Toronto Law Journal

Hot off the Press: The CSA Issues Guidance on Climate Change-Related Risks

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On August 1, 2019, the Canadian Securities Administrators ("CSA") published Staff Notice 51-358 *Reporting of Climate Change-related Risks* (the "Notice") to highlight the responsibilities, risks and materiality considerations that board members and key personnel should consider in light of climate change-related issues as they relate to the issuer's Management's Discussion and Analysis ("MD&A") and Annual Information Form ("AIF"). No new legal obligations were created or modified as a result of the issuance of this Notice. Instead, its purpose was to clarify expectations and elaborate on CSA Staff Notice 51-333 *Environmental Reporting Guidance*.

Unless otherwise stated, this article focuses only on an issuer's disclosure obligations as they relate to its MD&A and AIF. Different tests of materiality may arise depending on the particular context.

Climate change-related risks can impact the financial health of an issuer

Climate change-related risks are becoming more of a mainstream business issue than in the past. Particularly, issuers and investors alike are recognizing that climate change-related matters can impact a company in many ways, and that such risks can provide insight into the sustainability of a business model. Notably, climate change-related matters can interrupt an issuer's operations, present unplanned costs or capital expenditures, impact the issuer's reputation, and limit its business opportunities. In turn, investors are devoting more time and attention to environmental risks and are generally seeking improved disclosure on risks, opportunities, financial impacts and governance related to climate change-related risks.

What factors should an issuer consider when determining a "material" climate-related risk?

The regulators recognize that materiality assessments in relation to climate-change related risks may be more difficult to identify than other risks. This is largely due to our evolving understanding of climate change-related risks and the duration of time for crystallization of climate-related risks. Although the materiality test varies depending on specific contexts, information is generally considered "material" for purposes of a MD&A or an AIF if a reasonable investor's decision whether or not to buy, sell or hold securities in an issuer would likely be *influenced* or *changed* if the information in question was omitted or misstated (the "Materiality Test"). Management and board members (including the audit committee in some instances) have a role in strategic planning, risk oversight, as well as the review and approval of particular regulatory filings.

Omitting or misstating "material" information in an issuer's MD&A or AIF can lead to potential risks including litigation, enforcement or other regulatory action against the issuer or its

personnel. An issuer's leadership should therefore consider the effects of climate change-related matters and any other "material" risks that can be posed to the issuer when preparing documents in order to meet its continuous disclosure obligations.

How can I determine if information relating to a climate-related risk is "material" (for purposes of a MD&A or an AIF)?

It is important for issuers to remember that there is no bright-line test. Instead, materiality may vary between different issuers even amongst those in the same industry, and an issuer should consider both qualitative and quantitative factors in its determination. Additionally, issuers should consider materiality in light of the context as a whole, rather than an isolated fact (although some facts can be "material" on their own). The following are a few considerations that issuers and their management should consider when determining whether or not a climate change-related matter is "material":

(i) What is the timing of the potential risk? Issuers are cautioned against limiting their materiality assessment to near-term risks, and instead should disclose risks in its MD&A and AIF even if the matter may only crystallize over the medium or long term, whether certain or not, if the Materiality Test has been met. Additionally, management is encouraged to consider the magnitude of the effect and whether the environmental risk is likely to increase over time.

(ii) What type of risk is it? Physical risks can be acute or chronic. A physical, acute risk is generally event-driven, such as by extreme weather conditions like a hurricane or flood. This may in turn pose financial implications to an issuer due to physical damage to its assets or a disruption in a supply chain or its operations. A physical, chronic risk is generally a longer-term shift in climate patterns, such as consequences arising from higher temperatures, that may cause sea levels to rise or heat waves.

