IN THIS ISSUE:

The Emperor’s New Clothes: The Extent of a Performance Bond Surety’s Liability
Glenn W. Ackerley ........................................... 1

Deterrence and Denunciation: Court of Appeal Sends Strong Message on Workers’ Safety
R. v. Metron Construction Corp. ................. 3

The Importance of Copyright in an Architect’s Works
Andrea W. K. Lee and Jennifer Li .................. 5

Contract Performance Frustrated by Actions of Outsider
Advanced Precast Inc. v. Brown Daniels Associates Inc. ................................. 7

Settling a Multi-party Construction Dispute
Sable Offshore Energy Inc. v. Ameron International Corp. ........................................ 10

Introducing the new CLL Editor
Markus Rotterdam ........................................ 12

GUEST ARTICLE

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THE EMPEROR’S NEW CLOTHES: THE EXTENT OF A PERFORMANCE BOND SURETY’S LIABILITY

The recent decision in OHL Construction Canada v. Continental Casualty Co. [OHL Construction] re-examines a fundamental question: what is the extent of the surety’s liability under a performance bond? The answer to the question was thought to be so well settled for so many years that someone could justifiably wonder why anyone would bother to challenge it. Everybody knows the liability of the surety under a bond is limited to the penal sum of the bond.

It is therefore hardly surprising that when the obligee in OHL Construction brought a claim against the performance bond for an amount of almost ten times the penal sum of the bond, the surety moved to have the claim struck. How could a surety have an exposure for greater than the penal sum? What principle could be clearer?

What is surprising is that Justice Firestone decided the question was not so clear and allowed the claim to proceed on to trial. In dismissing the motion, the court allowed for the possibility that there may be circumstances where a surety could be liable for more than the face amount of the bond. The fact that the common wisdom appears to have been mistaken is all-the-more surprising not because the case could arguably turn the understanding of surety law on its head but because the reasoning why the surety’s liability is not limited is so simple. It seems so obvious, in hindsight, that we can justifiably ask why the argument has not been made on a regular basis.
We understand that the bond is an instrument containing a covenant on the part of the surety to perform certain obligations in the event of the principal’s default. We also understand that the financial extent of those obligations is limited by the amount of the bond. However, in the OHL Construction case, the claimant obligee argued that the surety had failed to perform its obligations when called upon, and by virtue of that breach, the surety should be liable for the full damages suffered by the claimant for the surety’s non-performance, independent of the penal sum stipulated in the bond. In other words, the extent of the surety’s obligations is only capped at the penal sum if the surety performs its obligations under the bond. If, on the other hand, the surety wrongfully refuses to perform its obligations, in breach of its covenant, then it cannot not enjoy the benefit of the cap; the protection offered by the penal sum is irrelevant. Instead, the surety is exposed to the obligee’s claim for damages in full.

The court accepted that it is not “plain and obvious” that this argument has no reasonable chance of success.

The well-known story of The Emperor’s New Clothes by Hans Christian Andersen comes to mind. The Emperor was swindled by a pair of weavers who led him to believe that only those who were worthy and wise could see the finest suit of clothes the weavers had made for him; otherwise, the fabric would be invisible. Anyone who could not see the clothes was unfit for office or hopelessly stupid. Of course, the Emperor proceeded to parade down the streets, and, not wanting to be poorly thought of, the noblemen and townspeople all complimented the Emperor on his fine attire. Finally, it took a boy to point out that the Emperor did not really have anything on.

In this case, the common assumption that the penal sum acts as a limit of liability for breach rather than a limit upon the obligation of performance was being challenged head on. In effect, the obligee was saying this notion is like the Emperor’s clothes: everyone may be saying the principle exists, but it is really not there.

It is interesting to note that, twice in the decision, Justice Firestone observed that the parties were not able to cite any Canadian authority standing for the proposition that a claim against a surety based on a performance bond must be limited to the bond amount. The assumed state of affairs appears to be without foundation in the case law.

What does exist in the way of authority on the point is even more interesting and calls into question the entire premise of the commonly held view. It turns out that, back in 1969,
the British Columbia Court of Appeal looked at the very same issue as in the OHL Construction case in an unreported case called John Laing & Son (Canada) Limited v. United States Fidelity & Guaranty Co. [John Laing]. In that case, the court reached the conclusion that the penal sum of the performance bond limited the payment to be made to the obligee under the bond by reason of the defaults of the principal. However, the penal sum did not have any relation to payments that the surety might have to make to the obligee by reason of its own breach of the bond.

