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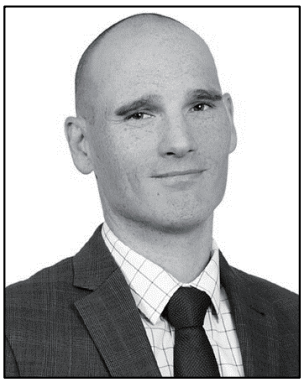

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OTTAWA LRT AND THE FUTURE OF P3S: PUBLIC (INTEREST), PRIVATE (COLLABORATION) AND (MEANINGFUL) PARTNERSHIPS

On December 16, 2021, the Ontario government established the Ottawa Light Rail Transit Commission to conduct a public inquiry into the commercial and technical circumstances that lead to certain breakdowns and derailments on the Ottawa Light Rail Transit (OLRT) system.

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CONSTRUCTION
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The Commission's final report and recommendations, which were published November 30, 2022, follow several themes. For industry proponents engaging in public-private partnership (P3) projects, the following themes are central:

1. Improving collaboration amongst all parties and stakeholders on future projects, including a greater emphasis on the partnership aspect of the P3 model;
2. ensuring that all parties involved in a project (including all private sector participants) acknowledge that they are working in the public interest, which should be the core organizing principle for projects; and
3. acknowledging the need for the early resolution of disputes.

The Commission's Purpose and Recommendations

The City of Ottawa engaged with numerous partners on the procurement, design and construction of the OLRT system — a 12.5 km light rail transit line that included underground tunnelling, 10 aboveground stations, and three underground stations. The City ultimately entered into a project agreement with Rideau Transit Group General Partnership (RTG) for the design, construction, financing and maintenance of the OLRT project, utilizing the P3 model for procurement.

The public inquiry was precipitated by construction delays and various technical and service failures, including alleged reliability issues and two derailments on the OLRT's main line. In addition to determining the causes of the breakdowns and derailments, the Commission's mandate included "*making recommendations to assist in preventing the OLRT's project issues from happening again*".

Following four weeks of hearings in mid-2022, along with dozens of witness interviews, the Commission released its final report on November 30th. The final report contains over 100 recommendations. While some of those recommendations are specific to the OLRT project and the role of government authorities in the procurement and delivery of future projects, the Commission also made recommendations that

have more general application relevant to all stakeholders on future projects (particularly P3s). In particular, the Commission made the following notable recommendations:

- Regardless of the project delivery model chosen, collaboration should be at the heart of the relationship between the public entity and private-sector partner(s).
- All private-sector stakeholders should be required to acknowledge that they are working in the public interest. The public interest should be a core organizational principle that informs all steps taken on a project.
- Public entities and private-sector service providers working on complex infrastructure projects should continually foster a culture of early reporting of issues, challenges, and mistakes.
- Project participants must ensure that the entity responsible for project oversight is provided with timely, complete, and accurate information about the infrastructure to allow for effective and transparent oversight, while being mindful that they are serving the public and striving to maintain and bolster the public's trust.
- Where amendments to contracts are being considered, relevant and affected parties should be involved in those discussions, including relevant subcontractors.
- Construction contracts should include mechanisms for calculating extensions of time and adjusting schedules if obstacles arise and delays are encountered. While provisions addressing delay are not new, parties should envision delays and plan for them at the contracting stage.
- Subcontracts must align and be consistent to avoid gaps in project obligations or deliverables.
- In considering a delivery model that requires private project financing, care must be taken to ensure private creditor rights do not create additional risks for the project. For example, where changes to the project require creditor consent, limits should be placed on the additional equity they can demand as a condition to their consent.
- Early dispute resolution should be incentivized in the project agreement, particularly where those disputes will affect the work going forward. Resolving operational problems and providing reliable public service must take precedence over all other priorities, including contract enforcement. The resources necessary to address a problem should be mobilized ahead of contractual interpretation and dispute resolution, which could be done without prejudice to parties' claims against one another.
- The Ontario government should investigate how to better incentivize the timely resolution of infrastructure problems in P3 contracts to avoid delay due to disputes between the parties. Positive and negative incentives should be considered. For example, positive incentives might include a break in payment mechanism deductions if significant problems are resolved before a Key Performance Indicator deadline in the contract.

The P3 Model

Although the Commission was not tasked with investigating the efficacy of the P3 model, the Commission did make some comments as to how the model affected the OLRT Project, ultimately determining that the use of the P3 model had a "mixed impact" on the OLRT Project.

The Commission's comments highlight some of the benefits (from a policy perspective) of using the P3 model given some of the risks that exist on large infrastructure projects, as well as some of the challenges that may arise due to the long-term nature of such arrangements.

