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MANUAL OF CONSTRUCTION LAW

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This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparation stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Release 2026-1 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 1 (The Construction Team), Chapter 2 (The Tendering Process), Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), Chapter 5 (Construction Liens) and Chapter 6 (Bonds).

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Highlights :

Recent case law introduced with this release includes the following:

The Tendering Process—The Bid Package—Discrepancies and Questions—Ambiguity Between Schedule of Bids and Instructions to Bidders—Tendering Documentation Requiring Same Unit Prices for Certain Items on Two Projects—Lowest Bidder Having Different Prices—Lowest Bid Rejected—Duty on Bidder to Raise Any Ambiguity—Although there was an inconsistency in the tendering documentation and the instructions to the bidders, in requiring the bids on two projects to use the same unit prices for repeated items, there was a duty on the bidder to raise any ambiguity with the tendering authority, and not unilaterally submit different prices for the required work. In this case, the Ministère du Transport intended to build a reserved lane along a highway. The public transit agency (AMT) launched a tendering process for that project. AMT was also involved in a second paving project for the same highway. The instructions to the bidders required the bidders to use the sane unit price for certain items in the price and quantity schedule, which concerned activities that were repeated in both projects. Of the 112 items in the Schedule, 27 were repeated and required the same unit price. The contractor submitted its two bids, which ended up being the lowest bids in the tendering process. However, the contractor's bids were rejected as they did not comply with the requirements of the tendering process. The AMT accepted the bids of a third party, which submitted identical unit prices for all the repeated items. The contractor then filed an action against the AMT claiming loss of profits resulting from the rejection of its bid on the reserved highway project. The contractor's action was allowed, and it was awarded damages of compensated for its lost profits that amounted to $708,292 for its lost profits.

The judge addressed the content of the contractor's bid. He concluded that the contractor was justified in proposing different prices for the work required in the two projects, since the sections of the Schedule were not only differentiated by letters a) and b), but also by the description of the work in the technical specifications attached to them. In the judge's opinion, it was up to the AMT to draft the instructions to bidders and the directives in the Schedule so that bidders all understood the requirements in the same way and it was not up to the contractor to ensure the accuracy of its interpretation. The contractor had further argued that the requirements in question were not the essential elements of the tendering process. The tendering process amounted to a contract of adhesion, and any ambiguity should be resolved in favour of the bidder. In this instance, the inconsistency raised by the AMT resulted from an ambiguity in the tendering process documentation. As the contractor's bid was the lowest, the AMT should have given the contract to the contractor. The evidence adduced by the contractor detailing its financial loss was reliable and accepted. AMT appealed, and its appeal was allowed.

While it was true that the requirement imposed in the Schedule of Bids regarding a single unit price for certain activities was not reproduced in the instructions to tenderers, it was undeniable that it ap-

peared in the Schedule of Bids, and that the contractor's representative acknowledged having read it and understood its objective. The contractor had an obligation to raise with the client any ambiguities or contradictions noted in the tender documents under the instructions to tenderers. The trial judge did not address this obligation anywhere. By failing to consider the bidder's obligation in this regard, the judge committed a manifest and decisive error. The trial judge erred in a manifest and decisive manner in concluding that the AMT had failed in its obligations by rejecting contractor's tender when it was tainted by a major irregularity arising from the non-compliance with a requirement of which it was aware. The contractor chose not to consider the requirement because of its ambiguous or contradictory nature with the instructions to bidders, rather than raising this ambiguity with the AMT as provided for in the instructions to tenderers: *Agence métropolitaine de Transport v. Sintra inc*. 2024 CarswellQue 3731, 2024 QCCA 500 (C.A. Que.) reversing *Sintra inc v. Agence Métropolitaine de Transport*2022 CarswellQue 20389, 2022 QCCS 4971, 38 C.L.R. (5th) 176 (C.S. Que.).

