
- Project Co never received this email notification, asking that they comply with additional or overriding procedures - thus they didn't receive proper notice to proceed with a variation enquiry, as required in the Project Agreement.

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

Respondent's position:

- The respondents argue that the application judge's finding that they were notified as required by s. 62.1(c) can be supported by substituting the March 25, 2020 internal email with the appellants' April 21, 2020 letter that was sent to the respondents.
  - The April 21 letter read that Ontario did not require any additional and overriding procedures in addition to those the respondents had already undertaken to comply with their health and safety obligations required by law.

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

ONCA Analysis:

- March 25 email was an internal email that was not sent to the Project Parties.
- As such, the March 25 email could not have notified the Project Parties of the required compliance with the COVID Protocols and thus, could not be used a basis for the Project Parties to claim for additional time for delays caused by implementing the protocols.
- A “Notice” under s. 61.1 of the Project Agreement must be in writing and delivered by registered mail, facsimile transmission followed by registered mail, or personal service.
  - No evidence as to whether the April 21, 2020 letter met these requirements.
  - Regardless, the April 21 letter was ambiguous and Ontario never indicated that the letter or any of its letters constituted notice under s. 62.1(c)

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

Disposition:

- Declined to dismiss the application, as requested by the Appellant.
  - not appropriate for a Court of Appeal to engage in fact finding processes which determine whether a variation enquiry ought to have been initiated or not.
- Allowed the appeal, set aside the application judge's judgment and costs order, and remitted the application to the Superior Court for directions.
- Up to the parties to decide whether they wish to proceed with the rehearing before another judge of the Superior Court.
- Appellant entitled to costs.

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP V. ONTARIO, 2022 ONCA 187

Significance

- Confirms the importance of complying with notice provisions in a construction contract.
- Notice requirements should be clearly communicated prior to the contract and written within the contract to avoid future uncertainty or disputes on what constitutes a notice.

Tower Restoration v. Attorney General of Canada, 2021 ONSC 3063

TOWER RESTORATION V. ATTORNEY GENERAL OF CANADA, 2021 ONSC 3063

Facts

- The Government of Canada accepted a bid from a proponent (“Tower”) for the replacement of all the windows of a federal penitentiary.
- Tower was given a lump sum by Canada to complete the project.
- Tower incurred costs of $1,003,621.82 that it sought to recover from Canada.
- Canada rejected the claim and issued a final decision.
- The terms of the dispute resolution clause required Tower to dispute the decision within 15 days. Tower failed to do so.

TOWER RESTORATION V. ATTORNEY GENERAL OF CANADA, 2021 ONSC 3063

Facts continued..

- Two years later, Tower commenced legal proceedings against the decision.
- Canada brought a motion for summary judgment, asking the Court to dismiss Tower's action for failing to provide a Notice of Dispute in accordance with the provision of the contract.
- Tower took the position that the case should proceed to trial so it could call further evidence to support its position that Canada, by its conduct, effectively waived strict compliance with the contractual notice provisions.

TOWER RESTORATION V. ATTORNEY GENERAL OF CANADA, 2021 ONSC 3063

Issue

1. Should summary judgement dismissing the Plaintiff's action be granted?

Analysis & Significance

- The Court found that the terms of the contract regarding the notice were "crystal clear" and expressed the policy rationale behind notice terms.
- The Court places a high standard on sophisticated commercial parties to follow their contracts with precision.

Similarly in…

Elite Construction Inc. v Canada,
2021 ONSC 562

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ELITE CONSTRUCTION INC. V CANADA, 2021 ONSC 562

Facts

- The contractor, Elite Construction Inc. (“Elite“), brought an action against the owner, Canada, seeking $4,165,772.77 in additional compensation under the contract for delays and extras.
- The contract contained two applicable notice provisions:
  - One requiring Elite to give Canada notice of its intention to claim for an extra, loss, or damage within 10 days of the alleged cause of same;
  - Another that required Elite to submit a Notice of Dispute to Canada within 15 days of the receipt of any decision or direction of Canada.