Two of the primary public policy rationales for the P3 model include: (i) the creation of value for money, and (ii) effective risk transfer, the two of which are inextricably linked, as P3s tend to gen-

erate value where there is an effective transfer of risk between the public and private sectors. The Commission highlighted the fact that the transfer of the geotechnical risk to RTG resulted in significant cost savings to the public, stating:

> *The DBFM* [Design, Build, Finance and Manage] *approach to procurement effectively transferred the costs associated with certain project risks to the private party, the consortium (namely, RTG). Most importantly, while the City paid a significant premium to transfer the geotechnical risk on the project to RTG, in doing so the City obtained a material advantage, because that risk eventually materialized in the form of the Rideau Street sinkhole. The financial impact of the sinkhole was substantial, as the City avoided remediation costs that were over $100 million. The City has also transferred significant costs associated with fixing the OLRT1 and related maintenance issues to the consortium.*
>
> *It is unfair to dismiss these cost savings as a lucky benefit. Indeed, the heightened geotechnical risk (due to including the downtown tunnel in the plan for the OLRT1 project) was identified by the City and its advisors early on in the project. They acted in concert to mitigate that risk. The selection of a P3 model and the inclusion of the risk transfer ladder in the RFP process were deliberate choices made to reduce this risk to the City. In this case, the P3 model worked precisely as it should have by transferring the risk. The people of Ottawa were the beneficiaries of that good planning.*

As with any project delivery model, the P3 model can have certain drawbacks. The Commission noted that the OLRT project suffered from both limited public oversight and an insistence on rigidly enforcing contractual rights. The combination of these features led to an adversarial relationship that negatively affected the project. Nevertheless, the Commission's recommendations make clear that, although the long-term and large-scale nature of P3 projects pose certain challenges to parties, those challenges can be mitigated by effective planning, execution and implementation. In other words, parties must adhere to the "partnership" component of the P3 model — working together collaboratively at a project's early stages and during the project's execution — for the benefits of the P3 model to be realized.

Conclusions and Industry Take-Aways

The extent to which the Commission's recommendations affect future project design and delivery remains, of course, to be seen. However, we have already seen and are continuing to see gradual shifts in public-private delivery models which seek to address some of the concerns that the Commission raised in its report. Examples of such shifts in the P3 market made by procuring authorities include:

- Exploring "early contractor involvement" approaches to public-private delivery models;
- revisiting and adjusting the existing dispute resolution process between the public and private sectors;
- separating large infrastructure projects into several smaller projects and procuring them as "bundles"; and
- increasing the use of the design-build-finance model of project delivery, thereby eliminating the private sector's obligations to operate, maintain or rehabilitate such projects.

Nevertheless, the OLRT Commission's report and recommendations are likely to be borne closely in mind by public entities when entering into projects in the future. Bidders and contractors may need to be prepared to work within models that are meant to adhere to the Commission's recommendations.

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HOW THE METAVERSE CAN RESHAPE THE CONSTRUCTION INDUSTRY

Ever since Mark Zuckerberg, the chief exe cutive of Facebook, announced that the company would change its name to Meta and become a so-called

"metaverse company", the buzzword on everyone's lips for the last year has been the *Metaverse*.

There is no universal definition of what the metaverse is; however the Cambridge Dictionary provides a broad definition that can serve as a good starting point for this discussion: "*The metaverse is a virtual world where humans, as avatars, interact with each other in a three-dimensional space that mimics reality*". Those of us with younger children will be familiar with games like Roblox and Minecraft, which provide some insight into the early stages of the metaverse as an immersive social platform.

Beyond the social application, industries are looking at ways to leverage this technology, and the construction and design spaces are no different. Like it or not, the metaverse will change the way projects are developed and this article will touch on just some of the ways this will happen.

Construction

Using digital tools for physical application is not new to construction. It started with CAD (Computer-Aided Design), and then transformed into BIM (Building Information Modeling), which itself has been around for years and has allowed owners, designers, and construction professionals to collaborate by creating and managing information for a built asset, in real time, through cloud-based software. The purpose of BIM was to produce a digital representation of an asset across its lifecycle, from planning and design to construction and operations.

BIM already incorporates many metaverse characteristics but has one drawback — BIM is static in nature, as it requires constant user input to update the model. The construction industry is using the metaverse to take the next step, by creating what is known as a "digital twin". Digital twins utilize elements of BIM and integrate it with the Internet of Things, sensors, and algorithms to create a dynamic model that can be updated without user input and is able to run simulations to show how external stimuli will potentially impact the physical asset.

