Canadian College of Construction Lawyers

LEGAL UPDATE

CANADIAN College of CONSTRUCTION Lawyers Inc. | Le Collège CANADIEN Des Avocats en droit de la CONSTRUCTION INC.

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Editor's Note

The development of good faith as a basic organizing principle in contractual relations remains a hot topic in Canadian law. In some jurisdictions, this is nothing new. Specifically, the concept of dealing in good faith in contracts is already well established in the *Civil Code of Quebec*. Similarly, the Uniform Commercial Code of the United States of America requires contracting parties to deal in good faith.

However, the source of the duty of good faith in these places is legislative. Judge-made good faith is more radical. For example, in the absence of an express statutory or contractual requirement, courts in the United Kingdom have generally been reluctant to import the concept. There is scope here for a uniquely Canadian approach. We are seeing an increasing number of reported cases on this subject, and are about to see more.

On that note, a tip of the hat to CCCL Fellow Trish Morrison for bringing to our attention the work of two of her BLG colleagues, Peter Banks and Tiffany Bennett, who prepared a summary of two cases recently argued before the Supreme Court of Canada, one from B.C. and one from Ontario, challenging rejection of good faith claims by the respective appellate courts of those provinces. The cases were heard on December 6, 2019 and judgment was reserved. We await the release of these decisions in 2020 with interest.

On the same theme, an additional tip of the hat to Honourary CCCL Fellow Justice Graesser for bringing to our attention a recent case comment prepared by Professor Jassmine Girgis of the University of Calgary on an Alberta Court of Queen's Bench decision dismissing an action by an aggrieved bidder alleging bad faith in a tendering process.

Thank you to Mr. Banks, Ms. Bennett and Professor Girgis for allowing their work to be reproduced here.

Editor’s Note

In addition, for this final Legal Update of 2019 we bring to your attention a recent Ontario Court of Appeal decision on surety bonds, and an Ontario Master’s decision examining the scope of litigation privilege in the context of a demand for production in a lawsuit of a consultant’s report prepared for a major infrastructure project in trouble.

Happy holidays, and all the best for 2020. With these pending Supreme Court decisions on good faith and ongoing roll-out of legislative reform on liens, it promises to be an interesting year in our area of practice, and my colleagues and I on the Legal Update Committee therefore look forward to receiving your updates.

Brendan

Update:
Supreme Court of Canada to Hear Two New Cases on Good Faith in Contract

LU #155 [2019]

Primary Topic:
I General
Jurisdiction:
Canada
Authors:
Peter Banks and
Tiffany Bennett,
Borden Ladner Gervais

CanLii References:

2019 BCCA 66

2018 ONCA 896

CANADA

Update: Supreme Court of Canada to Hear Two New Cases on Good Faith in Contract

Five years after its landmark decision in *Bhasin v Hrynew*, 2014 SCC 71, on December 6, 2019 the Supreme Court of Canada heard two new cases on good faith in contract. The Supreme Court in *Bhasin* introduced to Canadian jurisprudence the general organizing principle of good faith in contract. This is not a "free-standing rule", but rather "a standard that underpins and is manifested in more specific legal doctrines", exemplifying the idea that a contracting party should have appropriate regard to its counterparty's legitimate interests.[1] Flowing from this is a common law duty of honest contractual performance. The Court held that this duty means parties may not lie to or mislead each other about the performance of the contract but does not otherwise equate to a duty of loyalty or disclosure. *Bhasin* has been widely cited in case law and discussed in academic commentary. The two upcoming appeals provide a ripe opportunity for the Supreme Court to address further issues arising out of its earlier decision.[2]

Decisions under Appeal

The two appeals that bring the Supreme Court back to the notion of good faith in contract law are expected to clarify the parameters of good faith as a general organizing principle and the specific scope of the duty of honest contractual performance. Each of the cases under appeal deals with circumstances beyond those addressed by the Supreme Court in *Bhasin* and raises important practical issues.