Transitional risks can range from short-term to a long-term impact and are posed by risks such as those relating to an issuer's reputation, market, regulatory consequences, policy and legal or technological risks. Each risk is further described below:

(a) reputational risk: arises from changing perceptions related to the way that an issuer is contributing or hindering a climate-related issue, including customer preferences and stigmatization;

(b) market risk: arises from shifts in supply and demand and how climate change-related risks impact decision-making;

(c) regulatory risk: arises from the increased regulation of climate change-related matters and the potential for increased regulatory action in the event of non-compliance;

(d) policy risks: include actions that are taken to limit an issuer's contribution to climate-change or that seek to promote sustainable resources and more efficient practices;

(e) legal risk: may arise from exposure to actions related to an issuer's failure to disclose sufficient information or address risks; and

(f) technology risk: such as when technology replaces old systems or methodologies.

(iii) What are some additional considerations that an issuer should take into account?

(a) Can the issuer quantify the risk? Where practicable issuers are also encouraged to quantify and disclose the potential financial and other possible impacts of the risk.

(b) What is the probability that the trend, demand, commitment event or uncertainty will occur?

(c) What is the anticipated magnitude of the climate-change related risk?

If an issuer has disclosed climate change-related risks, can this be considered forward-looking information ("FLI")?

FLI related to climate change-related matters might include an issuer's intention to reduce its emissions or minimize its climate change footprint as it relates to its operations. Depending on the context, the issuer's projections, plans and objectives for any action or to minimize future climate change-related risks (including any consequence thereof) can be considered FLI. In turn, issuers are reminded that if they disclose FLI, the same general securities rules apply, meaning that the issuer must comply with the requirements set out in National Instrument 51-102 – *Continuous Disclosure Obligations*, including:

1. the information must be identified as FLI;
2. cautionary language related to the information must be provided;
3. "material" factors or assumptions used to develop the FLI must be provided;
4. FLI that is previously disclosed must be updated; and
5. the issuer's policy for updating the FLI must be described.

What should issuers contemplate if they disclose climate change-related risks voluntarily?

Issuers may choose to voluntarily disclose climate change-related risks or other information that may not necessarily be "material" due to the increased interest of investors. Issuers who decide to do so should remember that voluntary information must be prepared with the same rigour as regulatory filings. Such voluntary disclosure must not contain any misrepresentations or obscure or minimize any "material" information, as in doing so may give rise to civil liability for secondary market disclosure. Additionally, "material" information required to be disclosed under securities legislation must be disclosed in all applicable regulatory filings; it is not enough to voluntarily disclose "material" information using other avenues or resources.

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Federal Court Admits Foreign File Wrapper in Canadian Claim Construction

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To get a Canadian patent for an invention, a patentee must "prosecute" a patent application before the Canadian Patent Office. In so doing, a prosecution file — also known as a file wrapper — is generated, which comprises communications between the patentee's patent agent representative and the Office.

In the United States, prosecution history estoppel is intended "to hold the inventor to the representations made during the application process… by amending [the patent claims during prosecution], the inventor is deemed to concede the patent does not extend as far as the original claim".[1] In contrast in Canada, file wrappers have been irrelevant and inadmissible in Canadian patent construction, which allowed Courts to focus on the actual language of the claims in the issued patent when construing a patent, while avoiding "opening the pandora's box of file wrapper estoppel".[2]

Opening Pandora's Box: The introduction of file wrapper estoppel in Canada

In late 2018, the Canadian *Patent Act* was amended to add that a file wrapper may be admitted into evidence in Canadian patent litigation for claim construction. On September 25, 2019, in *Canmar Foods Ltd v. TA Foods Ltd.*,[3] the Federal Court of Canada admitted such evidence for the first time since its introduction into the Canadian patent litigation regime.

Federal Court applies file wrapper estoppel in claim construction

In *Canmar*, the patentee Canmar Foods brought a patent infringement action against TA Foods for alleged infringement of Canmar Foods' patent, which claimed a method for roasting oil seed. In construing the patent claims and identifying the essential elements, TA Foods claimed that the American file wrapper of a related patent application was relevant and incorporated into the Canadian file wrapper by reference because the patentee had acknowledged in correspondence with the Canadian Patent Office that the claim amendments in the U.S. had been to overcome novelty and obviousness objections.