The data that is collected from sensors can be used in conjunction with historical data or simulations to optimize the performance of the assets by monitoring and diagnosing the asset's condition. One such application is to forecast the construction schedule and then monitor the as-built progress. Imagine a system of cameras and sensors that automatically update the as-built model with construction progress, allowing an owner or contractor to monitor efficiency of the workforce to record and simulate delays or acceleration.

In a society that ever increasingly values privacy, the constant monitoring required to accurately update a digital twin potentially raises some ethical or privacy issues. For example, a workforce can be monitored around the clock to determine their efficiency and progress, potentially identifying weak links or unproductive workers. On the one hand it can reward trades and individuals for "beating" the simulation to release an incentive payment, but on the other hand it provides extraneous and unbiased data to show exactly who has been inefficient. We all know that perfect efficiency is a myth, it is something many strive towards, but never achieve. A certain margin of error must be built into a simulation, but that raises a further question — what is reasonable? — 80 per cent efficiency? Seventy per cent? Efficiency that could be monitored empirically could potentially be used as a bargaining chip when bidding or pricing work.

The most significant difference between BIM and digital twinning is the three-dimensional nature of the model. While BIM appears three dimensional, it is always depicted in two dimensions on a flat screen. A digital twin on the other hand is immersive in three-dimensional space. Using VR (virtual reality) goggles, users can enter the virtual space as they would any other building and virtually walk around the structure. This can provide a better understanding or visualization of how spaces and rooms can interact with each other, or to consider possible finishes within the context of the surrounding environment.

Design

Architects will be at the forefront of adopting the metaverse and digital twinning. It will likely start with using digital twins as immersive models to present their concepts to developers or owners. Interior designers can show how colour and texture will work in a three-dimensional space. Clients will be able to walk through a virtual replica of a space to get a better understanding of the eventual physical asset, before the ground is broken. This will potentially mitigate later changes and tweaks to the design.

Utilizing digital tools in the development of physical assets barely scratches the surface of what is possible for talented designers. Architects will be at the forefront of the industry's acceptance and application of digital twins, but the metaverse will open new doors and possibilities for the industry.

With the emergence of new digital worlds, a new type of architect is beginning to emerge — *the meta-architect*. Certain computer-generated realms allow people to purchase their own virtual real estate, in many instances, for significant sums of *real* money. These digital lots naturally need to be developed, and just as in the real world, architects are retained to design one-of-a-kind dream homes, offices or even sports stadiums.

Meta-architects are unconstrained by the limitations of the physical world, principles of engineering or construction budgets, which allows them to push the boundaries of what is imaginable. Their only limitation is amount of digital real estate that has been assigned to them. Just as in the real world, scarcity drives demand and price.

Conclusion

In the construction industry, authors have identified a number of benefits a digital twin can provide — increased transparency of information; real-time monitoring, analysis, and feedback; better stakeholder collaboration; advanced preventive measures; advanced what-if scenario analysis and simulations; real-time tracking; and higher accuracy.

Although we are only at the initial stages of harnessing the metaverse, it is already clear that it will significantly impact the way physical assets are designed and constructed in the future.

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CONTRACTING IN AN ENVIRONMENT OF CLIMATE CHANGE

The pre-COVID construction environment now seems like a distant memory. The impacts of the pandemic were quick and overwhelming. Seemingly overnight, *force majeure* clauses went from being a rarely used piece of boilerplate contractual language to the hottest topic in town. Given the number of disputes that arose involving *force majeure* clauses, some of which spilled out into the courts, most of which were privately resolved in boardrooms and arbitration halls, it is fair to say that a good number of industry participants, be they lawyers or businesspeople, were caught unprepared.

While everyone is now keenly aware of the risks of a pandemic on their construction contracts, and (hopefully) taking appropriate precautions — are we ignoring a more foreseeable, equally as destructive, and likely far longer lasting impact on the construction industry?

"*Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future*". The impact of climate change on Canada will be "*particularly severe and devastating*" as it will "*continue to be affected by extreme weather events like floods and*

forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise…" (Supreme Court of Canada, *References re Greenhouse Gas Pollution Pricing Act, 2021*). The foregoing should be of concern to every individual.

Significantly, the impacts of climate change are not some distant threat. The construction industry is already one of the industries most affected by adverse weather events — which as noted by the Supreme Court of Canada are exacerbated by climate change. The construction industry is by its very nature particularly vulnerable to adverse weather conditions as a result of its reliance on labour, supply chains, and outdoor work. As noted by A.B. Senouci and S.A. Mubarak in a "*Multiobjective Optimization Model for Scheduling of Construction Projects Under Extreme Weather*", on a yearly basis, 45 per cent of construction projects are already affected by adverse weather resulting in billions of dollars in additional costs each year. Expect that number to go up sharply in the near future.