In *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2019 BCCA 66, a decision from the British Columbia Court of Appeal, the question is whether a contractual duty of good faith applies to restrict a party's exercise of discretion in the absence of a contractual term. Wastech Services Ltd. ("Wastech") and the Greater Vancouver Sewerage and Drainage District ("Metro") were parties to a 20-year contract for the disposal of sewage waste from the Vancouver regional district. The contract gave Metro the discretion to allocate waste between certain disposal facilities and contained detailed provisions for certain payment adjustments in specific circumstances.[3] In 2011, Metro exercised this discretion in a manner that reduced its costs, but also impacted Wastech's profits.

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[1] *Bhasin v Hrynew*, 2014 SCC 71 at paras 64-65.

[2] *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, Supreme Court of Canada File No. 38601 and *C. M. Callow Inc. v Zollinger*, Supreme Court of Canada File No. 38463.

[3] *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2019 BCCA 66 [***Wastech***] at paras 20-29.

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The dispute proceeded to arbitration. Wastech argued that there should be a term implied into the contract that limited Metro's power to re-direct waste between the facilities without adjusting the rates it paid to Wastech, or otherwise compensating Wastech. However, the evidence was that the parties had made the decision not to include such a term in the contract, and, as such, the arbitrator refused to imply the term Wastech sought. Despite making this finding, the arbitrator then held that Metro breached its duty of good faith because, in the exercise of its discretion for allocating waste, it did not have appropriate regard to Wastech's interests. The British Columbia Supreme Court overturned the arbitrator's decision as it improperly expanded the concept of good faith beyond its scope. The British Columbia Court of Appeal upheld the lower court's decision, stating:

> Since the arbitrator had rejected the implied term as something the parties had intentionally excluded… he erred here in failing to apply the right test – namely whether Wastech had a *legitimate expectation arising out of the Agreement* that Metro would not exercise its discretion in the way it did. The answer to that question had to lie not in the financial effect of the re-allocation on Wastech, but in the Agreement. Only then could an expectation to this effect be described as "contractual"[4].

The Court of Appeal held that "this fact substantially *took away* from the argument in support of a breach of the duty of good faith."[5]

The second decision on appeal is the Ontario Court of Appeal's decision in *C.M. Callow Inc. v Zollinger*, 2018 ONCA 896. In this case, the appellant condominium corporations formed a Joint Use Committee ("JUC") to make decisions relating to the condominium corporations' shared assets. C.M. Callow Inc. ("Callow") and the condominium corporations entered into two maintenance contracts, one for summer maintenance and one for winter maintenance, respectively. The winter maintenance contract provided for early termination by the condominium corporations on ten days' notice. In March or April of 2013, JUC decided to terminate the winter contract, but did not provide Callow with notice of termination until September 2013, so as to avoid jeopardizing Callow's work under the summer contract.

Meanwhile, in the summer of 2013, Callow unilaterally performed free extra work, of which JUC was aware, with the hope that it would incentivize

[4] *Wastech* at para 68 (emphasis in original).

[5] *Wastech* at para 69 (emphasis in original).

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the condominium corporations to renew the two contracts upon their expiry. Nevertheless, in September of 2013, the condominium corporations terminated the winter maintenance contract on notice and Callow sued for breach of contract.

The trial judge found that the condominium corporations breached the contractual duty of honest performance. The Ontario Court of Appeal allowed the appeal on the basis that the trial judge had effectively modified the contractual right to terminate the contract and went beyond what the duty of honest performance requires or permits. The Court of Appeal held that there was no unilateral duty of disclosure, and that the duty of honest performance did not modify or otherwise limit the right to terminate the winter maintenance contract in accordance with its terms.

Implications

These important cases at the Supreme Court raise issues about the scope of good faith in contract post-*Bhasin*. The *Wastech* case raises the issue of how the general organizing principle of good faith manifests itself in the exercise of contractual discretion. The *Callow* case challenges the extent of any duty to disclose a decision to terminate a contract. We anticipate that the Supreme Court's decisions in these cases will provide further clarity on the application of the principles outlined in *Bhasin* and the impact of good faith on Canadian contract law.