Contracts—Breach of Contract—Owner—Failure to Pay Contract Price—Prompt Payment Adjudication Scheme—Jurisdiction of Adjudicator—Adjudicator Erring in Determining Over One Percent of Contract Price Owing—"Price of Completion" Referring to Valure of Uncompleted Work and Not Quantum of Disputed Payment Claim—An adjudicator was wrong in law in finding jurisdiction for an order for "prompt payment" under the legislative prompt payment scheme, based on the outstanding payment owing to the contractor being larger than one per cent of the contract price as the "price of completion" in s. 2(3) of the *Construction Act*, R.S.O. 1990, c. C.30, referred to the value of the uncompleted work, and not the quantum of the disputed payment claims. In this case, the contractor contracted to construct a swale for the owner. The parties agreed that the swale was not fully constructed by the contractor, but was later completed by a different contractor. The parties went to arbitration on the issues of whether the swale work had been removed from the contract work by mutual agreement, and whether the price of completion of the swale work was less than $5,000. The adjudicator did not make factual findings on those two issues. He issued a brief decision in which he found that he had jurisdiction because the outstanding payment was much larger than one per cent of the contract price. In his final determination, he found the contract was not substantially "completed" within meaning of *Construction Act*. He granted the contractor's request for an order for prompt payment from the owner to the contractor in the amount of $564,813. The owner's application for judicial review was granted.

The adjudicator was plainly wrong in law in finding jurisdiction on the basis that he did. The "price of completion" in s. 2(3) of the *Construction Act* referred to the value of uncompleted work, and not the quantum of the disputed payment claims. In coming to a contrary conclusion, the adjudicator misconstrued the plain meaning of the *Construction Act*, failed to apply settled and longstanding jurisprudence on the meaning of deemed "contract completion" under the Act and misconceived the scheme of the prompt payment adjudication provisions of the Act. The adjudicator did not make factual findings material to the basis on which the jurisdictional issue was argued before him, and on which it ought to

have been decided. In particular, the adjudicator did not make material factual findings regarding whether the swale work had been removed from the contract work by mutual agreement, and therefore was no longer part of the scope of work required for contract to be completed, and whether the "price of completion" of the swale work was less than $5,000. It was open to the adjudicator to decide a point on a basis not raised before him by the parties, but as a matter of procedural fairness, he should have given the parties notice of the concerns and an opportunity to address them. Had additional submissions been sought, the parties might well have persuaded the adjudicator that his proposed analysis was in error. Without factual findings on the two key issues argued by the parties respecting the jurisdictional issue, the matter had to be remitted for a fresh determination before a different adjudicator: *Jamrik v. 2688126 Ontario Inc*. 2024 CarswellOnt 11019, 2024 ONSC 2854, 174 O.R. (3d) 291 (Ont. S.C.J.).

Construction Liens—Interlocutory Motion—Posting of Security to Vacate Claim for Lien—Motion to Reduce Security—Developer Terminating Contract But Continuing to Pay Subcontractors—Amount of Security Reduced Only for Payments to "Person Having a Lien"—Where the property developer terminated the contract with the construction manager, but provided notice of intention under s. 28 of the *Construction Act* R.S.O. 1990, c. C.30, to continue to pay certain subcontractors, and the developer brought a motion to post security to vacate the manager's claim for lien, the motion judge erred by reducing the amount of the required security by payments made to certain subcontractors, which were beyond the scope of s. 28 that provided for direct payments to a "person having a lien" owing to that person for services or materials supplied to the improvement. In this case, the plaintiff was the construction manager for a mixed-use condominium project owned and developed by the defendant developer. The contract required the plaintiff as general contractor to retain and manage the subcontractors. Upon the supply of services or materials for the project, the plaintiff became entitled to a lien on the developer's interest in the project land. After about four years, the developer sent a letter notifying the plaintiff of termination of its right to perform work under the contract, alleging numerous delays, deficiencies in the work and failures to cure defaults incurred by the plaintiff. The letter also stated that the developer was providing notice under s. 28 of the *Construction Act* of its intention to continue paying certain of the subcontractors who had completed work at the project in order to further mitigate its losses. The plaintiff preserved its lien against the project land by registering a claim for lien on title in the amount of $5,035,813.It then perfected its preserved lien by commencing a construction lien action, and registering a certificate of action on the project land's title.