Not only does climate change present a real threat to construction projects, but for the construction companies that are able to pivot into the arena of "green" construction, there are significant business opportunities available. There are many reasons that environmentally conscious building certifications such as LEED (Leadership in Energy and Environmental Design) and the Living Building Challenge continue to grow in popularity. One of those reasons is that investors concerned with climate change are speaking with their wallets. Irrespective of views on climate change, Environmental, Social and Corporate Governance (ESG) continues its meteoric rise. A 2022 PricewaterhouseCoopers (PWC) report entitled "*The Growth Opportunity of the Century*" notes that ESG is "*nothing less than an all-encompassing shift*" that may eventually have "*the same, if not a greater, impact than the introduction of UCITS* [Undertakings for Collective Investment in Transferable Securities] *or AIFMD* [Alternative Investment Fund Managers Directive] *standards*". More and more investors are choosing to invest into ESG-focused entities. The same PWC report notes that, under some assumptions, it is expected that ESG fund assets under management will account for over 50 per cent of all European mutual fund assets by 2025. The construction industry is likely to see even more of this shift in asset allocations than most, as it is already facing scrutiny for its disproportionate share of global energy-related C02 emissions in recent years.

Given the apparent inevitability of climate change, it is crucial that industry participants position themselves to work with, or to competently advise their clients on, climate change issues. Competency in this area will lead to (at least) three synergistic benefits:

1. Achieving, or advising your clients on achieving, ESG goals;
2. Positioning yourself and your clients to participate more in an increasingly lucrative "green" industry; and
3. Preparing for the negative impacts of climate change on you and your client's projects.

The following contractual approaches offer a starting point for anyone wondering how they can adapt their construction contracts to meet ESG goals, attract "green" investment, and protect you and your client's construction projects from increasingly frequent adverse weather events.

Collaborative Contracting

One of the greatest difficulties with implementing project level changes that are focused on climate change is that the nature of the problem is collective. Addressing it requires everyone to contribute to the solution.

A general contractor who is contractually obligated to maintain green house gas (GHG) emissions at a certain level, will in turn need to ensure that every subcontractor is contractually obligated to maintain GHG emissions at a certain level, and the contractual obligations continue down the construction pyramid.

This is a difficult model to sustain. Indeed, as a project grows in size and scope, it can become nearly impossible to ensure that interests are aligned between all participants. These obvious points of failure/dispute are endemic to fixed-price contracts.

Collaborative contracts include features that are specifically designed to overcome many of the issues that are inherent to fixed price contracts. These features include "reimbursable costs", "Gainshare/Painshare" regime, commitments to cooperate and act in "good faith", "no blame" regimes, and collective problem solving and decision making. More broadly speaking, collaborative contracting is a contractual model that has the potential to more easily and cohesively bring the construction and design of large scale works into compliance with standards that are agreed upon by the parties, or otherwise mandated upon them. Collaborative contracting also allows parties to respond more adeptly to unanticipated issues that arise during the project. This is done in large part by sharing the obligations, risks, and rewards amongst the parties in such a way that necessarily forces them to align their interests with one another.

The collaborative contracting model is thus arguably well suited to allow parties to address difficult climate changes issues that are already part and parcel of a construction project and will becoming increasingly so in the future. The collaborative contracting model as a whole is also potentially helpful for dealing with the type of large-scale issues that face projects dealing with climate change in one way or another. Further, there are specific collaborative provisions that contracting parties can adopt to deal with climate change issues. As an example, the parties can implement "climate risk sharing" clauses that are designed to incentivize contracting parties to increase compliance with changing environmental standards on contract performance without turning to the adversarial incentives that are all too familiar under a regular fixed-price contract.

Climate Change Focused Contractual Clauses

For those not looking to make a big change, an incremental approach to contractually approaching the impact of climate change is the piecemeal insertion of climate change-related provisions into construction contracts. There are innumerable provisions that can easily be added to a construction contract to address a broad range of climate change issues. Note that we will separately discuss *force majeure* clauses in the section below, given their standalone significance to construction and climate change.

Climate change focused provisions can range from simple additions such as clauses that encourage parties to go "paper-free", or to conduct all meetings/negotiations/arbitrations virtually, to significantly more involved and complex provisions. For instance, contracting parties can choose to implement a "carbon budget" that can work alongside the traditional financial budget in the project, incentivizing participants to reduce GHG emissions in their work. In turn, this can be taken a step further, by specifying climate metrics for performance, and inserting liquidated damages provisions for breaches of climate metrics (potentially in the form of donations to environmental causes).

The Chancery Lane Project, a UK-based pro bono initiative doing much of the heavy lifting in this arena, publishes dozens of sample clauses that can be readily included in contracts that address various issues related to climate change.