Case Comment:

LaPrairie Works Inc v Ledcor Alberta Limited, 2019 ABQB 701(CanLII) -

Bidders Do Not Owe Duties of Fairness and Honesty to Other Bidders in Tendering Competitions

LU #155 [2019]

Primary Topic:
XII Tendering
Jurisdiction:
Alberta
Author:
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Associate professor,
Faculty of-Law,
University of Calgary

CanLii Reference:

2019 abqb 701

ALBERTA

Bidders Do Not Owe Duties of Fairness and Honesty to Other Bidders in Tendering Competitions

This case raises the interesting question of whether bidders in a tendering competition owe duties of fair play to other bidders. The plaintiffs asserted that a contract had been formed among the bidders, requiring the bidders to treat each other fairly in the bid preparation stage, and that this contract had been breached at their expense. In a judgment summarily dismissing this claim, Justice Michael Lema found that the plaintiffs had not discharged the onus of proving a contract existed (at para 57).

Decision

LaPrairie Works Inc. and Contractors Leasing Corp. ("LaPrairie") are the plaintiffs. They bid in an Alberta Government's Request for Proposals ("RFP") in relation to highway maintenance contracts. Ledcor Alberta Limited, P.T. Brown and Gary Mayhew ("Ledcor") are the defendants. Ledcor won the tendering competition. LePrairie asserted that a contract existed between the bidders, to treat each other fairly during the bid preparation phase, and that Ledcor had breached it. In separate proceedings, LaPrairie sued the Alberta Government for what it perceived to be shortcomings in the bid and selection process, and it settled those claims (at para 43). These latter proceedings had no bearing on this application (at para 43), as this application was about whether the parties had made a contract with each other before beginning to assemble their bids, not about whether Ledcor's bid was compliant (at para 6, p 4).

LePrairie argued that a contract between the bidders had been formed in one of two ways. First, that the bidders had expressly contracted with each other. Or second, that an implied contract had arisen due to the parties entering into the bidding process.

LePrairie's first argument was that the bidders had formed a contract between themselves to act fairly and honestly in the bid preparation stage.

Justice Lema laid out many portions of the affidavits and the cross-examination testimony in which LePrairie argued for the existence of a bidders' contract. He found that while there could have been an acknowledgment, understanding, or even an expectation that the bidders would act fairly and honestly while preparing their bids, that was not the same as reaching a contract, as in, "promising to behave in a certain way *in exchange for* a reciprocal promise" (at para 6, p 9, emphasis in original). The judge drew a distinction between the Alberta Government requiring fair and honest bidding, and the bidders agreeing amongst themselves to conduct themselves fairly and honestly in the bid preparation stage. The Alberta Government did have RFP rules, and each bidder needed to follow the rules to avoid the consequences of breaching them, such as disqualification of its bid, but that does not mean the bidders owe a duty to each oth-

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er, or had a contract with each other, to follow the rules (at para 6, pp 5, 9). Nothing prevents the bidders from contracting in this way, but the judge did not find any such agreement in this case (at para 6, pp 3, 4, 10).

In its second argument, LaPrairie argued that an implied contract had arisen between the bidders by virtue of their participation in the tendering process, through a multi-party or an inter-member contract. These types of contracts require a common set of rules to which parties agree to be bound, knowing and expecting other parties will do the same. Justice Lema found that the rules and requirements in the RFP did not address bidder conduct vis-à-vis other bidders in the bid preparation stage. This is unlike multi-party contracts, whereby the entry into a contest signals an intention to enter into contracts with other members (at paras 31-32), or inter-member contracts, whereby members, by virtue of their membership, enter into contracts with each other (at para 34).

Overall, Justice Lema did not find any evidence indicating that LePrairie had entered into a contract with Leduc to prepare their bids fairly and honestly, and that LePrairie had therefore not raised a genuine issue about the existence of a contract between the bidders.

Given that finding, the court went on to find that the Supreme Court of Canada case, *Bhasin v Hrynew*, 2014 SCC 71 (CanLII), was not applicable here, as the organizing principle of good faith and honest performance arises in the performance of a contract, and not in the absence of one (para 23).

As for other arguments made by LaPrairie, the court found that there was no gap to be filled via the implication of a bidders' contract, and that there was no public policy basis for implying a contract between bidders.

Analysis (*some of this analysis relies on Jassmine Girgis, "Tercon Contractors: The Effect of Exclusion Clauses on the Tendering Process" (2010) 49 Can Bus LJ 187)*

The tendering process is governed by a dual contract model, first established in *Ron Engineering & Construction Eastern Ltd v Ontario* (1981), 119 DLR (3d) 267 ("*Ron Engineering*"), which gives rise to "Contract A" and "Contract B". Contract A does not govern the relationships between the different bidders, at least, not without explicit reference. Rather, Contract A arises between each individual bidder and the owner or issuer upon the submission of the bid; the tender call constitutes the offer of Contract A in relation to the tender process and submission of the bid constitutes acceptance. Contract B, the subject matter of the bid, arises between the owner and the winning bidder.