The John Laing decision is therefore directly on point and supports the proposition that the penal sum is not a limit of the surety’s liability for breach of the bond. One could say that for the last 45 years, we have been overlooking the fact the Emperor has not been wearing any clothes the whole time.

**CASE SUMMARY**

**DETERRENCE AND DENUNCIATION: COURT OF APPEAL SENDS STRONG MESSAGE ON WORKERS’ SAFETY**

*R. v. Metron Construction Corp.*

On Christmas Eve, 2009, four people died at a Toronto high-rise when a swing stage at the 14th floor collapsed and plummeted to the ground. Metron, the contractor undertaking the restoration of exterior balconies, pled guilty to a charge of criminal negligence causing death and was fined $200,000. The Ontario Court of Appeal overturned the fine, finding that such a small monetary value was manifestly unfit for the crime. The Appeals Court substituted a $750,000 fine instead.

Metron had contracted to restore concrete balconies on two high-rise buildings in Toronto in September 2009. The work was scheduled to be completed on November 30, 2009, but quickly fell behind schedule.

Work on site was done by way of 40-foot-long swing stages, which consisted of four ten-foot-long modules held together by plates and bolts.

Metron took numerous safety precautions on site and had its project manager and site supervisor both take swing stage instructor and operations courses. The project manager inspected the job site weekly and held periodic meetings with workers to review swing stage safety requirements. All workers on site received an English copy of the swing stage safety manual.

Notwithstanding these safety precautions, some of the swing stages contained no markings, serial numbers, identifiers, or labels describing max capacity, as required by occupational health and safety legislation and good industry practice. Moreover, there was next to no product information, design drawings, or assembly instructions. Finally, there was no professional engineer’s report on site, attesting that the swing stage had been erected in accordance with design drawings, which is required by the relevant regulations.

It was typical practice on site for two workers to operate on a stage at any one time; however, on the night of the accident, six men, including the site supervisor, boarded the swing stage. Only two of the men were tied off with safety lines because there were only two lifelines. The swing stage collapsed under the men’s combined weight, and four of the six men tragically died.

Subsequent toxicology reports found that three of the four deceased, including the supervisor, had ingested marijuana shortly before the accident.

Metron and the Crown reached an agreed statement of facts that noted that Metron’s site supervisor had failed to take reasonable steps to prevent bodily harm and death. Specifically, the supervisor either directed or permitted six workers to board the swing stage when he knew or ought to have known that it was not safe to do so and when he knew or ought to have known that only two
lifelines were available. The supervisor also permitted intoxicated persons to work on site.

Under s. 2 of the Criminal Code, a supervisor is a “senior officer” of a corporation, and therefore, his actions in this case were imputed to Metron as a corporate entity. Consequently, Metron pled guilty to violations of s. 217.1 and s. 219, criminal negligence causing death, under the Code.

Metron’s CEO also pled guilty personally to four counts under the Occupational Health and Safety Act [OHSA] and received a fine of $22,500 per count for a total of $90,000 plus the mandatory 25 per cent victim surcharge fine.

**Corporations and the Criminal Code**

Sections 22.1(b) and 217.1 of the Code were introduced in 2004.

Section 22.1 states that

> In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

> (b) the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs—or the senior officers, collectively, depart—markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

Section 217.1 provides that

> Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Section 2 of the Code provides a definition for “organization”, capturing corporations as well as “senior officer” that is defined as follows:

> Senior Officer means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

The court found that a construction site supervisor fell within the definition of senior officer and representative of a contractor.

The Code also contains guidelines for the imposition of sentences on organizations and sets out ten factors for consideration at s. 718.21.

**The Lower Court Decision**

With Metron’s guilty plea, the court had to determine the appropriate sentence. The Crown sought a penalty of $1 million, while Metron argued that $100,000 was the more appropriate fine. The guiding principle for a fine for criminal negligence is deterrence and denunciation.

The Crown identified several aggravating factors that, it argued, militated in favour of a steep $1 million penalty. Specifically, the Crown focused on the egregious nature of the accident in the face of clear warning signs and simple, available steps to prevent the incident. For example, the collapsed swing stage had stickers that indicated the maximum load, it was assembled without the use of instructions, and the supervisor failed to require the workers to wear mandatory fall protection that would surely have saved their lives.