Force Majeure

While collaborative contracting may allow contracting parties to share in both the risks and benefits of construction in the face of climate change, some may seek to use the now familiar *force majeure* clause to insulate a party from the effects of climate change. The party invoking a *force majeure* clause must be able to show that the act that occurred was something beyond reasonable human foresight. Many have postulated, however, that this language may quickly become inapplicable to the impacts of climate change on construction projects, particularly given that tech-

nological advancements in climate science are constant, allowing us to map out hurricanes, typhoons, snow storms, and other weather events ever longer into the future.

Accentuating the argument against relying on a "standard" *force majeure* clause in the face of the impacts of climate change is the fact that the types of impacts of climate change are as varied as they are destructive. A project can face acute physical risks that hit strong and fast (i.e., hurricanes), it can face chronic climate impacts (i.e., increased salt needed for snow covered roads), changing governmental policies (i.e., carbon tax), or even just purely financial risks (i.e., increasing commodity prices).

Luckily, *force majeure* clauses are incredibly versatile. Lawyers should take into account their client's particular circumstances and the facts at hand to draft bespoke "*force majeure*" clauses that best respond to the client's needs in the environment that they are in. This might mean engaging with technical experts — who can speak to the likely impacts of climate change on a given project — far earlier and more extensively in the drafting process. This could mean drafting *force majeure* contracts that remove "foreseeability" of the event from the analysis. Or it could even mean considering having the contracting parties implement a "hell or high water" provision that requires performance regardless of whatever may take place to impede performance.

A friendlier companion of *force majeure* clauses, "best efforts" clauses, "reasonable efforts" clauses, and "commercially reasonable efforts" clauses, should also be kept in mind, particularly in instances where strict performance standards may be unrealistic and/or undesirable. These circumstances can readily feature in the context of climate change related objectives.

Conclusion

The above contractual provisions offer just a few of the options available to those in the construction industry who anticipate change coming and want to position themselves to be ahead of the curve. It is a model of adopting a climate change proactive, rather than reactive, approach. As with any technological or financial revolution, there may be great benefit for those who successfully adapt and jump on the train early on. Evolving standards and regulations alone mean that there are strong incentives for shifting their construction projects to respond to societal trends.

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ECONOMIC IMMIGRATION: A POTENTIAL SOLUTION TO THE LABOUR SHORTAGE IN THE CONSTRUCTION SECTOR

According to a 2020 study by BuildForce Canada, the construction sector stands to lose some 257,000 workers to retirement by 2029. Though immigration could help fill the labour shortage in Quebec, the number of newcomers entering the construction sector has been in decline, due in part to the predominance of immigration policies aimed at attracting other types of candidates, especially those with high levels of education.

That said, two programs could be of interest to employers seeking to hire temporary construction workers. Under the Temporary Foreign Worker Program (TFWP), employers must, among other things, obtain a Labour Market Impact Assessment (LMIA) and a Québec Acceptance Certificate (QAC). The International Mobility Program (IMP) lets employers hire temporary workers without a LMIA. Canada has also signed agreements with countries like Colombia, Peru, Mexico and Korea

to facilitate international mobility for certain workers under the IMP.

Under the TFWP, the LMIA confirms to the Canadian government that the foreign worker will fill a gap in the market and that no Canadians or permanent residents are available to do the job. It helps prove that hiring a foreign worker would not adversely affect the job market. Accordingly, employers must prove that they tried and failed to recruit a Canadian or permanent resident for the position. This is an additional step in the hiring process, which also includes obtaining a temporary visa, a QAC and a work permit for the foreign worker.

What Happens When the Foreign Worker Arrives in Quebec?

After arriving in Quebec, foreign workers must meet certain conditions to work in the construction industry, as many of its professions and trades are regulated. Most workers will have to undergo an equivalence process, and many will have to complete a retraining program, practical training and exams.

Once they are in Quebec, permanent and temporary immigrants must take additional steps before they can start working in construction. These vary depending on the job sought (e.g., professional position, position as a technician, or position as a skilled worker). The immigrant's construction experience can also be a factor.

Employers should therefore look into how certain countries' comparable training and certification systems are to accurately determine what skills workers will actually have upon arrival. In some situations, employers may want to provide short courses or training programs to help workers obtain the necessary permits. Employers should consider these matters even before posting a job.

To enter certain construction trades in Quebec, foreign workers must hold a competency certificate or certificate of qualification. The Commission de la construction du Québec (CCQ) is tasked with ensuring that people who work on construction sites hold the required competency certificates. This also applies to foreign workers. Employers and foreign workers need to be aware of these additional requirements. Eight measures to help counter the construction industry labour shortage came into effect on April 26, 2021. These measures allow the CCQ to issue apprentice competency certificates to all individuals who submit a relevant record of recognition of professional experience. Foreign workers can obtain this certificate by showing the CCQ that they have worked a number of hours equivalent to 35 per cent of the duration of apprenticeship in the relevant trade. They must also pass a health and safety course and present a job guarantee.