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Integral to the tendering process is the implied duty of fairness found in Contract A, which allows bidders to submit bids while knowing that the issuer is subject to certain obligations. These obligations, as noted in this case, require the issuer to "play by the rules", in the sense of evaluating the bids fairly and acting honestly in selecting the winning bid (at para 6, p 10). The Supreme Court has articulated these obligations in several different cases, starting with *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999), 170 DLR (4th) 577 ("*MJB Enterprises*"), a case that confirmed and expanded the analysis in *Ron Engineering*. There, the Court recognized an implied obligation by issuers only to accept compliant bids (*MJB Enterprises*, at paras 40-41). In a later case, *Martel Building Ltd v Canada* (2000), 193 DLR (4th) 1 ("*Martel Building*"), the Supreme Court maintained that this duty to reject non-compliant tenders falls under a broader umbrella of fairness, which includes "an obligation to treat all bidders fairly and equally" (*Martel Building* at para 88). This, said the court, is "consistent with the goal of protecting and promoting the integrity of the bidding process…" (at para 88).

However, the duty of fairness is not guaranteed in tendering competitions; it can be excluded by the parties. After all, tendering is nothing more than a series of contracts to which contract law principles apply. Due to the "special commercial context" (*Tercon Contractors Ltd v British Columbia (Ministry of Transportation and Highways)* (2010), 315 DLR (4th) 385 ("*Tercon Contractors*") at para 67) in which it exists, it does import certain rights and duties for the parties, but these rights and duties are nothing more than implied terms, meaning they can be varied if the parties do so expressly by an exclusion of liability clause (oftentimes referred to as a "discretion clause" in the tendering context). *Tercon Contractors* is the most recent decision to conclude that the duty of fairness can be excluded (see also *MJB Enterprises* at para 40-41; *Kinetic Construction Ltd v Comox-Strathcona (Regional District)* (2003), 29 CLR (2d) 127, 2003 BCSC 1673, affd 245 DLR (4th) 262, 2004 BCCA 485 at para 31). The majority in *Tercon Contractors* stated, "[i]t seems to me that clear language is necessary to exclude liability for breach of [the duty of fairness in] the tendering process, particularly in the case of public procurement" (at para 71).

There has been plenty of concern about parties' ability to exclude the duty of fairness from the tendering process, the foundation of which is the fair and equal treatment of bidders (see, for example, S.M. Waddams, "Tenders for Construction Contracts" (1999), 32 CBLJ 308 at 309), as these obligations sustain the integrity of the dual-contract model. If an owner can judge tenders on non-disclosed standards, the dual-contract model, which protects owners and bidders and injects commercial certainty into the process, would cease to be utilized. As the court in *Double N Earth movers Ltd v*

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Edmonton (City) (2007), 275 DLR (4th) 577 said (at para 70),

The reciprocal obligations of owners implied in MJB Enterprises and Martel arose out [of] the expectation of bidders that if they undertook the significant time and expense involved in preparing a bid, their bids would each receive fair and equal consideration by owners during the evaluation of bids and the award of Contract B.

And yet, after *Tercon Contractors*, it became clear that the obligations of fairness could be excluded with a carefully drafted discretion clause.

This concern has most likely been alleviated with the Supreme Court's decision in *Bhasin*, where the court recognized "an organizing principle of good faith that underlies and manifests itself in various more doctrines governing contractual performance" (at para 63). The *Bhasin* Court did not define good faith and noted that what it means "depends on the context", but it did broadly say that "good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance" (at para 66). The court also recognized a general duty of honesty in contract performance flowing directly from the organizing principle of good faith. The Court said it meant simply that parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract" (at para 73). This duty of honesty is not an implied term and therefore cannot be excluded; "it operates irrespective of the intentions of the parties" (at para 74) and in that way, limits freedom of contract, much like the doctrine of unconscionability.