In the Canadian patent prosecution, Canmar Foods had acknowledged before the Canadian Patent Office that the amended claims "correspond substantially to those submitted during prosecution of a related United States application",[4] and explained the newly submitted claims were "much narrower in scope than the previously examined claims in view of the introduction

[1] *Festo Corp v. Shoketsu Kinzoku Kogyo Kabushiki Co. Ltd.*, 535 US 722 (2002) at 737-738.
[2] *Free World Trust v. Électro-Santé Inc.*, [2000] 2 S.C.R. 1024 at para. 66.
[3] 2019 FC 1233
[4] Office Action Response to CIPO dated August 24, 2012 at page 2, for Canmar Foods' Canadian Patent Application No. 2,582,376.

of significant limitations derived from the description and previous dependent claims" and "encompass[ed] both novel and non-obvious subject matter".[5]

Canadian file wrapper estoppel includes foreign file wrapper in "extraordinary circumstances"

The Court held that with the addition of file wrapper estoppel to the Canadian *Patent Act*, claim construction in Canada now requires an assessment of (i) the claims; (ii) the disclosure; and (iii) the [Canadian] prosecution history. Justice Manson noted that while ordinarily only Canadian prosecution history is admissible for claim construction (the *Patent Act* language allowing file wrapper estoppel makes no reference to foreign prosecution histories), in extraordinary circumstances, foreign prosecution histories may also be admissible. He held that the intended effect of the new provision is to allow the Court to consider "the substance behind intentional amendments to the claims".

Define "extraordinary"

Justice Manson observed of the extraordinary circumstances that justify considering foreign file wrappers, the Court should be able to consider foreign file wrappers only to purposively construe the Canadian patent claims where "the patentee acknowledges that the claims have been amended to be substantially the same as claims submitted in another jurisdiction, *and* the patentee admits that the amendments have limited the scope of the claims in order to make the claims novel and non-obvious" (emphasis in the original).[6]

This exception, he noted, is necessary because if foreign file wrappers could not be considered even where limitations are made to overcome novelty and obviousness objections, Canadian patentees would be incentivised to refrain from explaining those amendments to the Canadian Patent Office, relying instead on corresponding co-pending foreign applications. Because Canmar Foods had specifically referenced its corresponding U.S. patent application in the Canadian file wrapper, he found the U.S. prosecution history admissible for claim construction.

[5] *Canmar* at para. 86.
[6] *Canmar* at para. 74

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The Ethics Commissioner's Report as a Political Football

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The Ethics Commissioner, Mario Dion, found that the Prime Minister of Canada, Justin Trudeau, contravened section 9 of the *Conflict of Interest Act* by using his position of authority over his former Attorney General, Jody Wilson-Raybould.

In the federal election, this report has been used as a political football.[1]

Did the Ethics Commissioner get it right? I cannot speak to his findings of fact, but he made some legal findings that are open to challenge. He was, however, hampered by the refusal of a waiver of cabinet confidentiality in relation to which nine witnesses informed the Ethics Office that they had information they believed to be relevant.

Reference to the *Rolls-Royce* case

The Commissioner cites the U.K. *Rolls-Royce* case as casting further doubt on the position taken by Mr. Trudeau on this issue.[2] The Commissioner cites the Right Honourable Sir Brian Leveson as follows:

> I have no difficulty in accepting that these features demonstrate that a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain. <u>None of these factors is determinative of my decision in relation to this DPA; indeed, the national economic interest is irrelevant</u>.[3]

But here is the problem. The Ethics Commissioner fails to mention that the U.K. Court approved a deferred prosecution agreement (DPA) in *Rolls-Royce* on the grounds that the company "is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures."[4]

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[1] **Hon. Andrew Scheer:** "Mr. Trudeau, you broke ethics laws twice. You interfered in an ongoing criminal court proceeding. You shut down parliamentary investigations into your corruption, and you fired the only two people in your caucus who were speaking out against what you were trying to do just for telling the truth. Tell me, when did you decide that the rules don't apply to you?" https://www.macleans.ca/politics/federal-leaders-debate-full-transcript/

[2] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 317.

