Revisiting the "multiple contracts per improvement" approach confirmed by Ontario's Divisional Court in *Caledon (Town) v. Bronte Construction*: unforeseen consequences and a case for the "one-contract-per-improvement" approach

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By way of the *Construction Lien Act Amendment Act, 2017*, the name of Ontario's *Construction Lien Act* was changed to the *Construction Act*[1], lien expiry triggers and time-frames were changed, holdback provisions were significantly altered and sweeping new prompt payment and adjudication provisions were introduced. The changes are still being implemented over time, based on the "transition provisions" set out at s.87.3 of the *Act*. These provisions are tied, in part, to when the owner first procures or enters into a contract for the improvement. Unfortunately, the transition provisions gave rise to confusion and debate, particularly over whether "improvement" should be interpreted to involve, potentially, more than a single contract. [2]

The issue was addressed by Associate Justice Wiebe, of Ontario's Construction Lien Court, in *DNR Restoration Inc. v. Trac Developments Inc.*, 2023 ONSC 1849 (CanLII). His Honour held that there could be multiple contracts for the same improvement and that, for the purposes of s.87.3, one must accordingly assess when the "first contract" was procured or entered into:

[1] R.S.O. 1990, c.C.30.

[2] For the purposes of the *Act,* of course, a "contract" is between a contractor and an owner, while a "subcontract" is between parties beneath the owner in the construction pyramid.

> "Throughout the [*Construction Act*], including in section 87.3, the concept of improvement is not tied to and limited by the concept of "contract." Indeed, it is the contrary – an improvement can be broader in scope than a contract. In section 1, "improvement" is defined in broad terms to be the entirety of a project. An improvement is defined to include any "alteration, addition or capital repair to the land," or "any construction, erection or installation on the land," or "the complete or partial demolition or removal of any building, structure or works on the land." Section 87.3 does not change that definition.
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> The concept of "contract" in section 1 can be narrower in scope. It is defined in relation to the concept of "contractor," which is defined as the person who contracts with the owner "to supply services or materials to an improvement." As such, a "contract" can encompass the entire improvement or, such as in this case, a part of it. Where a contract is narrower than the scope of the improvement, and there are other contracts for the improvement, the only logical interpretation to be given to section 87.3(1)(a) is that the first contract will determine which version of the [*Construction Act*] will apply to all contracts for the improvement." [3]

The impact of Associate Justice Wiebe's decision has been significant for some. In assessing whether their liens expire on the 45-day timeframe applicable under the *Construction Lien Act* or the 60 day timeframe under the *Construction Act,* contractors and subcontractors have had to determine when the owner first procured or entered into a contract for the overall "entirety of the project", to use Associate Justice Wiebe's turn of phrase. Also, while s.39, allows them to ask the owner for the "date on which any applicable procurement process was commenced", they might not have the luxury of time to await an answer.[4] Many construction lawyers work off of a 45-day timeframe out of an abundance of caution.

The question of whether a single improvement can involve multiple contracts recently came before a panel of the Divisional Court in *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555 (CanLII). In that case, the Town had hired Bronte to perform wastewater pond work at two locations in Bolton, Ontario: Pond #7 on Castelli Court and Pond #14 at Landsbridge Street. The design for the work had been previously requisitioned by the Town: from WSP for Pond #7 and from Matrix Consulting for Pond #14. Bronte was awarded payment of its unpaid accounts from Caledon on an adjudication conducted under the *Construction Act*, and Caledon sought a judicial review of that determination.

The Divisional Court set aside the Adjudicator's determination in relation to Pond #7. It held that because Bronte's contract for Ponds #7 and #14 was for two

[3] *DNR Restoration*, *supra*, at paras. 32-33.

[4] s. 39 requires the answer to be provided within a reasonable time not to exceed 21 days.

premises, it was also for two different improvements. It then held that the adjudication provisions of the *Act* did not apply to the #7 improvement because Caledon had procured a contract for the work on that Pond (the Caledon/WSP design contract) prior to October 1, 2019, which is the threshold date established for the application of the adjudication provisions under s.87.3 of the *Act*. The Court accordingly found that the adjudicator had no jurisdiction to address amounts owed in relation to Pond #7. It allowed the adjudicator's determination to stand in relation to Pond #14.

Simply put, then, the Court decided that improvements arise on a premises-by-premises basis, but not on a contract-by-contract basis. Justice Corbett wrote the decision for the Court.