Exactly what the principle of good faith looks like in the context of tendering has not been considered since *Bhasin*, but *Bhasin* did mention the cases that first articulated the content of the duty of fairness in tendering processes. I predict it will look exactly the way it has always looked – bidders must be treated equally and fairly, and in particular, non-compliant bids must be disqualified. The basic requirements of "honest, candid, forthright or reasonable contract performance" from *Bhasin* would make it difficult to exclude the fair treatment of parties or award a contract based on undisclosed criteria.

Since this duty of fairness, or the organizing principle of good faith, is not free-standing, it cannot apply absent an underlying contract or responsibility. As Justice Lema noted, *Bhasin's* "animating principle focuses on good-faith performance of contracts, not the creation of a generalized duty of good faith behaviour" (*LaPrairie*, at para 23). Without an underlying contract, the bidders do not owe duties of fairness to each other.

Case Comment:

Lopes Limited v. The Guarantee Company of North America, 2019 ONCA 853

LU #155 [2019]

Primary Topic:
VIII. Bonds and Sureties
Jurisdiction:
Ontario
Authors:
Brendan D. Bowles, Partner, and
Myles Rosenthal, Student-at-Law,
Glaholt LLP

CanLII Reference:
2019 ONCA 853

ONTARIO

Case Comment: *Lopes Limited v. The Guarantee Company of North America*, 2019 ONCA 853

One of the many recent legislative changes in the Ontario construction industry is the requirement, under section 85.1 of the *Construction Act*, R.S.O. 1990, c. C.30, for surety bonds on public projects valued at $500,000 or more.

It can therefore be anticipated that bonds will become an increasingly important remedy for unpaid subcontractors and suppliers on Ontario public projects, and to the extent any other provinces follow this aspect of Ontario's legislative reforms, nationally, as well. In this context, it is worth paying attention to the Ontario Court of Appeal's recent decision upholding a subcontractor's claim on a labour and material payment bond, even in the face of a surety's defence that the unpaid subcontractor had fully mitigated its damages by securing a completion subcontract after the bonded contractor's default.

It is well established that an obligee may make a claim under a bond so long as the principal is in default and it is not in default. But what steps must an obligee take to mitigate its damages when making a claim?

The Ontario Court of Appeal recently considered this question in *Lopes Limited v. The Guarantee Company of North America*, 2019 ONCA 853 ("**Lopes**"). Lopes involved a construction project that was secured by both a performance bond, in favour of the owner, and a labour and material payment bond, in favour of the contractor and its subcontractors.

Before completing its scope of work, the original contractor abandoned the project, leaving many subcontractor invoices unpaid. The owner made a call on the performance bond and the surety exercised its option to procure a completion contractor to perform the original contractor's remaining scope of work.

The unpaid subcontractor secured a completion subcontract with the completion contractor under more favourable terms than those under the original subcontract. The subcontractor performed its obligations under the completion subcontract, was paid in full, and subsequently made a claim under the labour and material payment bond for the full amount owed to it by the original contractor.

The surety challenged the claim, arguing that because the subcontractor secured the completion subcontract under more favourable terms than those under the original subcontract, the subcontractor had fully mitigated its damages and thus was not entitled to make a claim under the bond for any amount.

Litigation ensued and summary judgment was granted in favour of the subcontractor. The case made its way up to a three-judge panel of the Court of

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Appeal, including Justices Feldman, Fairburn and Jamal. Giving its reasons orally, the Court unanimously dismissed the appeal, and upheld the lower court's Order granting summary judgment in favour of the subcontractor.

The Court noted that the case law on mitigation of damages is clear:

"the plaintiff [has] the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and [this] debars him from claiming any part of the damage which is due to his neglect to take such steps": Cockburn v. Trusts and Guarantee Co. (1917), 1917 CanLII 10 (SCC), 55 S.C.R. 264, at p. 267, citing British Westinghouse Electric Co. v. Underground Electric Railways Co., [1912] A.C. 673 (H.L.), at p. 689."

The Court held that the lower court correctly found that the subcontractor's decision to secure the completion subcontract was not a step taken to mitigate its losses with respect to the original contractor's breach of contract. The subcontractor secured the completion subcontract because the original contractor abandoned the project; not because it was unpaid. That said, even if the original contractor had paid the subcontractor's invoices in full, the subcontractor would still have secured the completion subcontract under more favourable terms than those under the original contract. Securing the completion subcontract was thus irrelevant with respect to the original contractor's breach.