Following a motion brought by the developer, it was ordered that the claim for lien and certificate of action be vacated upon the developer posting security by way of a lien bond in the amount of the claim for lien plus $50,000 for security for costs. The developer posted the security and filed a statement of defence. The developer then moved for an order that the security posted be reduced to a "lesser and reasonable amount determined by the court pursuant to s. 44(5) of the *Construction Act*". The motion judge calculated a reduction of the amount of posted security by about $3.5 million to $1,531,587. The difference was the amount

of uncredited direct subcontractor payments that had been determined by the motion judge to have been made by the developer to satisfy amounts that the plaintiff owed to the subcontractors. The motion judge found such amounts to be valid payments under s. 28 of the *Construction Act*. The plaintiff argued that s. 28 of the Act did not apply because the subcontractors were not lien claimants, and because there was no reliable evidence to determine what portion of the subcontractor costs incurred by the plaintiff in its claim for lien had been paid by the developer. The motion judge rejected both submissions and granted the motion to reduce the posted security. The plaintiff appealed, and its appeal was allowed.

The motion judge erred in interpreting the scope of s. 28 of the *Construction Act*. To the extent that the motion judge's analysis related to questions of mixed fact and law, he erred with respect to an extricable question of law, reviewable on a correctness standard. Properly interpreted, s. 28 applied to direct payments to a person having a lien relating to any amount owing to that person for services or materials supplied to an improvement of the premises. The motion judge's error was in expanding the scope of s. 28 to include payments to other subcontractors who were not persons having a lien. The use of the words "owing to that person" in s. 28 was inconsistent with the motion judge's conclusion that the scope of s. 28 extended beyond direct payments to a person having a lien. Limiting the scope of the s. 28 payments to "persons having a lien" made sense when considered in the context of the statutory scheme, and the purpose of the legislation. Given the motion judge's error as to scope, he did not make findings of fact on the extent that the developer made direct payments to subcontractors that met the statutory definition of a "person having a lien", and otherwise fell within s. 28. As the record on appeal did not provide a basis for making that determination, the motion judge's order could not stand. However, this did not preclude developer from revising its motion or bringing fresh motion under s. 44(5) of the Act: *Demikon Construction Ltd. v. Oakleigh Holdings Inc*. 2024 CarswellOnt 19539, 2024 ONSC 6261, 174 O.R. (3d) 530 (Ont. S.C.J.), reversing *Demikon Construction Ltd. v. Oakleigh Holdings Inc. et al*(2024), 2024 CarswellOnt 5369, 2024 ONSC 2151 (Ont. S.C.J.); and reversing *Demikon Construction Ltd. v. Oakleigh Holdings Inc*. (2024), 2024 CarswellOnt 12204, 2024 ONSC 4472 (Ont. S.C.J.); additional reasons to *Demikon Construction v. Oakleigh Holdings*(2024), 2024 ONSC 992, 2024 CarswellOnt 1829 (Ont. S.C.J.).

Construction Bonds—Bonds Required by Contractor—Subcontractor Entering Indemnity Agreement with Insurer—Contractor Terminating Subcontract and Claiming Payment—Subcontractor Receiving Interim Award from Adjudicator—Insurer's Security Interest Under Agreement Prevailing Over Unsecured Award—Amount of Award to be Paid Into Court Pending Outcome of Various Proceedings—Where the insurer issued a performance bond and labour and material bonds as required by the contractor, and the subcontractor executed an indemnity agreement in favour of the insurer, and the contractor terminated the subcontract, making a claim for