Metron argued that its fine should be moderated, focusing on a number of mitigating factors. First, Metron argued that its guilty plea saved taxpayers the time, money, and emotional toll of a trial. Moreover, it argued, Metron had no prior criminal record or OHSA convictions and had a long history of compliance with the Ministry of Labour. In addition, Metron displayed no systemic course of unsafe conduct—this was a one-off unfortunate accident outside the norm of their typical operation.

Typically, a judge will look to precedent cases of similar facts to determine an appropriate sentence; however, in Canada, there was only one previous conviction of a corporation for criminal negligence causing death, in Quebec. Therefore, the sentencing judge turned to similar OHSA cases for guidance. Those cases emphasized deterrence and denunciation, the same principles found in the Code; however, OHSA violations carried a maximum penalty of $500,000, while the Code had no maximum penalty.

The fines imposed in the OHSA cases reviewed by the judge ranged in from $115,000 to $425,000. Ultimately, the judge set Metron’s fine at $200,000, noting that a substantially higher fine would likely put Metron out of business.

**The Appeal**

The Crown raised three issues on appeal:
CONSTRUCTION LAW LETTER • Volume 30 • Number 3

1. Did the judge err in using the sentencing range found in OHSA cases to determine the appropriate range of sentence for criminal negligence causing death?

2. Did the judge err in limiting Metron’s fine to an amount it could afford to pay?

3. Was the sentence manifestly unfit?

On each issue, the Court of Appeal found in favour of the Crown.

Issue 1

The Appeal Court found that the judge was right to review OHSA cases but ultimately, the $200,000 did not reflect the higher degree of moral blameworthiness and gravity associated with a criminal conviction, as opposed to a regulatory violation. The penalty, according to the Court of Appeal, failed to reflect the principle of proportionality found in s. 718.1 of the Code. The Court of Appeal noted that a “corporation should not be permitted to distance itself from culpability due to the corporate individual’s rank on the corporate ladder or level of management responsibility”.

This is a clear message from the Court of Appeal that a corporation as a whole must be held responsible for the actions of its representatives and senior officers, no matter where in the organization they may be found.

Issue 2

As to whether ability to pay should factor into the determination of penalty with respect to a corporation, the Appeal Court found that the judge had wrongly imputed factors for consideration in penalizing convicted persons to convicted corporations. The Court of Appeal found that the Code was silent on the issue of ability to pay and that while the possibility of bankruptcy as a result of a fine was a consideration, it was not a determinative consideration.

Issue 3

Finally, the Court of Appeal determined that a $200,000 penalty was manifestly unfit for the crime. Four men died in what was ultimately a highly preventable accident. A fine of $200,000, the Appeal Court found, simply failed to convey the required message of the importance of worker safety. The lower court judge did not give enough emphasis to the principles of denunciation and deterrence. Fines must send a message to the public at large as well as punish the convicted. For that reason, the Court of Appeal substituted a much steeper $750,000 fine.

Ontario Court of Appeal
Rosenberg, Watt, Pepall JJ.A.
September 4, 2013

GUEST ARTICLE

THE IMPORTANCE OF COPYRIGHT IN AN ARCHITECT’S WORKS

Overview

Architects are highly trained professionals responsible for the planning and design phase of the construction of a structure. As such, an architect’s instruments of service, including plans, sketches, drawings, graphic representations, and specifications, are extremely valuable to any given construction project. Consequently, an architect is well served in maintaining copyright in their work—that is, the sole right to produce or reproduce their work or any substantial part thereof in any material form—for financial and other motives.

Copyright Protection

Copyright protects an architect’s expressions in the form of their instruments of service, but not their ideas, procedures, nor methods of operation. To be protected by copyright, an instrument of service must be in some material form, capable of identification, and having a more or less permanent...
endurance. In addition, the instrument of service must originate from the architect and be an exercise of skill and judgment that cannot be a purely mechanical exercise. As mentioned in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the exercise of skill requires “the use of one’s knowledge, developed aptitude or practised ability in producing the work”, and the exercise of judgment requires “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work”. The aesthetic merit of an architect’s instrument of service does not factor into an architect’s exercise of skill and judgment.