Accordingly, this case reaffirms the principle that a claimant must always take reasonable steps to mitigate its damages. However, their must be a sufficient nexus between the claimant's actions following a breach, and the breach itself, in order for a Court to find that such actions were taken to mitigate the loss consequent on the breach.

Securing the completion subcontract did not prevent the unpaid subcontractor from collecting its unpaid accounts with the defaulting contractor from the surety. *Lopes* reaffirms the power of a remedy that can be exercised even where lien rights are expired, and with less solvency risk than a trust claim. Now that we have mandatory public project bonding in Ontario, it should be standard practice for counsel acting for unpaid subcontractors and suppliers on such projects to pursue a bond claim.

Case Comment:

Walsh Construction Company Canada v. Toronto Transit Commission

LU #155 [2019]

Primary Topic:
I. General
Jurisdiction:
Ontario
Authors:
Brendan D. Bowles, Partner, and
Jackie van Leeuwen, Student-at-Law,
Glaholt LLP

CanLII Reference:
2019 ONSC 5537

ONTARIO

Case Comment: Walsh Construction Company Canada v. Toronto Transit Commission

In *Walsh Construction Company Canada v. Toronto Transit Commission*, 2019 ONSC 5537 ("*Walsh*"), the Ontario Superior Court of Justice examined litigation privilege in the context of a complex multi-party dispute. Master McGraw's decision reaffirms that, properly understood, a claim of litigation privilege over a consultant's report is not easily maintained. According to *Walsh*, even where a consultant is retained after litigation has started and further litigation is contemplated, and moreover even if litigation is *one* purpose of the retainer, these factors may still not be enough to protect the consultant's report from disclosure. The facts must establish that litigation was the *dominant* purpose in creating the report in order to protect it from disclosure. This standard can be onerous on a major construction or infrastructure project, where consultants are often retained for multiple purposes and there can be several layers of claims processes. *Walsh* vividly demonstrates this disclosure risk.

Walsh arose out of one part of a $3.184 billion transit infrastructure improvement, the Toronto York Spadina Subway Extension ("TYSSE"), comprising six stations and an 8.6-kilometre tunnel. The TYSSE was a prominent project attracting considerable local public interest. Among other things, the work provided long-desired subway service to York University and was the first project by the Toronto Transit Commission ("TTC") extending beyond the boundaries of the City of Toronto into adjoining York Region.

However, the TYSSE was significantly delayed and over-budget, finally opening to the public after many years of construction in December 2017, two years late. The original 2015 opening date for the subway was initially extended to the end of 2016. When it became apparent that this was not achievable, the end of 2017 was publicly announced as the new opening date. Throughout construction, costs ballooned. As such, the TTC was under considerable public scrutiny and political pressure to control costs and deliver the subway extension without further delay.

By December 2014, it was clear that the TYSSE was in trouble. The Project was subject to numerous existing claims and litigation with more on the way. In this context, the TTC retained Bechtel Canada Co. ("Bechtel") as a consultant in respect of the entire TYSSE. TTC retained Bechtel pursuant to a Consulting Services Agreement, which stated that Bechtel's aim was to gather data, evaluate information, get a common understanding of the Project and prepare recommendations.

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Before the Bechtel Report was delivered and acted upon by the TTC, there had been no single third-party project manager who was contracted to the TTC in respect of all TYSSE construction work. Each of the six stations was constructed by a different builder, and the tunnelling portion was undertaken by two different entities. At issue in *Walsh* was the delay to the construction of one of the six stations, originally called Steeles West (now known as Pioneer Village), located on Steeles Avenue at the north end of the York University campus, along the border of the City of Toronto and York Region. Walsh Construction Company of Canada ("WCC") was hired by the TTC as general contractor for Steeles West station. WCC and TTC are now litigating various claims arising from WCC's work on Steeles West.