payment pursuant to the bonds, but an adjudicator ruled in favour of the subcontractor, awarding it payment for two invoices, the insurer's motion to have the award paid into court was granted as the subcontractor had otherwise breached the indemnity agreement, and the insurer had a security interest in the disputed funds, and a trust claim over them. In this case, the contractor as general contractor for a project engaged the electrical subcontractor to provide electrical supply and required the subcontractor to provide performance security. The insurer delivered performance and labour and material bonds (bonds) in the amount of $2,050,339, naming the insurer as surety. As a precondition to the insurer issuing the bonds, the subcontractor and its principal executed an indemnity agreement in favour of the insurer. The contractor later terminated the subcontract, and made a claim pursuant to the bonds. On an interim basis, the insurer entered into a mitigation agreement, under reservation, with the contractor, and paid advances of $340,000. The mitigation agreement provided that if the insurer denied liability at any time, the contractor would not be entitled to any further advances, and would have to reimburse and indemnify the insurer for any amounts paid. The subcontractor applied for an adjudication pursuant to s. 13.5(1) of the *Construction Act*. The adjudicator ordered the contractor to pay the subcontractor for two invoices under the subcontract, and rejected the contractor's claim for set-off for delay. The subcontractor was awarded $316,960 pursuant to the determination. The adjudicator specifically noted that he had not determined whether the contractor properly terminated the subcontract.

Based on the adjudicator's decision, the insurer took the position that the subcontractor was not in default of the subcontract, that the contractor had not properly performed its obligations thereunder, and that the contractor was not entitled to make a claim under the bonds. The insurer advised the contractor that it would not be making any further payments under the mitigation agreement. The insurer requested that the contractor reimburse and indemnify the insurer for all payments made to date, and that the contractor not release to the subcontractor the funds awarded by the adjudicator. The contractor paid the money to its counsel in trust, and took the position that it would not release the funds awarded to the subcontractor by the adjudicator because there were competing claims. Some of the funds were released by agreement to subtrades, leaving some funds still in dispute. The insurer brought a motion for summary determination that the disputed funds be paid to it immediately or to the court. The insurer's motion was granted in part. The insurer was only entitled to its losses as defined in the indemnity agreement. Several ongoing proceedings involving the parties, not yet resolved, could affect the insurer's entitlement. The disputed funds should be paid into court the pending outcome of various proceedings among the parties.

The indemnity agreement provided that an event of default by the subcontractor included a breach or an alleged breach of the subcontract, the failure, refusal or inability to pay bills, and any other occurrence which would expose the insurer to loss, cost or expense. The subcontractor committed an event of default. While it was arguable that the subcontractor did not pay its employees because the contractor did not pay its invoices, the indemnity agreement provided that an event of default included "any failure" or "inability" to pay bills or indebtedness.

The subcontractor's non-payment satisfied the definition, and the reason therefor was irrelevant. A notice of breach given by the contractor to the contractor claiming that the subcontractor had not completed certain work, and failed to pay suppliers also constituted an event of default because it was an alleged breach potentially exposing the insurer to "loss, cost or expense" according to the terms of the indemnity agreement.

The insurer had a security interest in the disputed funds as well as a trust claim over them. That was the objective intention of the parties as set out in the clear and unambiguous wording of the indemnity agreement. The parties' objective agreement was that any funds awarded to the subcontractor, including funds awarded pursuant to a determination by an adjudicator under the *Construction Act* were subject to a security interest and impressed with a trust in favour of the insurer. Section. 13.5(2) of the *Construction Act*, was part of the amendments to the Act establishing the provision for determinations by the Ontario Dispute Adjudication for Construction Contracts. This provision specifically noted that the parties who might proceed and obtain a determination were parties to a subcontract. This part of the Act did not purport to apply to sureties. In addition, it would not have been a commercially reasonable interpretation to exclude interim awards from the security interest. The insurer registered its security interest pursuant to the indemnity agreement under the *Personal Property Security Act*, and its registered security interest stood in priority to the award in favour of the subcontractor because the adjudicator's determination resulted in an unsecured award: *Westport Insurance Corp. v. BDA Inc*. 2024 CarswellOnt 15030, 2024 ONSC 5450, 174 O.R. (3d) 141, 46 C.C.L.I. (6th) 318 (Ont. S.C.J.).