ELITE CONSTRUCTION INC. V CANADA, 2021 ONSC 562

Facts Continued…

- Canada moved for summary judgment on the basis that Elite failed to comply with the notice provisions of the contract, and was thereby precluded from pursuing its claim.
- Elite argued that it provided notice of its claims in various forms, including Contemplated Change Order Summaries, informal email and letter correspondence, and requests for extension of time.

Issue

1. Should summary judgement dismissing the Plaintiff's action be granted?

ELITE CONSTRUCTION INC. V CANADA, 2021 ONSC 562

Analysis

- The court did not accept Elite's various attempts to deliver notice, as they did not strictly comply with the provisions agreed to in the contract.
- The court heavily favored strict compliance in the interpretation of notice principles and discussed the benefits of this approach:
  - Parties are able to focus on the immediate dispute and adjust their positions while the rest of the work in the contract continues;
  - Ensures that the contractor will be compensated for additional costs either during the work or later, if they comply with the provisions of the clause and notice requirements;
  - Allows the owner to consider their options to pay the contractor or dismiss the notice.

ELITE CONSTRUCTION INC. V CANADA, 2021 ONSC 562

Significance

- A contractor intending to pursue a claim against an owner must adhere to contractual notice provisions, or risk having its claim dismissed entirely.
- A failure to comply with notice provisions acts as a bar to a contractor's claim, even in the absence of prejudice to the owner.

H.R. Doornekamp Construction Ltd. v. Canada (Attorney General) (Department of Public Works and Government Services), 2022 ONSC 2247

H.R. DOORNEKAMP CONSTRUCTION LTD. V. CANADA, 2022 ONSC 2247

Facts

- Canada had awarded a contract to the Doornekamp Construction Ltd. (contractor) to re-face the concrete on a lock in the Trent Severn Waterway.
- Doornekamp made a claim for additional compensation under the contract, Canada denied the claim and Doornekamp contested that assessment.
- Canada took "a second look", approving a small portion of the claim. Thereafter, Doornekamp did not dispute the decision. No "Notice of Dispute" was given.

H.R. DOORNEKAMP CONSTRUCTION LTD. V. CANADA, 2022 ONSC 2247

Facts continued…

- The contractor commenced legal proceedings to obtain the funds.
- Canada brought a summary judgment motion to dismiss the action, and submitted that Doornekamp was bound by the "Dispute Resolution Clause" of the contract and that, as a result, it conceded any right it might otherwise have had to sue Canada.
- The contractor accepted the dispute resolution process, but argued that the condition precedent for a decision (the need to consult and co-operate) was not met by Canada and that this issue required trial.

H.R. DOORNEKAMP CONSTRUCTION LTD. V. CANADA, 2022 ONSC 2247

Issue

1. Should the appeal from a motion for summary judgment brought by the defendant seeking the dismissal of the action be granted?

H.R. DOORNEKAMP CONSTRUCTION LTD. V. CANADA, 2022 ONSC 2247

Analysis

- The court found that whether or not Canada had satisfied the obligation to consult and cooperate, and thereby complied with the condition precedent, there was a genuine issue requiring a trial.

- It was not possible on a motion for summary judgment to determine whether Doornekamp's rights under the dispute resolution clause have been extinguished - this required a trial.

H.R. DOORNEKAMP CONSTRUCTION LTD. V. CANADA, 2022 ONSC 2247

Significance

- Notice provisions will not be interpreted and applied in a vacuum. They must be interpreted upon a reading of the entire contract, and in all of the circumstances, in an effort to determine the intention of the parties.
- Contractual conditions precedent (such as the obligation to consult and cooperate) are important and must be met.
- Contract drafting must be clear in order to constitute the meaning behind phrases such as “consultation and cooperation” to avoid future litigation regarding its meaning and whether its been met.