As reflected in *Walsh*, litigation related to Steeles West had begun before the Bechtel retainer. This included litigation commenced by WCC subcontractors, wherein WCC named TTC as a Third-Party defendant, and a lawsuit against TTC by the tunneling and excavation contractor whose scope of work included Steeles West. The lawsuit by WCC in which the litigation privilege motion arose had not yet been filed when Bechtel was retained. However, WCC had advanced claims under its contract against TTC before the Bechtel retainer, which claims were subsequently brought forward in WCC's lawsuit against TTC.

At issue in *Walsh* was whether certain portions of a February 2015 report prepared by Bechtel for the TTC, entitled the "Spadina Subway Extension Project Assessment Report" (the "Bechtel Report"), redacted in the version produced by the TTC in the litigation (the "Redacted Portions"), were subject to litigation privilege.

It should be noted that the subject matter of the Bechtel Report was broader than just the Steeles West portion of the Project; it covered the whole of the TYSSE. Moreover, a significant purpose in TTC commissioning the Bechtel Report was to assess the TYSSE Project and determine the fastest way to complete the work, including Steeles West Station.

After retaining Bechtel, TTC requested that WCC meet with Bechtel on a without prejudice basis to present its view of the issues on Steeles West. Before the meeting, TTC confirmed that Bechtel was not a claims consultant.

The CEO of TTC at the relevant time was Andy Byford (current President of the New York City Transit Authority). In his CEO Report, dated January 21, 2015, Mr. Byford stated that Bechtel was retained "to conduct a thorough,

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CanLII Reference:
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Case Comment: Walsh Construction Company Canada v. Toronto Transit Commission

in-depth analysis of the project." On March 26, 2015, Mr. Byford wrote a Staff Action Report, which set out four options for completion of the TYSSE and specified that "None of the options … address current contractor claims". Mr. Byford further stated that the Bechtel Report "…recommends that a comprehensive project 'reset' involving a new third-party project manager be undertaken to deliver the project by December 31, 2017 at an estimated budget increase of $150M." TTC acted on the Bechtel Report and hired Bechtel as project manager. After this "reset", the TYSSE indeed opened in December 2017, albeit with many parts of the work still subject to ongoing claims and litigation, including the *Walsh* case.

Turning our focus back to *Walsh*, in 2019, WCC challenged TTC's litigation privilege claims over the Redacted Portions and brought a motion which, in part, sought an order compelling TTC to produce an unredacted copy of the Bechtel Report.

In determining whether TTC should be required to produce the unredacted Bechtel Report, Master McGraw applied the test for litigation privilege, which required TTC to establish first, that litigation was contemplated when the Bechtel Report was created, and second, that the Bechtel Report was created for the dominant purpose of litigation.[1] Master McGraw also examined the evidence surrounding the creation of the Bechtel Report. The onus of establishing an evidentiary basis for a privilege claim was explained by Master Dash as follows in *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*:[2]

> The evidence must be specific and speak to the content of each document. The court could also look to the circumstances and the chronology of events to help in determining the dominant purpose for creation of the documents. It may also 'inspect the document for the purpose of determining … the validity of a claim of privilege' pursuant to rule 30.06 (d).

In applying the first part of the test to the Redacted Portions, Master McGraw relied on the reasoning of Master Dash in *McNally International*

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[1] *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Company*, 2015 ONSC 4714 at para. 80.

[2] *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 1190. Reversed on other grounds, *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, 2007 CanLII 54963 (ON SC), [2007] O.J. No. 4899; leave to appeal to Div. Ct. denied, 2008 CanLII 30312 (ON SCDC), [2008] O.J. 2508 (Div. Ct.).

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LU #155 [2019]

Primary Topic:
I. General
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Inc. v. Toronto Transit Commission[3] ("*McNally*"). In *McNally*, Master Dash analyzed an assertion of litigation privilege in similar circumstances as those which existed between WCC and TTC. He determined that, because contractual claims are a regular part of most construction projects, a reasonable prospect of litigation does not arise each time a claim is filed to a dispute resolution board, especially because dispute resolution boards are designed to help the parties avoid litigation. However, in *Walsh*, the timing of actual and potential litigation brought by WCC against TTC, as well as the contract claims, suggested that the Redacted Portions were prepared when TTC believed that more litigation might follow. Accordingly, Master McGraw determined that the Redacted Portions were prepared in reasonable contemplation of actual and anticipated litigation. Therefore, the first part of the test was satisfied.