**Ownership of Copyright**

An architect who authors an instrument of service is the first owner of the copyright, subject to several exceptions outlined in the *Copyright Act*. According to the English court in *Meikle v. Maufe*, “the architect owns the copyright in the plans and also in the design embodied in the owner’s building. The building owner may not therefore reproduce the plans or repeat the design in a new building without the architect’s express or implied consent”. However, if the architect is employed under a contract of service or apprenticeship, then the copyright of the work produced during employment belongs to the employer as the first owner, provided there is no agreement to the contrary.

**Standard Form Contracts**

To manage the expectations between an architect and an employer/client as to the ownership of copyright, architects are well advised to execute standard form contracts. The Ontario Association of Architects provides the *Standard Form of Contract for Architect’s Services* wherein copyright for the architect’s instruments of service belongs to the architect and remains their property regardless of whether the project for which they are made is executed or not, and whether the architect has been paid for their services or not. However, as a condition precedent to the client’s right to use the architect’s instruments of service, the architect must be paid for all the fees and expenses owed to them in full.

Under the *Standard Form of Contract for Architect’s Services*, the client may be allowed to retain copies of the architect’s instruments of service for information and reference for the project at hand. The copies of the architect’s instruments of service themselves may only be used by the client, for the purposes intended, and for a one-time use, on the same site, and for the same project. The architect’s instruments of service may be used for renovations, additions, or alterations to the project; however, alteration of the architect’s instruments of service by the client or any other person is prohibited unless a written licence is obtained from the architect. In addition, the architect’s instruments of service may not be offered for sale or transfer unless the express written consent of the architect is obtained.

**Term of Copyright**

Copyright protects an architect’s instruments of service for a term of the architect’s life, the remainder of the calendar year in which the architect dies, and a period of 50 years following the end of that calendar year. The architect, however, may assign the right or grant an interest in the right by licence. Given that the architect is the first owner of the copyright, assignments and grants of copyright (other than by will) automatically revert to the architect’s estate 25 years after their death. Where an employer is the first owner of the copyright, this rule does not apply.

**Change of Architect**

Under the Ontario *Architects Act* regulations, it is a prescribed standard of practice for an architect to refrain from soliciting or accepting any work in respect of a building project, knowing or having reason to believe that another architect has been engaged on the same project for the same purpose by the same client. However, this prescribed standard of practice does not prevent an architect from undertaking the work after (a) the client has given written notice to the architect that the engagement or employment of the other architect has been terminated and (b) the architect has given written notice by registered mail to the other architect that they have been engaged or employed by the same client for the same purpose. This raises the question of whether the newly retained architect may use the previous architect’s instruments of service.
The newly retained architect may only use the previous architect’s instruments of service if the previous architect has provided their consent or agreement. If the client does not provide assurance that the previous architect has been paid for their services, or agrees that there is a dispute over the fees, then the newly retained architect must advise the client that the instruments of service relative to the dispute cannot be used until the dispute is resolved.

**Remedies for Infringement of Copyright**

Because copyright is the sole right to produce or reproduce a work or any substantial part thereof, it is an infringement of copyright for any person to take such action without the architect’s consent. Where copyright has been infringed, the architect is entitled to all remedies by way of injunction, damages, accounts, and delivery up. However, if the infringing party was not aware and had no reasonable ground for suspecting that copyright subsisted in the work, then the architect is only entitled to an injunction as a remedy. If the construction of a structure that infringes an architect’s copyright has commenced, the architect is not entitled to obtain an injunction to stop construction nor order the structure’s demolition.

When assessing damages for copyright infringement, they are to be dealt with broadly “as a matter of common sense”. Factors that are taken into consideration include:

(a) the profit gained from the infringing party,
(b) the architect’s loss of public and professional recognition from the infringement, and
(c) the fee the architect would have received for a licence to use the copyright, as in *Bemben and Kuzych Architects v. Greenhaven-Carnagy Developments Ltd.*

The remedies available to an architect in the face of copyright infringement, paired with the value of an architect’s work on any given construction project, serve to clearly demonstrate that the importance of copyright in an architect’s work cannot be understated.

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**CASE SUMMARY**

**CONTRACT PERFORMANCE FRUSTRATED BY ACTIONS OF OUTSIDER**

*Advanced Precast Inc. v. Brown Daniels Associates Inc.*

A contract is, in legal terms, “frustrated” when its full performance is made impossible. The following summary illustrates what happens when a contract between two parties—Advanced Precast Inc. and Brown Daniels Associates Inc. in this case—is frustrated by the actions of somebody who is not a party to the contract.