SOTA Dental Studio Inc. v. Andrid Group Ltd., 2022 ONSC 2254

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SOTA DENTAL STUDIO INC. V. ANDRID GROUP LTD., 2022 ONSC 2254

Facts

- SOTA retained Andrid Group (contractor) to perform work on the construction of a dental clinic in Vaughan.
- The contractor invoiced SOTA for its work. SOTA did not dispute the invoices within the prescribed time, making them due and payable pursuant to section 6.4 of the *Act*.
- An adjudication was held, and the adjudicator ordered SOTA to pay contractors $38,454.55 for work performed.
- SOTA did not make payment in accordance with section 13.19(2) of the *Act.*
- SOTA was granted leave to bring an application for judicial review of the adjudicator's determination but did not seek a ‘stay’ of the adjudicator’s decision in the interim.

SOTA DENTAL STUDIO INC. V. ANDRID GROUP LTD., 2022 ONSC 2254

Issue

1. Did SOTA fail to bring a motion to stay the determination of the adjudicator's decision?

Analysis

- when leave for judicial review is granted, the applicant is faced with two options: (1) obtain a motion to stay or (2) adhere to the prompt payment provisions of the *Act.*
- If the court permitted adjudicators' orders to be ignored while considering applications for judicial review, parties could run up costs and cause further delay.

SOTA DENTAL STUDIO INC. V. ANDRID GROUP LTD., 2022 ONSC 2254

Significance

- This case highlights the importance of complying with prompt payment provisions in contracts and the *Act.*
- Stays must be established on proper evidence in the context of a motion for stay - inability to pay is not proper evidence.

BCIMC Construction Fund Corp et al. v. 33 Yorkville Residences Inc. et al., 2022 ONSC 2326

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BCIMC CONSTRUCTION FUND CORP ET AL. V. 33 YORKVILLE RESIDENCES INC. ET AL., 2022 ONSC 2326

Facts

- This case involved three lien claimants (BCIMC Construction Fund) who had provided services to an owner of a condominium property, which was now insolvent and in receivership.
- The property was sold pursuant to a court order.
- The three lien claimants were unpaid, and no holdback had been retained by the project owner.
- Section 22(1) of the *Act* provides that the project owner is required to retain a 10 per cent holdback for each potential lien claimant.
- Section 78(2) of the *Act* provides that lien claimants have priority over “building mortgage” to the extent of any deficiency in the holdback.

BCIMC CONSTRUCTION FUND CORP ET AL. V. 33 YORKVILLE RESIDENCES INC. ET AL., 2022 ONSC 2326

Facts continued…

- Construction Act s. 78(2): Building Mortgage

  > (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

- The claimants argued that the reference in s. 78(2) to "a mortgage" in the singular meant that they were entitled to a priority of 10 per cent against each building mortgage.
  - There were two building mortgages.
  - Under their interpretation of s. 78(2), they would each be entitled, in effect, to 20 per cent, rather than the holdback of 10 per cent.

BCIMC CONSTRUCTION FUND CORP ET AL. V. 33 YORKVILLE RESIDENCES INC. ET AL., 2022 ONSC 2326

Issue

1. Whether liens had priority, to the extent of deficiency in the holdback required to be retained by the owner, over each separate building mortgage or over all building mortgages combined?

BCIMC CONSTRUCTION FUND CORP ET AL. V. 33 YORKVILLE RESIDENCES INC. ET AL., 2022 ONSC 2326

Analysis

- The lien claimants' priority in respect of the deficiency took effect against the first mortgagee, because it was a building mortgage.
  - Once effect was given to that priority, there was no more deficiency.
- *Ontario's Legislation Act*, 2006 provides that "words in the singular include the plural and words in the plural include the singular", and thus concluded that "not much weight can be placed on the use of the singular 'mortgagee' and 'mortgage'" in the *Act.*

BCIMC CONSTRUCTION FUND CORP ET AL. V. 33 YORKVILLE RESIDENCES INC. ET AL., 2022 ONSC 2326

Significance

- When a project owner is in receivership, lien claimants are limited to priority over all building mortgages combined, rather than each mortgage separately.
- Lien claimants' statutory priority over building mortgages will be limited to a maximum of 10 percent of the price of the services or materials actually supplied to the project.

PRESENTER

Tristan Neill

Associate– Gowling WLG

tristan.neill@gowlingwlg.com

+1 519-575-7517

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