The decision that a single improvement cannot involve more than one premises is not, in our view, controversial. Justice Corbett addressed each of Caledon's arguments to the contrary in detail, grounding his conclusions in the spirit and intention of the *Act,* the definition of "improvement", the concept of the "general lien" (which applies to a single contract for more than one improvement) and the test for when a contract is substantially performed.

In holding that there can be more than one contract for a single improvement, Justice Corbett effectively confirmed Associate Justice Wiebe's decision in *DNR Restoration*. In doing so, however, Justice Corbett did little to elaborate on the conclusion. He noted that it is a "trite statement in construction law" that the concept of "improvement" is tied to land and not the "contract", a statement which he went on to hold:

> "bears stating since, ***obviously***, ***the Act contemplates that different persons will undertake different work under different contracts on the same "improvement***". Contracts are not in respect to distinct improvements because the works described in the contracts are distinct …" (emphasis added) [5]

Justice Corbett referenced no case law in support of his determination that different contracts can be undertaken on the same "improvement", although he did reference Associate Justice Wiebe's analysis that the concept of improvement is not tied to the contract. It is perhaps unfortunate that Associate Justice Wiebe's conclusion that "the improvement is the entirety of a project" was not considered in more detail, as we know that construction law counsel were, to various degrees, looking forward to the Divisional Court's bringing clarity to the issue. This writer recalls discussing

[5] *DNR Restoration*, *supra,* at para. 33.

the issue with various senior construction law counsel some 25 years ago and coming to understand that, while the issue is complicated, there is a fairly strong argument that improvements should arise on a contract-by-contract basis.

We are not sure we agree, for example, that the *Construction Act* does not tie the concept of improvement to the concept of contract. While this may occur in the definitions of "improvement" and "contract" themselves, we believe that other portions of the *Construction Act* do expressly tie the two concepts together.

As regards substantial performance of a contract, for example, one of the pre-requisites for substantial performance under s.2(1) is that "the improvement to be made ***under that contract*** or a substantial part thereof is ready for use or is being used for the purposes intended". Section 32 requires the payment certifier to determine whether ***the contract*** (and not the "improvement") has been substantially performed.

Given *DNR Restoration* and *Caledon,* it now appears that where multiple contractors are retained, the contracts of those who are in and finish "early" (such as designers, demolition contractors, excavators, forming contractors and structural steel erectors) will never hit substantial performance. This because, on a plain reading of s.2(1), the improvement will only be ready for use as intended after (and sometimes well after) their contracts are ***actually complete***. In our respectful view, it makes no sense to say that a contract will be totally complete well before it will be substantially performed.

Consider, also, the other pre-requisite for substantial performance under s.2(1): the "***improvement*** to be made under that ***contract***" must be capable of completion or correction at a cost of not more (roughly) 97% [6] of the contract price (where price is at first instance tied to the contract between the parties). Further, section 2(2) allows the payment certifier [7] to deduct "the price of the services or materials remaining to be supplied and required ***to complete the improvement***" from "***the contract price***" for the purposes of the determining if the mathematical calculation for has been met. This can occur, however, only where the improvement is ready for use or is being used as intended. These provisions, again, directly tie the concept of improvement to the concept of contract.

We also suggest that it makes no sense to allow the payment certifier to consider the cost of completing contracts which have not as yet even been started in determining whether the value of work performed under a single contract has

[6] It is actually, relative to the contract price, 3 per cent of the first $1,000,000, 2 per cent of the next $1,000,000 of the contract price and 1 per cent balance.

[7] or owner and contractor on agreement or a Court on a motion.

reached roughly 97% of its contract price. Yet this is what flows from a reading of s.2(2) and the finding that there can be more than one contract per improvement.

It appears that following *DNR Restoration* and *Caledon,* and as an improvement will not generally be ready for use as intended until the last of the contracts being performed in its construction are near completion, contractors who start and finish early will be unable to obtain the substantial performance of their contracts (and obtain their basic holdback) before they are actually complete. This, we submit, would be both significant and contrary to the spirit and intention of the *Act.*

In addition, contractors who start and finish early might also lose the benefit of the trust remedy established under s.7(3) of the *Act.* This deems amounts received or held by the owner after their contracts have been certified as being substantial performed to be trust funds. However, if the certification is delayed or does not occur because the improvement is not yet ready for use as intended, the trust will not arise.