[3] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 317. Emphasis is that of Ethics Commissioner.

[4] SERIOUS FRAUD OFFICE and ROLLS-ROYCE PLC January 17, 2019, at paragraph 62.

Good case analysis requires that one consider both the principles enunciated and also the result in the case as those principles are applied. The result in the *Rolls-Royce* case illustrates that deferred prosecution agreements may be appropriate for other reasons, apart from the prohibited route of national economic interests. I have previously written about these divergent roads in this Journal.[5]

No allowable discussions of public interests with the Attorney General

The Ethics Commissioner concludes that "the larger public considerations are inextricably linked to SNC-Lavalin's private interests. Accordingly, Mr. Trudeau could not properly put forward any arguments involving public or private interests to the Attorney General. The remediation agreement regime makes it clear that only the prosecutor must weigh (or exclude) these interests."[6]

The reference to public interests would prohibit the Prime Minister from discussing the issue of a DPA for any company with the Attorney General. But why then did the legislature explicitly require that the Attorney General consent to the negotiation of a DPA?[7] The legislature could have said the public prosecutor must consent. Instead, the legislature chose to refer to the Attorney General, who is also a member of Cabinet.

Section 715.32 (1)(d) of the *Criminal Code* explicitly requires that the Attorney General consent to the negotiation of the agreement. This might be described as the "ladder up" scenario, with the rung above being judicial approval, which is also required.

In the reverse "ladder down" scenario, where the prosecutor does not think that a remediation agreement is appropriate (which was the case in the SNC-Lavalin matter) the legislation for remediation agreements does not explicitly give power to the Attorney General or Cabinet to override the prosecutor. Comparison with other legislation shows that the drafters could have put in such a power but chose not to. For example, section 12 of the *Telecommunications Act* gives the Cabinet power to vary or rescind a decision of the CRTC.[8]

In order to override the prosecutor, the Attorney General must rely on a different piece of legislation, the *Director of Public Prosecutions Act*. Under section 10 of this Act, the Attorney General can issue a directive respecting specific prosecutions and that directive would be

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[5] Kenneth Jull, "The Right and Wrong Way to Seek Remediation Agreements", Toronto Law Journal, March 2019.
[6] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 319.
[7] *Criminal Code*, section 715.32(1)(d).
[8] See *Telecommunications Act*, S.C. 1993, c. 38, section 12(1).

published in the Canada Gazette to ensure transparency.[9] The Attorney General can also take over the prosecution under section 15.[10]

I have previously advanced the position that in the absence of an explicit power in the remediation regime for Cabinet to override a decision to not negotiate a remediation agreement, the Attorney General's power to override the prosecutor should be read restrictively and not permit a wide policy override. The legislation does not give the Attorney General or the polycentric Cabinet variance power which could incorporate broader policy concerns. Such an interpretation would be consistent with the prohibition to consider factors such as the national economic interest, which raises political-economic considerations.[11]

In my view, if the Attorney General must resort to the *Director of Public Prosecutions Act*, the reasons for such an intervention should relate to the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria. For example, if a prosecutor did not properly consider the reduction of the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, or consider the relevant factors, that might be a valid reason to intervene.

Here is the magic question. Should the Prime Minister be allowed to discuss with the Attorney General the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria? Given the explicit reference to the Attorney General in the legislation, and given that he or she is a member of Cabinet, it would seem to make sense that the Prime Minister could have a legal discussion about these criteria. This would not be a political discussion, but rather a principled discussion about the criteria in the legislation. The Ethics Commissioner would not permit such a discussion.

This is an important issue, that may very well come up in future cases. This might be a suitable subject for the government to study and consider making regulations as they are empowered to do under the legislation.