On September 28, 2010, a company called 777 Bay Street Inc. (777), the owner, and Brown Daniels Associates Inc. (BDA), the general contractor, signed a contract using the CCDC-2 2008 form to effect repairs to the owner’s building. BDA then entered into a subcontract in the amount of $43,000 plus tax with Advanced Precast Inc. (API) for the precast concrete portion of the main contract. API, in turn, lined up several subtrades to perform the work.

In January 2011, when one of API’s subcontractors arrived on the site with its workers and heavy machinery, it encountered several problems.

The first problem was that BDA was concerned that the equipment would be too heavy for the location in which it had to be placed to carry out the work. The second problem they discovered was that the existing fasteners used to attach the precast concrete panels to the building were different from those shown in the drawings and specifications. It became clear that the existing precast concrete panels could not be removed without major damage to the panels.
While the API contract provided for replacing panels as required for the additional price of $1,500 per panel, neither party had intended or expected that most or all of the panels would have to be replaced.

Because of these problems, the project consultant, B+H Architects, issued a Proposed Change Notice (PCN) that removed from the API contract a major portion of the work.

In response to the PCN, BDA required documentation from API as to what costs it had already incurred so that it could negotiate a reasonable change in price that would reflect monies already expended on the portion of work that was to be eliminated from the main contract and, in turn, from the API contract.

However, API took the position with BDA that its contract was a fixed price contract and that API was not required to renegotiate the price if the owner reduced the scope of work. At trial, API also argued that in any event, its costs by that date added up to the contract price even though only about 12 or 13 per cent of the work required under the API contract had been completed.

Despite repeated requests, API never gave BDA the documents it needed to prove to 777 how much API had actually spent before B+H issued the PCN.

After several months, B+H performed its own calculation of the price change attributable to eliminating part of API’s work from the contract and issued a Change Directive (CD) reducing the price of the main contract by $40,000.

BDA’s position was that the price reduction was a pass-through to API. By contrast, API’s position was that BDA had to absorb the price reduction because the API contract, being a fixed price contract, did not allow for a unilateral change in scope or price. BDA refused to pay any portion of the API contract so API registered a lien for $48,590 plus tax.

**Breach or Frustration of Contract**

At trial, API argued that BDA breached the contract when it unilaterally reduced API’s scope of work and changed the price. BDA’s position was that the API contract was subject to the main contract and that the provisions regarding changes passed through from the owner to the general contractor and from the general contractor to its subcontractors.

API admitted that BDA’s terms and conditions formed part of the contract and that subcontractors were deemed to have inspected the full contract documents.

Master Albert of the Ontario Superior Court of Justice reviewed the contractual procedure in the CCDC-2 document dealing with changes.

Part 6 of the contract provides that the owner has the right to unilaterally change the scope of work.

GC 6.2 Change Orders sets out the mechanism for determining the price adjustment for changes. The consultant (in this case, B+H) must provide a written description of the proposed change to the contractor, BDA. The contract requires BDA to promptly present to B+H a method of adjusting the contract price. If the owner, 777, agrees to the price, the change is effective immediately.

If there is no agreement, GC 6.3 Change Directives specifies how a price adjustment is achieved, based on the contractor’s actual expenditures and savings attributable to the change, with a method for valuing the expenditure. It provides that if the change results in a net decrease in the contractor’s costs, the contract price must be decreased by the amount of the net decrease in the contractor’s costs without an adjustment to the contractor’s percentage fee.

This section of the main contract also provides that if the parties cannot agree on the price adjustment, the adjustment must be referred to the consultant for determination.

API asked the court to accept that notwithstanding 777’s right to unilaterally change the scope of work of the main contract, BDA did not have the right to pass those changes on to API because the API subcontract did not expressly include the change order provisions.

Master Albert disagreed. She found that the API subcontract clearly incorporated by reference those provisions of the main contract that pertained to the concrete component of the work required by the main contract. She found that included in those
provisions, incorporated by reference, were the provisions pertaining to change orders.

When 777 reduced the scope of work, BDA had no choice but to bar API from performing the concrete work that the owner had removed from the main contract. The actions of the owner prevented BDA from complying with the API contract and also made it impossible for API to perform its contractual duties (i.e., the performance of its subcontract was frustrated).