Some foreign workers can also have all their experience and education recognized in certain trades. They may submit a request for recognition of hours equivalent to 100 per cent of the duration of apprenticeship to be eligible for the CCQ qualification exam.

Recently, to support Spanish-speaking newcomers, the CCQ began offering certain health and safety courses in Spanish. The *Santé et sécurité générale sur les chantiers de construction* course offered in Spanish in the Saint-Jean-sur-Richelieu region will help workers who struggle to communicate in French when they arrive and obtain the certificate allowing them to work on a construction site.

It is also important to note that the professional qualifications of workers in various construction trades and workers from certain countries, like France, are recognized. This means foreign workers from certain countries have an easier time moving to Quebec for work.

Other measures are being implemented by the Quebec government and foreign governments in view of helping the sector overcome its labour shortage. These include the pilot carpenter-joiner recruitment program in Tunisia and Morocco and the pilot worker recruitment program in El Salvador.

In light of the above, economic immigration could soon become a very viable solution to the ongoing labour shortage in the construction industry.

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RIGHT OF APPEAL UNDER ALBERTA'S *ARBITRATION ACT*

Agrium v. Orbis Engineering Field Services is a case involving statutory interpretation of s. 7(6) of Alberta's *Arbitration Act*. Section 7 of the Act allows a court to stay court proceedings in light of an arbitration agreement. Section 7(6) specifically states: "*There is no appeal from the court's decision under this section*". *Agrium v. Orbis* considers whether or not the court can hear appeals of an application to stay litigation proceedings in favour of arbitration.

By reasons filed on August 8, 2022, the majority of the three-member panel of the Court of Appeal (Crighton, Ho JJA) held that a party may appeal from a master (now applications judge) to a Court of King's Bench justice under s. 7 of the Act. The dissenting member of the panel of the court (Wakeling JJA) held that there is no right to appeal from a master's decision under s. 7(6) of the Act.

Background Facts

In 2013, the Agrium Inc. separately engaged Orbis Engineering Field Services Ltd. and Elliott Turbomachinery Canada Inc. and Elliott Company (collectively, Elliott) to provide work and services relating to the upgrade of one of its production facilities. Agrium drafted the purchase orders that governed the work, which contained the following mandatory arbitration provision relating to the resolution of disputes (emphasis added):

> 28. PROPER LAW and DISPUTE RESOLUTION:
>
> …***Any dispute relating to [the Agrium Contract] shall be resolved by arbitration in Calgary, Alberta, Canada, pursuant to the UNCITRAL Model Law and Rules.*** The courts having exclusive supervisory jurisdiction with respect to the matters relating to [the Agrium Contract] shall be the courts of the Province of Alberta.

A failure occurred at the production facility on March 22, 2014. Nearly two years later and on the eve of the limitation period, Agrium filed a statement of claim suing Elliott and Orbis and seven other defendants for its loss. None of the agreements with the seven other defendants contained a mandatory arbitration provision.

By the time Agrium served its claim on Orbis and Elliott, the parties agreed that the time limit for commencing an arbitration proceeding had long expired. Orbis and Elliott defended the claim on the basis of non-compliance with the dispute resolution provision. In March 2019 and January 2020, Orbis and Elliott respectively took steps to stay or strike the action pursuant to s. 7(1) of the Act.

Master's Decision: *Agrium, Inc. v. Colt Engineering Corp.*

By reasons reported at *Agrium, Inc. v. Colt Engineering Corp.*, the master dismissed Orbis and Elliott's application to strike the action, concluding that it had discretion to determine if Orbis and Elliott had waived reliance on the mandatory arbitration provision and attorned to the jurisdiction of the court. The master noted that although Orbis and Elliott took two years, and two years and three months, respectively, to move to strike, the extent of delay is simply a factor to be considered.

Court of Queen's Bench Decision: *Agrium Inc. v. Colt Engineering Corp.*

Orbis and Elliott appealed the decision to a justice of the Court of Queen's Bench and Agrium applied to strike both appeals on the grounds that s. 7(6) of the Act barred appeals from the master's decision. In *Agrium Inc. v. Colt Engineering Corp.*, the court held

that, first, s. 7(6) did not bar an appeal from a master's decision; and second, that Elliott and Orbis did not waive reliance on the mandatory arbitration provision in the Agrium Contract. The chambers justice allowed Orbis and Elliott's appeal from the master, struck the claim, and dismissed Agrium's application to strike the appeals.