Complex balancing of the right and wrong roads to remediation agreements

The Ethics Commissioner does not spend a lot of ink on the complex legislative scheme for remediation agreements, which has six objectives and nine factors to balance. The

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[9] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 1.1 Relationship between the Attorney General and the Director of Public Prosecutions. Public Prosecution Service of Canada Deskbook: Directive of the Attorney General Issued under Section 10(2) of the *Director of Public Prosecutions Act*, March 1, 2014. See 2.2. The power of the Attorney General to issue directives to safeguard the DPP's independence, s. 10, requires that directives respecting specific prosecutions and respecting prosecutions generally be in writing and published in the Canada Gazette. Mandatory publication of the directive assures transparency and enables the Attorney General to be accountable for his or her decisions.

[10] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 2.5. The power of the Attorney General to assume conduct of proceedings.

[11] Kenneth Jull, "The Right and Wrong Way to Seek Remediation Agreements", Toronto Law Journal, March 2019.

Commissioner cites my testimony before the Justice Committee as a double negative: "Mr. Jull proposed that to resolve this apparent paradox, one must consider principles of corporate criminal liability, where national economic interests are excluded from consideration only when harm to culpable stakeholders was at issue."[12]

This is a convoluted way of describing my evidence, which was that there is a right road to follow that has nothing to do with economic interests.

I said "If you have a situation where a crime is committed by senior or even middle-level officials, but there's a whole range of folks who had nothing to do with it, those two provisions work together. You can give a deferred prosecution to save those people from being affected, while at the same time it has absolutely nothing to do with economic interest."[13]

The Ethics Commissioner has confirmed in correspondence with me that my testimony "makes it clear that, in your view, an entity could be invited to negotiate a remediation agreement in instances where a range of non-culpable stakeholders is involved."[14]

Perhaps more time should have been spent on whether or not discussions went down the right or wrong roads. We could also learn from the United States' experience, which weighs the impact on innocent persons when considering whether to offer a deferred prosecution agreement. The following comment from the OECD Working Group underscores the division between innocence and the prohibited factor of national economic interest:

> Under section 9-28.300 ("Factors to be Considered") in the "Principles of Federal Prosecution of Business Organizations", a decision of prosecutors on whether to charge a corporation, negotiate a plea or other agreement, may consider "collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution". The evaluators questioned whether these considerations could feasibly include the national economic interest, contrary to Article 5 of the Convention. The U.S. reassured them that a decision based on "disproportionate harm" would not result in terminating proceedings. Instead, the DOJ would carefully consider whether a DPA or NPA might lessen the potential harm **to innocent third parties.** In addition, the DOJ would make the same kind of determination if the potential for "disproportionate harm" were to non-U.S. companies and individuals.[15] [Emphasis added]

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[12] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 313.
[13] https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence
[14] Letter to the author dated August 29, 2019.
[15] PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES, October 2010, paragraph 60. The OECD made the following commentary: "The evaluators welcome confirmation from the United States that the national economic interest is not a factor to be considered in investigative and prosecutorial decision-making under the FCPA, and that pursuant to the 'Principles of Federal Prosecution of Business

The concept of innocent third parties appears to have alluded the leaders' discussion of this issue in the election.[16] Perhaps this is a result of the fact that it requires a complex assessment of the principles of criminal liability. It is possible for senior officers or certain middle managers acting with intent, at least in part, to benefit a corporation and acting within the scope of their authority to have committed bribery offences on behalf of the corporation. At the same time, there may be many employees who are not involved or even aware of the misconduct. Customers and pensioners are a further step removed from knowledge about corrupt practices. A similar test is used in the U.K. legislation which refers to "collateral effects" on the public, employees and shareholders or institutional pension holders.[17]

Refusal to waive privilege: What is behind the curtain?

Lastly, the Ethics Commissioner was rightly troubled by the refusal of the Prime Minister or the Privy Council Office to waiver cabinet confidentiality. Nine witnesses informed the Ethics Office that they had information they believed to be relevant, but that could not be disclosed because, according to them, this information would reveal a confidence of the Queen's Privy Council and would fall outside the scope of Order in Council 2019-0105.