**Duty to Mitigate**

Once the API contract for a fixed price was frustrated, API had a duty to mitigate its damages (i.e., take all reasonable steps to minimize its losses and prevent additional losses). The consultant’s CD required API to produce evidence to support reasonable costs attributable to the proposed change. API had invoices from its subcontractor to support its claim but did not provide this information to BDA.

Had API been forthcoming with its documentation to support the revised contract price, BDA would have been in a position to negotiate with 777 for a reasonable price to reflect the change in API’s scope of work. Because API refused to co-operate, BDA could not do this. B+H then estimated the price adjustment, and the project’s books were closed.

Any amount found owing to API over and above the balance of the concrete contract price after applying the $40,000 price reduction certified by B+H in the Change Directive had to be paid by BDA out of its profits and could not be passed through to the owner.

Master Albert found that API did not take reasonable steps to mitigate and therefore had to share responsibility for its losses. She found that BDA also failed to reasonably mitigate: when API failed to co-operate, BDA simply gave up and did not participate in the price adjustment procedure with B+H for the concrete work.

BDA knew that API had incurred standby charges and, at a minimum, BDA should have estimated those standby charges and presented its calculations and whatever backup documentation it could gather (time sheets from its own site superintendent, union rates and numbers of workers on standby, for example) to B+H in an effort to recover some portion of the standby charges.

Master Albert concluded that BDA had to share some responsibility for the significant price reduction issued by B+H.

When a contract is frustrated, the court must apportion the losses. Master Albert apportioned two-thirds of the liability for failure to mitigate to API and one-third to BDA.

**Quantifying Damages**

This was not a case where BDA breached its contract with API. The contract was frustrated—its full performance was made impossible—by the owner who was not a party to it. Damages, therefore, had to be quantified on the basis of *quantum meruit* (“as much as earned”).

The Master found that the total value of the materials and services that API supplied to BDA under the contract was $25,631, including HST. API was two-thirds liable; therefore, it was responsible for $17,087 of its damages, and BDA was responsible for $8,544.

There remained the question of costs of the action. BDA paid no part of the contract price to API, not even the amount that it recovered from the owner under the main contract. API was left with no choice but to pursue its claim in the courts.

The amount in issue was small. The facts and issues were not complex. Two-thirds of liability for failure to mitigate was attributed to API. Taking into account these factors, the court decided that an appropriate award of costs was $5,000 for legal fees plus $1,360 for HST and disbursements, payable by BDA to API.

**Ontario Superior Court of Justice**

*Master C. Albert*

*May 10, 2013*
CASE SUMMARY

SETTLING A MULTI-PARTY CONSTRUCTION DISPUTE

*Sable Offshore Energy Inc. v. Ameron International Corp.*

Large construction claims for delay and/or design and construction defects generally involve one plaintiff and several defendants. What if some defendants are prepared to settle with the plaintiff while other defendants want their day in court—is everyone forced to stay in the litigation and continue to pay legal fees? Certainly not.

Imagine a wind farm project that involves site preparation, surveying and locates, drilling, and installation of windmill foundations before the windmills can be installed and the electrical work at the windmills can take place. All this work involves numerous parties, including the general contractor, the surveyors, the engineers, the drilling trade, the steel foundations installer, and the utility infrastructure contractor, to name a few. The project is located in Northern Ontario and is scheduled to be completed by mid-November.

A series of events and circumstances take place, and as a result, the project is not completed until the end of March, extended winter work has to take place but was not provided for in contract prices. The utility infrastructure contractor launches an action for damages arising from the delays, naming all the other parties identified above. Once the plaintiff contractor has produced evidence that it was delayed and that it incurred damages as a result, each defendant tries to shift the blame to its co-defendants. As in every dispute, the parties will consent to, or the court will recommend (or impose), a mediation. After two days of mediation, several defendants are prepared to settle, while the remaining two or three are firmly refusing to contribute any money to the settlement.

One might think that in this scenario, no settlement will take place at all, and the parties are court bound. Not necessarily. The “settling defendants” and the plaintiff may enter into a type of agreement that provides for settling the defendants’ evidentiary obligations in the ongoing litigation and protects them against any further liability to the “non-settling defendants” for contribution and indemnity. Such agreements have become known as “Mary Carter” or “Pierringer” agreements, named after the cases in which they were first judicially considered.

