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Litigation

Challenges Created by Electronic Data in Complex Construction Litigation

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For many years, the trend on construction projects has been for more and more data to be stored and transferred electronically. While this has simplified many aspects of the construction process, and increased efficiency and access to documents and information, it has also created new issues and concerns for the parties involved in those situations where the relationship between owner and contractor breaks down and complex construction litigation ensues.

It is not unusual for disputes with respect to cost overruns and delays in the construction industry to involve hundreds of thousands of pages of documents, and for substantial client, expert, and legal resources to be taken up in reviewing and making sense of this mass of documentation. It is equally common, notwithstanding this mass of documentation, for key pieces of information to be missing. And each of these problems is being exacerbated by the increased use of electronic forms of data storage and transmission.

First, the ease of use of e-mail and handheld electronic devices has increased the volume of documentation existing. Second, there is now a whole new category of data that most of us are unfamiliar with. This metadata is created not consciously by the creator of the document, but by the electronic devices and software themselves. For example, your computer will, unbidden, frequently track when a document was created, amended, transmitted, or read. This additional data can be extremely helpful or harmful in litigation but, most importantly, it often fits within the definition of a document or record for the purposes of production under the governing court or arbitral rules. A record includes not only an electronic version of a document, but also documents that exist only in a digital form.

Once litigation is contemplated or anticipated, there is a positive duty on each of the parties to secure and maintain any documents that might prove relevant and material. While this is true of all litigation, and is a reality that many companies are having to come to grips with in light of an explosion in the number of computers and handheld devices storing information, it is particularly an issue in the construction industry. Potentially relevant information is not typically stored within one company or one department. Technical information, scheduling information, budgets, communications with contractors and subcontractors, co-ordination with other projects, regulatory approvals and applications, engineering and design specifications, correspondence both formal and informal: all of this information, and more, is likely stored on computers and electronic devices in the field, in the main office, with the contractors, and with the subcontractors. Quickly, accurately, and efficiently preserving all of this data in a user-friendly manner requires planning and forethought.

The rules and practice developing in the courts and arbitral tribunals encourage co-operation and collaboration in finding and securing electronic data among the parties once a dispute is manifested. This balancing of costs versus benefit recognizes the potentially vast effort and cost that might otherwise be incurred. Your organization will be well-served if able to quickly identify what it has, where it is, and how it can be retrieved.

Failure to preserve electronic documents can, of course, affect your company's ability to prove its case at trial, but it can also lead to an adverse inference by the court that the lost or destroyed data would have harmed your position. Failure to have in place an adequate electronic record-keeping policy may result in an adverse inference being drawn against a party that is unable to properly identify electronic records that could reasonably be expected to be produced in the circumstances.

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While records do accidentally get lost or go missing – whether paper or electronic – a party that is unable to produce relevant documents may risk a finding of "spoliation" against it during litigation. Spoliation is a rule that applies to the destruction of evidence. It is a rule of evidence that the destruction of documents raises a rebuttable presumption that the contents of the evidence would be adverse to the party who destroyed the documents. Consequently, to the extent that a party is unable to properly produce electronic records which would otherwise be relevant, that party risks an adverse finding against it during litigation simply as a result of being unable to properly identify records which are relevant and may, in fact, otherwise not be harmful to its position.

Below are some general considerations for addressing concerns related to electronic data in construction litigation:

1. The first step for an organization is to consider where electronic data is located: computers; cell phones; PDAs? And what type of documents: e-mail; spreadsheets; drawings? What about web pages? Logs of historical internet activity? Cell phone logs?

2. The goal of any electronic record-keeping policy from a litigation perspective should be to have a method to identify, segregate and organize specific types of records as needed once the sources of electronic data are identified. For example, e-mails from specific individuals engaged in a particular project should ideally be readily identifiable so that if litigation does arise, elaborate, costly, and *ad hoc* searches for relevant communications are avoided. The strategies which can be employed vary with the size and nature of the company and project, but discussions with internal IT staff or external consultants can greatly assist in crafting an appropriate policy. Ideally, this will occur before the project commences, and not after the dispute has arisen.