What is the principled basis for the decision to waive cabinet privilege for discussions with an Attorney General, but not waive the privilege for a period when she was no longer an Attorney General but rather Minister of Veterans affairs? This distinction remains unclear, but it is hard to assess privilege claims without knowing more about the nature of the privileged documents or discussions.

Jody Wilson-Raybould hints at what might be behind the curtain in her last letter to the Justice Committee[18] when she stated:

> After much reflection, I decided to take the Prime Minister at his word that this was not the case, and accept a post I was honoured to have as the Minister of Veterans Affairs and Associate Minister of National Defence.

Organizations' a decision of prosecutors on whether to charge a corporation, or negotiate a plea or other agreement, would also consider the potential harm to innocent third parties in all cases, including those involving non-U.S. companies and individuals" (at paragraph 63).

[16] In response to the question quoted above from Mr. Scheer, the **Rt. Hon. Justin Trudeau** replied: "Mr. Scheer, the role of a Prime Minister is to stand up for Canadians' jobs, to stand up for the public interest, and that's what I've done and that's what I will continue to do every single day. The way I have worked for Canadians is around investing in them, unlike the vision that you're putting forward of giving tax breaks that help people who are making $400,000 K a year". There is no distinction between jobs of persons who are innocent and jobs of persons who were complicit in alleged foreign corruption. https://www.macleans.ca/politics/federal-leaders-debate-full-transcript/

[17] Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013, Serious Fraud Office, Section 2.8.2 vii: A conviction is likely to have collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders.

[18] Letter to Anthony Housefather dated March 26, 2019.

> However, I did make another decision at this time — that I would immediately resign if the new Attorney General decided to issue a directive in the SNC-Lavalin matter as this would confirm my suspicions as to the reason for the shuffle of me in particular.

We know that Minister Wilson-Raybould did resign. In her letter of resignation, she noted that she was in the process of obtaining advice on the topics that she was legally permitted to discuss in this matter.[19] The unanswered question is whether there were further discussions at the Cabinet table or elsewhere about SNC-Lavalin, and whether the right road was followed or the wrong road was discussed.

[19] https://www.macleans.ca/politics/ottawa/read-jody-wilson-raybouldsresignation-letter/

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The New *Construction Act*: Opportunity and Risk for Lawyers in Ontario

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As of October 1, 2019, the prompt payment and adjudication provisions of the new *Construction Act* (the "*Act*") came into force across Ontario. Different aspects of the *Act* have come into force gradually since its introduction on July 1, 2018. Although the new *Act* has created opportunities, it has also brought uncertainty for lawyers and construction clients across the province.

Lawyers in particular should beware the transition provision of the *Act*. The longer deadlines to preserve and perfect liens promised by the new *Act* do not necessarily apply to every contract. Every lawyer who deals with construction-related issues ought to be aware of how the *Act* applies and be prepared to advise clients accordingly. No lawyer wants to contribute to the expiry of a client's lien rights, or expiry of the ability to dispute an invoice under the new rules, due to a failure to understand the mechanics of the new *Act*.

Major changes introduced by the new *Construction Act*

Ontario's former *Construction Lien Act* was revised extensively. A full review of every modified provision is beyond the scope of this article, but every lawyer should be aware of at least three major changes introduced by the new *Act*.

(1) Lien reform including lengthened deadlines to preserve and perfect liens

The 45 day deadline to preserve a lien was extended to 60 days, and the 60 day deadline to perfect a lien was extended to 90 days. The failure to preserve or perfect lien rights in a timely manner continues to be fatal for a lien claim.

For construction liens with a face value of $200,000.00 or more, the monetary security required to vacate those liens from title has increased. Under the former *Construction Lien Act*, parties seeking to vacate a lien from title were required to post security in an amount equal to the lesser of 25% of the lien amount or $50,000.00. Now the required security is the lesser of 25% of the lien amount or $250,000.00. Failure to prepare proper security may delay parties seeking

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to vacate a lien from title, causing an interruption in financing or title transactions on a live construction project.