The Analysis by the Court of Appeal

Agrium appealed the court's decision. Among other issues, Agrium argued that the chambers justice did not have jurisdiction to hear the appeal of Orbis and Elliott from the decision of the master. The Court of Appeal therefore addressed whether s. 7(6) of the Act bars an appeal from a master in chambers to a justice of the Court of Queen's Bench.

The parties did not dispute or disagree on the following points:

1. the applicability of mandatory arbitration provision in the Agrium Contract;
2. that the time for commencing arbitration proceedings had expired;
3. the chambers justice's finding on the merits of the appeal;
4. the standard of review, being a question of law that engages principles of statutory interpretation.

The Court of Appeal reviewed the Act, the *Court of Queen's Bench Act*, the *Interpretation Act*, and the Alberta *Rules of Court*.

The court set out the following relevant statutory provisions:

1. Section 7 of the Act states:

> (1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
>
> (2) The court may refuse to stay the proceeding in only the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
>
> (d) the application to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.
>
> (3) An arbitration of the matter in dispute may be commenced or continued while the application is before the court.
>
> (4) If the court refuses to stay the proceeding,
>
> (a) no arbitration of the matter in dispute shall be commenced, and
>
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.
>
> (5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
>
> (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
>
> (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.
>
> (6) There is no appeal from the court's decision under this section.

2. Section 1(1)(c) of the Act defines "court" as: "*… in sections 6 and 7, the Court of Queen's Bench and the Provincial Court, and in all other sections, the Court of Queen's Bench*".
3. Section 28(1)(k) of the *Interpretation Act* defines the "Court of Queen's Bench" as the Court of Queen's Bench of Alberta. Section 2 of the *Interpretation Act* states that the *Interpretation Act* applies "*to every enactment whether enacted before or after the commencement of this Act*".
4. Section 12 of the *Court of Queen's Bench Act* states that "[*a*]*n appeal lies to a judge in chambers from a decision of a master in chambers*".
5. Rule 6.14 of the Rules of Court states the following: "*Appeal from master's judgment or order*: *(1) If a master makes a judgment or order, the*

> *applicant or respondent to the application may appeal the judgment or order to a judge*".

The court cited several principles of statutory interpretation. As the appeal involved several pieces of legislation, the court cited the presumptions of consistency and coherence. The court noted that: "*In the context of statutory interpretation, conflict is a narrow concept meaning the two acts under review cannot stand together and cannot both operate without interfering with the other*".

Moreover, legislation is presumed to be enacted in compliance with the constitution. The court noted that decisions of a master in Alberta have always been subject to review by a superior court justice, who hears appeals on a *de novo* [as if from the beginning] basis. The constitutional jurisdiction of a master and a justice could not be changed by an "*implied amendment to a provincial statute*".

Further, even if s. 12 of the *Court of Queen's Bench Act*, which confers a right of appeal from a master to a justice of the same court, conflicts with the statutory prohibition in s. 7(6) of the Act, the court did not agree with Agrium that the Act is the more specific provision that would override the right of appeal in the *Court of Queen's Bench Act*. Rather, the provision that specifically addresses the right of appeal is that in the *Court of Queen's Bench Act*.

The court noted that an appeal is *not* available pursuant to s. 7(6) of the Act where the decision of a master was not appealed, the time for doing so has expired, or a justice of the Court of Queen's Bench decided the issue. The majority held that this interpretation of s. 7 of the Act respects the constitutional limitations on the master's decision, the statutory right of appeal in the *Court of Queen's Bench Act*, and the legislative intention that arbitration matters not be subject to multiple levels of appeal.

Justice Wakeling in dissent would have allowed the appeal, noting that a master's decision is a decision of the Court of Queen's Bench of Alberta and it is "crystal clear" that "no appeal" means "no appeal". He further noted that s. 7(6) of the Act deprives a party a further right to appeal but would not preclude applying for permission to appeal to the Supreme Court of Canada or applying to a justice of Court of Queen's Bench for judicial review.

Takeaways

Section 7 of the Act allows the court to stay a proceeding where a party has commenced a court action in the face of a mandatory arbitration agreement. This issue often arises when a party has not followed the contractual dispute resolution process and has proceeded to file an action in court in ignorance or in an attempt to, perhaps, meet or preserve its limitation date. When that happens, the opposing party to the arbitration agreement can bring an application under s. 7 of the Act to stay the proceedings. Section 7(6) of the Act states that, "*there is no appeal from the court's decision under this section*". Even so, the law in Alberta is that appeals from applications judge's decisions under this section are permitted.

It is interesting to briefly place this case within the broader context of commercial arbitration and what the Supreme Court of Canada has emphasized is the central aim of commercial arbitration — "*efficiency and finality*". To the extent that *Agrium v. Orbis* permits a further appeal from an applications judge, it arguably challenges those twin aims set out by the Supreme Court.