3. A centralized storage "location" can greatly reduce the time and cost required to identify and disclose potentially relevant records. Absent a central storage location for project communications, drawings, financial records, etc., in the event of litigation, a separate search of each computer hard drive, PDA and hard copy files may be required for each individual involved on a project. The cost of conducting such a search may be prohibitive and could, in fact, undermine the cost effectiveness of litigating an otherwise defensible position. Furthermore, difficulty in properly identifying and organizing relevant records can have a significant impact on proving or defending a given case.

4. The requirement that relevant electronic records must be disclosed does not displace the requirement that relevant hard copy records must also be produced. The requirements for production of both electronic and hard copy records have the potential for greatly increasing the time and cost required to identify and produce records in complex commercial litigation. For example, producing the drawings on a project in both electronic and hard copy format could result in an enormous increase in time and expense. Accordingly, to the extent that a policy limiting hard copy duplication of records already existing in electronic format can be addressed, then such a strategy should be employed.

5. Electronic records should be stored in their original form. For example, an Excel spreadsheet documenting relevant financial data to the project in dispute should be maintained as an Excel spreadsheet. Maintaining files in their original format preserves data as it actually existed on the project and may mean the difference in successfully advancing a given case. The metadata preserved in this manner can ease and simplify the litigator's and Court's task as well as sometimes providing key evidence supporting a party's position.

6. Be aware of metadata. Ensure that any policy considers that there will be a permanent record in many cases of electronic documents including deleted records. This is of particular importance where electronic records or e-mails contain informal or "off-the-cuff" remarks, which may be harmful during litigation.

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7. Prior to commencing construction work on a project, a representative should be appointed to be responsible for ensuring that an agreed upon record keeping strategy is in place and will be followed. The representative should also be familiar with the types of records which are required to be kept on the project, for instance, by the terms of the construction contracts. Knowing which records must be maintained will assist at the outset in organization of relevant records which might become needed in the event of litigation. From an owner's perspective, knowing which records a contractor is required to keep will assist in monitoring relevant information and maintenance of appropriate records.

8. An electronic record keeping policy or strategy should be decided upon prior to commencement of a given project. Once the project commences and everyone is focused on its completion, it is likely too late to attempt to organize the project records. The difficulty will only increase where the project has encountered some difficulty or a dispute has already arisen. At this point, everyone on the project will be (properly)focused on minimizing delay and cost overruns. Preserving documentation for possible litigation will likely be far from the top of the list.

CONCLUSION

The general considerations outlined above are of growing importance because the need to adopt an electronic record-keeping strategy is no longer simply a matter of cost control. It is increasingly a requirement of the courts and arbitral tribunals.

For example, on September 4, 2007, the Alberta Court of Queen's Bench *Civil Practice Note 14: Guidelines for the Use of Technology in any Civil Litigation Matter* came into force.

This practice note in the Alberta Rules of Court is meant to provide guidance to parties in the use of a court-approved framework for managing both hard copy and electronic records. In general, the practice note requires parties to litigation to preserve electronic documents and for the parties to consult and outline the appropriate scope of electronic discovery in any given instance.

Courts have already begun to deal with electronic document issues and this focus will simply increase over time. While these issues are still emerging and the courts have only begun to deal with electronic document issues in the last few years, parties involved in complex construction projects should take steps now to reduce their risks in the event of litigation.

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Man-Shield (Alta.) Construction Inc. v. 1117398 Alberta Ltd.

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In *Man-Shield (Alta.) Construction Inc. v. 1117398 Alberta Ltd.*, the Alberta Court of Queen's Bench recently considered the issue of whether a contractor who has failed to file a builders' lien within the statutory 45-day time limit may nonetheless register a certificate of lis pendens against the property and claim an *in rem* interest in the land itself based upon a claim of unjust enrichment and constructive trust. The court noted that this was the first time that this issue had been determined in a reported decision, and the case therefore has important ramifications for both owners and contractors alike.