(2) ***Legislated "prompt payment" timelines to pay and dispute invoices***

A new legislated deadline was introduced to requires property owners to pay construction contractors 28 days after receipt of a "proper invoice." A further deadline was introduced for contractors to pay their subcontractors 35 days after delivering a "proper invoice" to the owner. Subcontractors of those subcontractors are to be paid in a further seven days (*e.g.*, 42 days after the "proper invoice" was delivered), with a further seven days added for each sub-level. These deadlines are incredibly short, especially in an industry used to 60-day, 90-day, 120-day, or even lengthier payment terms.

The *Act* defines what needs to be included in a "proper invoice," but additional requirements can be agreed upon by the parties to a construction contract. Importantly, a "proper invoice" cannot be made conditional on the approval of the owner or certification by a payment certifier. Owners may seek to build onerous requirements into the definition of a "proper invoice" in an effort to avoid being bombarded by monthly invoices. In the absence of contractual terms that require advance notice, subcontractors and suppliers at lower levels may have difficulty determining relevant deadlines under the *Act*, as they may not know when a "proper invoice" was delivered by a contractor to an owner. Nor will sub-contractors necessarily know whether their invoice was included in the contractor's "proper invoice." All of these issues will arise over the coming months and years as construction stakeholders grapple with the new *Act*.

If an owner does not intend to pay a contractor's "proper invoice" in whole or in part, there is a legislated deadline to issue a "notice of non-payment" in 14 days. Contractors must similarly issue a "notice of non-payment" seven days after receiving a notice of non-payment from the owner, or prior to the seven-day deadline to pay a subcontractor in the event an owner never issued a notice.

New forms have been added in the regulations to the new *Act*. Lawyers ought to be mindful of the new deadlines and timelines in play for prompt payment, as they may impact clients' rights to dispute payment of an invoice.

(3) ***Adjudication, a new fast-track dispute resolution process to resolve construction-related disputes***

The *Act*'s October 1, 2019 provisions in force introduced a new interim dispute resolution process called "adjudication". Similar in many respects to an arbitration, adjudication contemplates the resolution of a dispute by a single adjudicator. The timelines for adjudication are exceptionally short. In the absence of parties' agreement to an extension, adjudicators' decisions are legislatively required to be released no later than 44 days after they receive all documents the claimant intends to rely on. That means all of the interim steps in order to achieve a resolution to the dispute need to occur in a 44-day window.

Notably, adjudicators may not have formal legal education as they may be appointed from all areas of the construction industry. The Authorized Nominating Authority to appoint adjudicators under the new regime is called Ontario Dispute Adjudication for Construction Contracts ("ODACC"). Among other qualifications, adjudicators must have 10 years of relevant experience in the construction industry and complete mandatory training. Adjudicators do not have to be lawyers and may be contractors, architects, engineers, quantity surveyors, or other industry stakeholders.

Adjudication is available to resolve a number of disputes related to a contract between an owner and a contractor to supply services or materials to an improvement. Adjudication is however only available prior to the completion of a contract. Pursuant to section 13.5 of the *Act*, adjudication may be used to resolve disputes related to valuation of services or materials provided, payment under the contract, change orders, disputes that are subject to a notice of non-payment, set-off, holdback, or any other matter that may be agreed upon by the parties or set out in the regulations.

Based on information available from the Authorized Nominating Authority for adjudicators, now known as ODACC, adjudications will likely be subject to pre-determined processes and/or fee schedules depending on the monetary value of the dispute. Most adjudication processes will be in writing only. Limited oral submissions may be available by teleconference or videoconference. Adjudicators may also determine a custom process more akin to an *ad hoc* arbitration.

Importantly, adjudicators' decisions may be enforced as binding court orders. The decisions are however still considered "interim" as they may be re-litigated in a lien proceeding or arbitration process. Rights to appeal from an adjudicator's decision are very limited. The potential for multiple interim adjudicators' orders to be enforced as binding judgments, and limited rights of appeal, may cause problems for parties who fail to respond to adjudications in a timely fashion.