Turning to the second part of the test, Master McGraw again relied on the reasoning of Master Dash in *McNally*. He considered the fact that litigation had commenced before the preparation of the Redacted Portions, as well as Bechtel's involvement in assessing or addressing contract claims in the process of preparing the Bechtel Report and the Redacted Portions. The latter was especially important given the similarities between the contract claims advanced by WCC and the claims advanced by WCC in litigation.

TTC bore the evidentiary burden of establishing on a balance of probabilities that the Redacted Portions were created for the dominant purpose of litigation. TTC relied largely on the affidavit of Tony Baik, TTC's Deputy Chief Project Manager (the "Baik Affidavit"). The Baik Affidavit contained evidence to the effect that beginning in 2013, throughout 2014 when the Bechtel Report was commissioned, and in 2015 when it received the Bechtel Report, TTC was both defending litigation and preparing for expected litigation arising from the Project. However, Mr. Baik was not directly involved in retaining Bechtel or the preparation of the Bechtel Report. In addition, his affidavit was sworn four years after the preparation of the Redacted Portions and was based in part on "double hearsay". Therefore, it was given less weight.

Although he was satisfied that the Redacted Portions were created for multiple purposes, Master McGraw determined that TTC had not met its burden of establishing that the Redacted Portions were prepared for the dominant purpose of litigation – or even that litigation was one of the purposes for which they were prepared. The evidence from around the time when the Redacted Portions were created, including TTC and Bechtel's represen-

[3] *McNally International Inc. v. Toronto Transit Commission*, [2005] O.J. No. 1011.

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tations, the Consulting Services Agreement, the Bechtel Report, the CEO Report, and the Staff Action Report, was stronger than the Baik Affidavit.

Based on the foregoing, Master McGraw ordered TTC to produce an unredacted copy of the Bechtel Report to WCC within 30 days.

Litigation privilege allows parties to prepare their case for trial in private, without interference or fear of premature disclosure. The Supreme Court has held that litigation privilege is a fundamental principle of the administration of justice which serves an overriding public interest to ensure the efficacy of the adversarial process by protecting communications and documents created for the dominant purpose of use in, or advice concerning, actual, anticipated, or contemplated litigation.[4]

A determination of whether litigation privilege applies becomes more difficult when the impugned document relates to contractual claims and ongoing litigation. Dispute resolution processes are often tiered, and it can be difficult to determine the point in time when a reasonable prospect of litigation arose and the dominant purpose for which it was created. When there is uncertainty or reluctance to produce an entire document, redaction can help balance the goals of full disclosure and the protection of privilege. However, whether the redacted portions of a document will be protected by litigation privilege will depend on the many factors outlined above, including the strength of the parties' evidence, the circumstances surrounding the creation of the document and the court's findings on whether litigation was reasonably contemplated when the document was created.

It is significant that Master McGraw was not persuaded, notwithstanding that actual and contemplated litigation existed concerning Steeles West prior to the preparation of the Bechtel Report, that litigation was the *dominant* purpose of the Redacted Portions of the report. Among other things, successful completion of a significantly delayed transit project subject to considerable public scrutiny motivated the TTC to commission the Bechtel Report. There is no question that the context of this specific project and the TTC's objectives in late 2014, early 2015 was important in assessing the purpose of the Bechtel Report. TTC wanted to "stop the bleeding" on this troubled, high-profile project. Litigation appeared to be at most one of many purposes of Bechtel's consulting work but was not dominant among these purposes.

[4] Blank v. Canada (Minister of Justice), 2006 SCC 39, at paras. 4 and 27-28.

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Walsh therefore contains valuable lessons for parties engaged in prominent infrastructure projects in delay, where litigation is contemplated or already started. The presence or anticipation of a lawsuit is not enough to prevent disclosure of a consultant's report in litigation. The purpose of the consultant's report is also crucial, and litigation must be a dominant purpose to shield a consultant's report from disclosure. Consultant reports aimed at successful project completion and controlling costs are prone to disclosure. Similarly, the lesson for claimants is to vigorously test litigation privilege claims, and where appropriate, pursue full disclosure of consultant's reports; it is a mistake to accept litigation privilege claims at face value.

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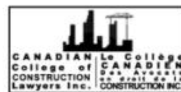

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