Daily Commercial News
by ConstructConnect®

GOVERNMENT

Judgement could be a game-changer for subs in insolvency cases

Don Procter February 14, 2019

A recent judgement in the Court of Appeal for Ontario marks a victory and possibly sets a precedent for subcontractors caught up in construction company insolvency cases.

The case involved a contractor's bankruptcy and who on the list of creditors should get priority for payment. Historically, banks have topped the list but a five-judge panel ruled that unpaid subs should be paid first.

"It is a critically important case in the construction industry," said Glenn Ackerley, a partner at WeirFoulds, a Toronto-based law firm.

"Now in a case of insolvency, money that comes in from unpaid project funds goes to the trades first — at least (based) on these facts — not to the bank."

Speaking at a seminar during the fourth annual Managing Risk in Construction Contracts and Projects Conference in Toronto, Ackerley said it is not known yet if the Supreme Court of Canada will hear the case.

Ackerley, who is chair of the construction law practice group at WeirFoulds and a member of the board of the Canadian Construction Association, also cited court rulings over such matters as procurement, limitations periods, bonding and insurance as well as contract issues.

He said contractors have “many good reasons” to dispute a ban on bidding on public sector work because they have current or prior litigation proceedings against the owner.

Contractors are hopeful they might be able to beat the ban under the new Canadian Free Trade Agreement which governs the procurement process for municipalities and other government bodies, Ackerley pointed out.

He told delegates there has been a shift by owners over the past few years from making tender calls to issuing RFPs, done in part so owners can “avoid contractual exposure.” The problem is that defining their contractual limitations can “be very confusing.”

He said it is difficult for the courts to determine what is unfair in an RFP, that is not “a contractual obligation.”

Ackerley cited a recent landmark case of a contractor and a supplier over the cost of schedule delays. A court of appeal deferred to an arbitrator who said a letter by the contractor to make a claim against the supplier “wasn’t detailed enough to be the claim.”

He said the courts are increasingly deferring to arbitrators or adjudicators as long as they deem the decision to be reasonable.

“Consider the choice of arbitrator very carefully,” he advised his audience. “It’s going to be very hard as time marches on to correct overturned decisions made by an arbitrator.”

Ackerley said last year there was “a wholesale shift” in the courts over the limitation period between an event and a lawsuit.

“The problem is, when does that clock (limitation period) start to run? It is very hard…in a construction project to know.”

He said there is now an “ultimate limitation period,” an outside date to start a lawsuit.

He said a statute passed in January 2004 has “kicked in,” meaning any project completed 15 years ago plus a day is “out of time” for any claims. For example, an engineer “is off the hook” for a badly engineered structure that collapses after the 15-year period.

Ackerley said while a contractor might want to avoid starting a lawsuit, it is important to understand the limitations period. Consider entering into an agreement with the other

understand the limitations period. Consider entering into an agreement with the other party concerning small deficiencies on a project because the statute allows you to "put the clock on hold while you wait to see what happens."

He cited a recent case in which a court ruled that a contractor was under obligation to pay subs of a subcontractor after that subcontractor went bankrupt.

That subcontractor had provided the contractor with a labour and material payment bond to ensure its subtrades and suppliers would be paid by the surety in case of insolvency.

The bond, however, was given to the contractor to hold and one of the unpaid subs went to the Supreme Court of Canada which ruled that the contractor was the bond trustee and therefore is responsible to pay the amount the bankrupt subcontractor owed to its subs, Ackerley said.

The court indicated that the contractor "owed a duty to let the beneficiaries (subs) know of the bond."

"As of July 1, 2018, we have a new Construction Act in Ontario which requires labour material payment bonds on projects and allows a party the right to recover the amount of claim against the surety," Ackerley said, noting it is important because "by statute it creates a direct right of action that doesn't require (the contractor) to be part of anything."

Recent Comments

Related Articles

Know your limits...especially when it comes filing initial claims

GOVERNMENT October 26, 2018

Experts offer tips on navigating Ontario's new Construction Act

ASSOCIATIONS , GOVERNMENT May 18, 2018

Canadian insolvencies increased 5.2 per cent in November from prior year: report

ECONOMIC January 9, 2019

Trust no one: A motto for builder's lien trust claims in a bankruptcy

ECONOMIC April 14, 2016

Most Read Articles

Most Read Articles

Goldboro green light could skew Atlantic labour demand: Ferreira

LABOUR , RESOURCE February 8, 2019

U.S. government appeals ruling that blocked Keystone pipeline

GOVERNMENT , INFRASTRUCTURE February 6, 2019

2018 U.S. and Canadian Construction Performances in Review

ECONOMIC February 7, 2019

Company gets water permit for refinery near national park

PROJECTS , RESOURCE February 8, 2019

You might also like

Sault Ste. Marie looking to fill hundreds of jobs, reaching out to GM employees

LABOUR February 14, 2019

$27.5-million investment made in three economic development programs for Indigenous communities

LABOUR February 14, 2019

Evolutions in concrete discussed at ORBA conference

ASSOCIATIONS February 14, 2019

Judgement could be a game-changer for subs in insolvency cases

GOVERNMENT February 14, 2019

Government addresses rural issues at ROMA conference

GOVERNMENT February 13, 2019

Funding to expand natural gas access to rural Ontario

RESOURCE February 13, 2019

IO to tackle GO RER with reworked planning team

GOVERNMENT , INFRASTRUCTURE February 13, 2019

NextBridge awarded 450-kilometre East-West transmission project

NextBridge awarded 450-kilometre East-West transmission project

INFRASTRUCTURE February 11, 2019