Lawyers in particular need to be aware that lien rights still exist and may expire while a client's focus is on resolving the rushed deadlines created by the prompt payment regime.

The transition provisions under the new *Act*

Despite the importance and significance of the *Act*'s changes, it is essential for lawyers to remember that not every construction project or contract will be subject to the new *Act*. Whether individual provisions of the *Act* apply to a given contract is governed by the transition provision of the *Act* in section 87.3.

The only contract that matters is the "prime contract" between owner and contractor. Many clients further down the construction supply chain will insist that the date of their particular subcontract or supply contract matters, but that is incorrect. The governing contract is the one between the owner and the contractor, even if your subcontractor client has never received a copy. If an owner contracts directly with multiple contractors, then different provisions of the

Act may apply to each of those different contracts. This makes it critical to ask clients early and up front for the contract between owner and contractor. Most importantly, lien rights should be preserved and perfected under the old *Construction Lien Act*'s timelines whenever possible.

In addition to the date the "prime contract" was entered into, the gradual transition provisions of the *Act* make it important to know whether the contract was subject to a procurement process, specifically, whether the owner commenced a procurement process prior to entering into the governing contract with the contractor. If so, it is important to know when that procurement process started. The *Act* defines a procurement process as (a) a request for qualifications, (b) a request for quotation, (c) a request for proposals, or (d) a call for tenders. Lawyers should have an awareness of this information prior to providing advice on lien deadlines and the application of the *Act*.

Given the gradual nature of the transition provisions, and the fact that different provisions apply to separate contracts, up to three different versions of the *Act* may apply in any particular case:

(1) **Old *Construction Lien Act*:** For improvements on non-leasehold interests, the old *Construction Lien Act* applies to a contract where its procurement process occurred prior to July 1, 2018. For non-leasehold projects without a procurement process, the old *Construction Lien Act* applies if the date the parties entered into the contract pre-dates July 1, 2018. Alternatively, for projects being done on leasehold interests where the lease pre-dates July 1, 2018, the contract for the improvement was entered into or the procurement process was commenced between July 1, 2018 and December 5, 2018.

(2) **New *Construction Act*, Phase 1:** Nearly all of the changes in the *Act* came into force after July 1, 2018 except for the prompt payment and adjudication provisions. The most critical change for lawyers to be aware of is the extension of lien deadlines. The *Act* should be carefully reviewed in each case to confirm which provisions are applicable. In summary, the "phase 1" post-July 1, 2018 changes are in play for:

   (a) non-leasehold improvement contracts where the procurement process commenced between July 1, 2018 and September 30, 2019;

   (b) non-leasehold improvement contracts where there was no procurement process, where the contract was entered into between July 1, 2018 and September 30, 2019; or

   (c) leasehold improvement contracts where the contract was entered into between December 6, 2018 and September 30, 2019.

(3) **New *Construction Act*, Phase 2:** All of the *Act*'s provisions are now in force as of October 1, 2019, including the prompt payment and adjudication provisions. The entire *Act* is in force for contracts where the procurement process was started on or after

October 1, 2019, or contracts without procurement processes that are entered into on or after October 1, 2019. These dates apply for contracts relating to both leasehold and non-leasehold improvements.

The transition provisions of the *Act* creates risks for lawyers who are asked for urgent advice without the benefit of a full appreciation of the underlying facts of a given situation. Lien deadlines will continue to run and expire in accordance with the *Act* during the course of a project. Although the new *Act* has created opportunities to achieve faster outcomes for clients seeking orders for interim payment, it has also provided additional areas where mistakes can be made. Lawyers serving the construction industry would be wise to have conversations up front with clients and colleagues about the new *Act* and its requirements. All lawyers would be wise to avoid traps and pitfalls created by the new *Act*, especially as its strict deadlines are interpreted and enforced over the coming years.