Mary Carter and Pierringer agreements are based on the same principles. Each agreement will be tailored to the specific case and the specific requirements of the parties. Each has its own characteristics. In a typical Pierringer agreement:

- the plaintiff will discontinue the action against the settling defendant;
- the plaintiff indemnifies the settling defendant for any portion of the damages a court may attribute to them and for any claims-over by the non-settling defendants;
- in the alternative, the plaintiff and settling defendant can agree that the plaintiff will limit its claim against the non-settling defendant to the non-settling defendant’s proportionate degree of fault;
- a disadvantage for the plaintiff is that they will now have to show the non-settling defendant’s specific liability rather than the liability of all defendants;
- a Pierringer agreement can result in a procedural disadvantage for the non-settling defendant; and
- the settling defendant avoids further legal costs.

A typical Mary Carter agreement, on the other hand, has the following characteristics:

- The settling defendant remains in the lawsuit and may pursue cross-claims against the non-settling defendant.
- The settling defendant guarantees the plaintiff a specified monetary recovery and caps
its own liability (which may be reduced depending on the court’s finding).

- The settling defendant cooperates with the plaintiff to maximize the quantum of the plaintiff’s recovery.
- The plaintiff indemnifies the settling defendant against any cross-claims for contribution and indemnity.
- The plaintiff and settling defendant risk adverse cost awards if the non-settling defendant does well at trial.

In spite of their differences, both types of agreement have the following effects:

- They reduce the plaintiff’s risk associated with litigation and/or finance the ongoing litigation.
- They put pressure on the non-settling defendants, encouraging them to eventually settle.
- The settling defendants either get out of the litigation or put a cap on their liability.

Not surprisingly, a plaintiff will likely favour a Mary Carter type of agreement, while a settling defendant will likely prefer a Pierringer. A key factor for defendants to consider settlement is to put an end to legal fees and all other costs associated with litigation, which a Pierringer allows them to achieve.

Until recently, the full benefits of these agreements were somewhat hindered, however, by the fact that settling defendants and the plaintiff were obligated to disclose the amounts of their settlements to the non-settling defendants. Earlier this year, the Supreme Court of Canada ruled that even in the context of Pierringer and Mary Carter agreements, settlement privilege must prevail. This decision was driven by the principle that the justice system must promote settlements and, to that end, must protect litigation privilege rather than shatter it. Sable Offshore Energy Inc. sued a number of defendants who supplied services and/or materials for the application of anti-corrosion paint to a number of Sable’s offshore facilities and structures. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer agreements with some of the defendants and disclosed all the terms of those agreements to the non-settling defendants, save for the amount of each settlement. The non-settling defendants brought a motion to compel the plaintiff to disclose the settlement amounts. The court held that settlement negotiations should be protected, that a negotiated settlement amount was a key component of such negotiations, and that there would be no prejudice to the non-settling defendants if the settlement amounts remained confidential. The settlement amounts were not disclosed, and settlement privilege is now that much stronger.

In passing, the Supreme Court also addressed the use of the words “without prejudice” on correspondence between parties before or during litigation and clarified that the use of these words is not a pre-condition to establish settlement privilege. What is important is the intent of the parties during their communications. Communications undertaken with the intent to settle will be protected by settlement privilege, regardless of whether the words “without prejudice” are used. Similarly, the use of those words is not a guarantee that settlement privilege will apply if no intent to settle can be demonstrated.

In summary, if you are ever involved in complex multi-party litigation, you can settle your way out of it with or without all of your co-defendants, and the amount you paid (or received) will remain privileged.

Supreme Court of Canada
McLachlin C.J., LeBel, Abella, Cromwell, Moldaver, Karakatsanis, Wagner JJ.
June 21, 2013
INTRODUCING THE NEW CLL EDITOR MARKUS ROTTERDAM

Markus Rotterdam
Legal Researcher
Glaholt LLP

After 30 years as editor of Construction Law Letter, Paul Sandori has retired from the post. Apart from continuing his work as senior consultant with Revay and Associates Limited, Paul is now working on the fifth edition of the book Bidding & Tendering: What is the Law?, which he co-authored with William M. Pigott. He is also preparing the second edition of his own book on the historical roots of the science of Mechanics, entitled The Logic of Machines and Structures.


CITATIONS


Copyright Act, R.S.C. 1985, c. C-42.


Meikle v. Maufe, [1941] 3 All ER 144.