Despite that, practically, parties and their counsel should engage in a detailed review of the governing contractual provisions in the initial stages of a dispute to ensure that they are not bringing a court action in the face of a mandatory arbitration agreement or provision. Doing so carries risk that a court may dismiss the court action. This may then mean that the plaintiff is without legal recourse because they may similarly be unable to commence arbitration proceedings after the passage of some time.

Alberta Court of Appeal

Agrium v. Orbis Engineering Field Services
T.W. Wakeling, M.G. Crighton and L.B. Ho JJ.A.
August 8, 2022

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MASS TIMBER CONSTRUCTION OPPORTUNITIES IN CANADA

The demand for sustainable, lower-carbon solutions in the construction industry is creating new opportunities for the use of mass timber in Canada. Building code regulations are changing to allow for taller wood structures. Hundreds of new projects are planned or underway in British Columbia and Ontario.

As an example, at the provincial and municipal levels, British Columbia is aiming to supply more wood and make more value-added wood products available in the province. British Columbia currently has more mass timber buildings per capita than anywhere else in North America. In addition, in April 2022, the City of Toronto announced a new mass timber pilot program for affordable rental housing, using wood products that must be certified by the Forest Stewardship Council (FSC) or CaGBC (Canada Green Building Council)-approved equivalent.

These developments are exciting. However, there are some important things for developers to consider when looking at a mass timber project, particularly:

- the approval process;
- product supply and trade issues;
- contractor experience and insurance; and
- environmental, social and governance (ESG) benefits.

Approval Process

The approval process for mass timber buildings is not as certain as other projects. Mass timber construction is still relatively new in Canada and the regulatory system is evolving with it. Developers should consider the potential for uncertainty and delays and address this risk in their project scoping and scheduling activities.

We note there are a number of positive developments. The new National Building Code of Canada was released on March 28, 2022. One of the highlights is the inclusion of encapsulated mass timber construction to allow for wood buildings up to 12 storeys tall. British Columbia was the first Canadian province to amend its Building Code to permit the construction of tall wood buildings up to 12 storeys. In Ontario, the Building Code was updated in 2015 to allow wood frame buildings up to six stories, with a change similar to British Columbia's proposed for the next edition of Ontario's Building Code. A 10-storey institutional building for George Brown College is already under construction in Toronto.

British Columbia launched its Mass Timber Action Plan in April 2022 as a roadmap to grow the indus-

try. As part of the plan, the provincial government says it will work closely with industry and researchers to identify and overcome regulatory barriers.

Product Supply and Trade Issues

The supply of mass timber products (e.g., cross-laminated timber) is critical to a project's success. Mass timber products typically make up a large percentage of overall project material costs. The source can affect cost, schedules and overall ESG aspects of a building.

It is very important to know if the product is sourced in Canada or overseas, as trade issue risk should be assessed for any project. Tariffs and supply chain disruptions may be concerns if the products do not come from Canada. Contractually, as the product is so critical to the project, we typically see developers designate the product source/supplier in a construction (CCDC) contract to avoid issues.

Contractor Experience and Insurance

Using mass timber is very different from concrete-and-steel construction. Developers should seek professionals, builders and trades who have experience with mass timber buildings and a well-developed plan to complete the project. The construction contract should contain sufficient covenants to confirm such experience. Consideration should also be given to including provisions mandating the use of certain product suppliers (see above). A review of standard warranty provisions to confirm appropriate for the specific products used should also be considered.

The insurance requirements for mass timber projects and the timing to place such insurance should be confirmed and priced in advance to avoid delays and cost surprises.

ESG Benefits

The ESG benefits of mass timber buildings add to their appeal for developers and governments. Wood is a natural and renewable building material. It can be grown sustainably and is a lower-carbon form of construction. Mass timber can match or exceed the structural performance of concrete-and-steel while reducing carbon emissions by as much as 45 per cent.

Developers must plan for the entire life cycle of a mass timber building to realize all the low-carbon benefits. Wood that ends up in a landfill will release its carbon back into the atmosphere, so planning for the re-use of building materials or using capsulated wood products is a necessary step.

ESG benefits are much more than environmental. First, British Columbia's Action Plan supports reconciliation by co-creating tangible economic and social opportunities for Indigenous people in the mass timber economy. Second, developers may be able to generate carbon offset credits under British Columbia's Offset Protocol. This policy is still under development, however, and the British Columbia government intends to release a finished protocol this year.

CITATIONS

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References re Greenhouse Gas Pollution Pricing Act, 2021, [2021] S.C.J. No. 11, 2021 SCC 11