The contractor in this case, Man-Shield, and the owner-developer, 1117398 (also known as Zephyr), entered into a contract for the construction of a condominium complex. Man-Shield alleged that Zephyr had refused to pay outstanding invoices for Man-Shield's work on the project in the amount of approximately C$1-million, and it filed liens against three condominium units remaining in Zephyr's name. However, the liens were filed out of time and were therefore discharged. Nonetheless, Man-Shield also registered certificates of lis pendens against the three condominium units and filed a statement of claim alleging unjust enrichment and the right to a constructive trust over the property. Zephyr brought an application to discharge the certificates of lis pendens and to summarily dismiss the claim.

Dealing first with the claim of unjust enrichment, Master Hanebury found that this claim should not be summarily dismissed. She held that the legislative scheme in the *Builders' Lien Act* did not bar the right of a contractor to claim unjust enrichment or *quantum meruit* against an owner, since those claims could be made outside of the provisions of the Act and did not constitute an attempt to assert an *in rem* interest in the land itself.

However, Man-Shield's ability to pursue a claim for unjust enrichment did not, in this case, lead to the conclusion that it could, in turn, seek the remedy of a constructive trust that was necessary to support the certificates of lis pendens against the property. Master Hanebury noted that a constructive trust may arise where there has been an unjust enrichment and where the "law is of the view that one person ought to surrender or hold property for the benefit of another". Relying upon the authority of the Supreme Court of Canada in *Peter v. Beblow*, she also noted that a constructive trust should only be granted where a monetary award is insufficient and there is a direct link to the plaintiff's contribution to the property which is to be the subject of the trust.

At first blush, Man-Shield's work on the condominium project might seem to have provided the required "contribution to the property". In addition, Man-Shield argued that a monetary award would be insufficient in this case, because Zephyr allegedly had no other assets with which to satisfy a potential judgment. The issue, however, was the interplay between the equitable remedy of constructive trust and the express legal rights afforded to contractors (and owners) under the Alberta *Builders' Lien Act*.

Master Hanebury noted that builders' lien legislation in Canada has altered the common law and equitable regime by giving trades people, service providers and suppliers who have improved the land an automatic statutory right to register a claim against the land in the form of a lien. There is no longer any need to seek the equitable remedy of a constructive trust. However, with the certainty arising from the codification of this legal right in the *Builders' Lien Act* came certain mandatory requirements, including the requirement to meet the strict timeframes for filing a lien. Man-Shield's failure to file a builders' lien within the 45-day time limit prescribed under the Act meant that it lost all entitlement to any *in rem* claim against Zephyr's property.

Master Hanebury pointed out that, to allow a contractor who fails to file a lien in time to assert a claim for constructive trust over the same property would simply allow that contractor to claim by the back door what it had previously failed to claim by the front door and would make a mockery of the entire builders' lien regime. If contractors were allowed to pursue a claim of constructive trust and to file certificates of lis pendens outside of the 45-day lien period, this would ultimately mean that owners would have no certainty of title, and the benefits of the legislative scheme would be lost. In other words, allowing claims for constructive trusts outside of the *Builders' Lien Act* would effectively extend the statutory period for filing liens indefinitely.

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For property owners, the *Man-Shield* case is significant in confirming that the statutory time limits in the *Builders' Lien Act* for filing liens against the property cannot be circumvented merely by a contractor or a subcontractor claiming the existence of a constructive trust. This may be particularly important for an owner facing a claim by a subcontractor, whose only remedy for unpaid invoices against the owner may otherwise be under the *Builders' Lien Act*, given the probable lack of a direct contractual relationship with the owner.

For contractors, the *Man-Shield* decision is likewise significant in affirming both the need to file a builders' lien in order to assert an *in rem* claim against the property itself, as well as the strict requirement to file such a lien within 45 days from the date on which work was last performed on, or services or materials were last provided to, the property. The decision confirms that a contractor who fails to file a builders' lien on time will likely be restricted to claiming relief against the owner of the land in the nature of *in personam* claims based in contract, tort or equity and will not be entitled to register a certificate of lis pendens or otherwise assert an *in rem* claim against the property itself through a claim of unjust enrichment and constructive trust. On the positive side for contractors, while not a final determination on the merits, this decision leaves open the door for contractors to claim against owners for unjust enrichment despite the lack of privity of contract, the existence of the *Builders' Lien Act*, and a failure to follow the statutory timelines stipulated for the filing of a lien.

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