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CONSTRUCTION LAW NEWSLETTER

Fall 2006

A publication of
Miller Thomson LLP's
Construction Law Group

THE CONSTRUCTION LIEN ACT AND THE PROCEEDS OF A POWER OF SALE

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In *Veltri Metal Co. (Re)*, a 2005 decision, the Ontario Court of Appeal was asked to determine whether the trust provisions of the *Construction Lien Act*, R.S.O. 1990, c. C.30, (the "Act") applied to the sale proceeds held by a bankrupt involved in creditor protection proceedings. The issue the Court faced was whether AC Metal Fabricating Limited ("AC Metal") and De Angelis Construction Inc. ("De Angelis") had valid trust claims against the sale proceeds of a leasehold interest held by Veltri Metal Products Company ("Veltri"), the bankrupt, and whether the sale proceeds constituted trust funds over which the lien claimants had a valid claim, under either s. 7 or s. 9 of the Act.

In its decision, the Court upheld Justice Farley's decision that there were no monies of the nature contemplated by the trust provisions of the Act in Veltri's hands as a result of the sale. The Court found that the Monitor held the net proceeds as a result of an independent mandate given by the court, rather than as agent for Veltri.

On the facts, the appellants, AC Metal and De Angelis, were contracted to perform various construction projects for Veltri in May of 2003, including work for what was known as the Lakeshore Plant, in which Veltri held a leasehold interest. The work was completed in December of 2003, and De Angelis was informed by Veltri that payment for the work would be made in early January 2004. However, when no payment was received by January 9, 2004, De Angelis registered a lien against Veltri's leasehold interest. On January 12, 2004, AC Metal registered its lien against the same leasehold interest.

In mid-January, 2004, Veltri sought creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. By court order under that act, a Monitor was appointed to oversee the sale of virtually all of Veltri's assets, which were sold pursuant to a sale order in May 2004. Veltri's leasehold interest in the Lakeshore Property was sold along with other assets, and the proceeds were held in escrow by the Monitor pursuant to court order, pending the outcome of the litigation at issue.

While the sale of the assets was made by Veltri as owner, and not by a receiver, court officer, or secured creditor, the sale agreement provided that Veltri would receive the proceeds, then turn them over to the Monitor.

The Trust Section Prerequisites Must be Met

In finding that the trust provisions did not apply to any of the funds from the sale of the leasehold, the Court held that the statutory prerequisites for establishing a trust under ss. 7(1), 7(2), 7(3) and 9(1) of the Act were not satisfied.

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Section 7(1)

The Court of Appeal's reasoning is easy to follow: as the proceeds of the sale were not received by Veltri, as owner, and were not to be used in financing the improvement of Veltri's property, no trust under s. 7(1) of the Act existed. The wording of section 7(1) requires that the money be both received by the owner and used to finance an improvement.

It is worth noting that Justice Farley found as fact that there was no evidence that any of the monies advanced by Veltri's secured creditors were used in the financing of the construction works carried out by the appellants. The Court of Appeal held there was no reason to interfere with this finding. Therefore, there is at least an argument to be made that had Veltri used money received from secured creditors to finance the Lakeshore Plant project, there may have been a valid s. 7(1) trust. However, this finding of fact was "fatal to AC Metal's trust claim under s. 7(1) of the Act."

Sections 7(2) and (3)

The Court of Appeal further held there was no trust created under either ss. 7(2) and 7(3) of the Act. Under these sections, a trust fund would have only been created if the sale proceeds were in Veltri's hands, or received by him. Neither of those prerequisites was satisfied, as Veltri did not benefit from the sale and the proceeds were delivered to the Monitor for distribution amongst the creditors. The proceeds of the sale were paid to the Monitor, and thus Veltri had no interest or right in the proceeds.

The Court of Appeal emphasized that according to the Sale Order the proceeds were to stand in the place of Veltri's assets and that the appellants had no claim to the assets under the trust provisions. The strongest rights to the proceeds belonged to the secured creditors, and the asset sale could not have taken place without their consent. Since the outstanding claims of Veltri's secured creditors exceeded the aggregate proceeds of the sale, the appellants' trust claims could not be paid out.

Section 9(1)

With respect to s. 9(1) of the Act, the Court of Appeal held that the proceeds were not received by Veltri and, moreover, there was no evidence establishing the value, if any, in Veltri's leasehold interest. Accordingly, the sale proceeds were not consideration received by the owner as a result of the sale, as required by this section of the Act.

Conclusion

To qualify for the Act's trust provisions, a claimant must show that the proceeds of a sale were used for the benefit of the owner and were received by the owner. Where the proceeds belong to secured creditors or are otherwise not available for the benefit of the owner, the conditions of the trust provisions will not be met. As these conditions were not present, the Court of Appeal had no choice but to find that the proceeds of the sale of the leasehold were not the subject of a valid trust.

THE TIME LIMIT FOR MAKING CLAIMS: THE *LIMITATIONS ACT* - PART 1

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The current Alberta *Limitations Act*¹ came into force on March 1, 1999. Limitation periods are designed to set a period of time within which a party may commence a claim. The *Limitations Act* sets time limits on when a claim may be made to provide certainty for all parties. After the limitation period has expired, a party need no longer be concerned about old claims haunting them.

The most dramatic feature of the current *Act* is the "Drop Dead Rule," a first for Canada. A drop dead rule provides for a certain final date within which all actions must be commenced. Prior to March 1, 1999, and to a certain extent today as well, one of the concepts that affected the certainty granted by limitations legislation was the concept of "discoverability." This means that the time period within which a party may sue does not start to run until the problem (in general terms) is discovered.