All of the above treats contractors differently based on when they attend to perform work in relation to an improvement, which we submit is contrary to the spirit and intention of the *Act.* It also, we suggest, goes starkly against the historical and court-honoured practice of releasing holdback on the substantial performance of contracts on a contract-by-contract basis, regardless of when the larger "project" is ready for use as intended. Finally, it goes contrary to the CCDC standard form contract language, which generally requires the payment certifier to certify the substantial performance of the contract without considering the extent to which the over-all improvement is ready for use as intended.

We also believe that the trust provisions of the *Act* tie the concept of improvement to a single contract. In this regard, section 7 of the *Act* provides that all amounts received by an owner "that are to be used in the financing of ***the improvement***" constitute a "trust fund for the benefit of ***the*** contractor". This is consistent with section 8, which imposes a trust on funds owed to or received by a contractor on a contract-by-contract basis. As the Divisional Court held in *Great Northern Insulation Services Ltd. v. King Road Paving*, 2019 ONSC 3671 (CanLII), at para 35:

> "Section 8 creates one trust fund for a contractor under its contract with owner in respect to all of its subcontractors under that contract. There is one trust, and all of the unpaid subcontractors and suppliers in "privity of trust" with the contractor are beneficiaries of that trust. All are entitled to assert

their trust claims against the entirety of trust proceeds until their trust claims have been paid in full or until trust funds are exhausted."

On the other hand, section 11 provides that a trustee who uses his own monies to pay for ***an improvement*** can retain that amount from trust funds without being in breach of the trust. It can also repay any loan it has taken out to pay for ***the improvement*** out of trust funds. On a strict reading of that section, and thus potentially in light of *DNR Restoration* and *Caledon,* trustees should now be able to use funds received to fund one contract to repay themselves, or repay loans, for funds advanced to fund *different* contracts on the over-all improvement. We are not sure that that was the intention of section 11.

We also believe that *DNR Restoration* and *Caledon* will have unforeseen consequences in relation to lien expiry. In this regard, consider the recent decision of the Divisional Court in *Prasher Steel Ltd. v. Pre-Eng Contracting Ltd.,* 2024 ONSC 4772 (CanLII). In that case, the Court held that a subcontractor's lien rights expire relative to (among other dates) its last day of supply of services or materials "to the improvement". The subcontractor was owed monies on a subcontract that had long-since been completed. Had it not returned to site under *another* subcontract, its lien rights would have expired. However, it had been retained by the same contractor to perform additional work under a different subcontract and the Court determined that, because a subcontractor's lien expires relative to (among other triggering events) its last day of supply to ***the improvement***, its lien for amounts owed on the first subcontract had not expired.

We have no doubt that the decision in *Prasher Steel* is absolutely correct, based on a plain reading of the *Act*. Pursuant to *DNR Restoration* and *Caledon,* however, it appears that a subcontractor who works for two ***different contractors*** on the same "improvement" will at times be able to keep its lien rights alive in relation to subcontract #1, even if that contract was long since been completed. This, we believe, will create administrative challenges and unknowns in the administration of subcontracts: it will be hard, for example, for one contractor to control or anticipate the extent to which a subcontractor's lien rights might later be revived if it does work for another contractor. Also, the holdback which the owner is required to retain must be held until "all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for" under section 22. Given that the subcontractor's lien is a charge against the holdbacks (plural) under section 21, it is entirely unclear how or when the holdback should be released given that the date of expiry of the subcontractor's lien may be very difficult to determine.

In the end, we believe it is unfortunate that the Divisional Court was not asked to revisit the "multiple-contracts-on one-improvement" approach in *Caledon*. There is, of course, no question that the issue is complicated, and that both Associate Justice Wiebe and Justice Corbett were correct in saying that the definition of improvement is tied to work done on and in respect of land, and not to a contract. We believe that on a broader reading of the *Act,* including its provisions relating to substantial performance and trust obligations, however, there is nonetheless an argument for saying that improvements should arise on a contract-by-contract basis. The definition of "improvement" does not preclude such an interpretation.

Regardless, absent legislative change or *Caledon* being revisited by the Divisional Court or Court of Appeal, construction law counsel should be attuned to the potential impact of the decision on aspects of the *Act* that go well beyond the transition provisions set out at s.87.3. Indeed, as the confusion lies at first instance in the confusing language of the *Act,* a legislative clarification may be appropriate. In the meantime, our Courts will continue to have a role to play in determining how the broader concept of "improvement" should be applied as regards (for example) certain aspects of substantial performance, holdback release, lien expiry and trust claims.

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