¹ R.S.A. 2000, c L-12 (*Act*).

The current *Limitations Act* affects claims in Alberta with two general rules:

Two years after Discovery Rule:

Claims must be brought within 2 years from the date the claimant knew, or ought to have known, that:

- (i) the injury, (personal injury, property damage, economic loss, non-performance of an obligation, or breach of duty) occurred;
 - (ii) the injury was attributable to the conduct of the defendant; and
 - (iii) the injury, assuming liability on the part of the defendant, warrants commencing an action
- and, in any case

Ultimate Rule or Drop Dead Rule:

Claims must be brought within 10 years from when the claim arose - normally when the conduct causing the injury occurred.

Barring a few exceptions, all claims are governed by both the "Two Years after Discovery Rule" and the "Ultimate Rule" or "Drop Dead Rule," whichever expires first. If a claim is commenced after the expiry of these periods, then the defendant is entitled to immunity from liability for the claim.

There are two principal exceptions to the above rules. The first exception is where there is other legislation setting a specific limitation period which will govern the generic provisions of the *Limitations Act*. For example, the *Municipal Government Act*² stipulates that actions against municipalities must be brought within a shorter time period. The second exception is where the parties agree in writing to extend a limitation period. (For example: a written "lifetime warranty" on equipment or materials.) However, limitation periods set out in the *Act* cannot be shortened (section 7).

Comparison of the Old and New Limitation Periods

Prior to the 1999 coming into force of the current *Limitations Act*, limitations legislation in Alberta differentiated between tort and contract claims, and further between different types of tort claims. The former limitations legislation provided for a six-year limitation period which commenced at different times depending on the nature of the claim. As discussed above, the current *Limitations Act* does not differentiate between tort and negligence claims, as it applies the "Two Years after Discovery Rule" and the "Ultimate Rule" or "Drop Dead Rule" to all claims.

The Winnipeg Condominium Case

In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, an action was brought by the owners of a condominium after some stone cladding fell off the side of a building.

In 1972, a developer contracted with Bird Construction to build a large apartment building. Bird Construction entered into a subcontract for the masonry work, including the stone cladding, with Kornovski & Keller Masonry Ltd. The building was substantially complete by December 1974. In 1978, the building was converted to condominiums.

In 1982, the Condominium Board was concerned about the stone cladding and contacted the architect and other consultants. On their advice, the Condominium Board arranged for repairs to be done at a cost of \$8,100.00. On May 8, 1989, a storey-high section of the cladding fell from the ninth storey of the condominium. The Condominium Corporation eventually had all of the cladding replaced at a cost of over \$1.5 million. The Condominium Corporation commenced an action in negligence against Bird Construction, the architect and Kornovski & Keller.

Considering the limitation period aspect of the case only, if these facts had occurred in Alberta before the current *Limitations Act* came into force, the Condominium Corporation would have been able to commence an action within 6 years from discovering the defect. This date would appear to be 6 years from the day the stone cladding fell off the building (May 8, 1989) because no structural defects were found in 1982. Accordingly, the Condominium Corporation would have had until May 8, 1995 to commence its action.

² R.S.A. 2000, c M-26

If these facts occurred under the current Alberta *Limitations Act*, the Condominium Corporation would have the earlier of:

- (a) **Two years after Discovery Rule:** Discovery: May 8, 1989; Limitation: May 8, 1991; and
- (b) **Ultimate Rule or Drop Dead Rule:** Claim arose when work performed: December, 1974; Drop Dead Date: December 1984.

Under the current Act, Bird Construction's exposure would be reduced because an action would have to have been commenced before December 1984, almost 11 years earlier than under the old Act. On the facts of this case, because no defects were discovered before 1984, Bird Construction would probably not have been sued before the limitation period expired and thus would have been protected from exposure for this claim.

Summary:

As illustrated by the *Winnipeg Condominium* case, the current *Limitations Act* is very effective in limiting exposure to long term liability. For those doing business in Alberta, internal business practices should be monitored to ensure that the appropriate systems are in place to commence or respond to claims in a timely fashion before the limitation period expires.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

On September 29, **Dražen Bulat** gave a presentation on Contract Law to the Association of Architectural Technologists of Ontario as part of their accreditation course.

On October 5, **Dražen Bulat** gave a presentation on the topic of "Contracts in the Construction Industry" at the Ontario First Nations' 11th Annual Technical Conference and Tradeshow.

On October 11, **Dražen Bulat** gave a presentation on the topic of "Bidding and Tendering" to the Toronto Construction Association as part of their course on Construction Law.

On October 24, **Teresa Meadows** presented on the topic of "You Need a 'Permit' for What? Regulatory Traps for the Unwary" to the Canadian Bar Association meeting for the Construction Law Subsection.

On December 12, **Kathleen Kendrick** will be presenting on the following topics: "Indemnities - what is reasonable, drafting issues" and "Direct vs. Consequential Damages", at the The Fundamentals of Construction Contracts in Alberta.

Anthony Scane recently conducted a workshop for practitioners hosted by the Canadian Institute. The workshop was on Motions and Other Interlocutory Proceedings in Construction Lien Actions.

On October 23, **Jane Sidnell** presented at the University of Calgary's, Law for Project Managers Masters Course, on the topic of Occupational Health and Safety.

On November 18 and 28, **Jane Sidnell** will be speaking on the topic of "Occupational Health and Safety: The Top 5 List" at the Legal Education Society of Alberta seminar Dealing with the Boom.

On January 22, **Jane Sidnell** will be presenting at the Construction Superconference, on the topic of Construction Contracting.

³ [1995] 1 S.C.R. 85 (*Winnipeg Condominium*)

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