CITATION: Gowing Contractors Ltd v. Walsh Construction Company Canada, 2025 ONSC2671
COURT FILE NO.: CV-19-628838
DATE: April 30, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gowing Contractors Ltd. v. Walsh Construction Company Canada, Walsh Construction Co., City of Toronto and Toronto Port Authority;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Richard Yehia and Evan Ivkovic for Gowing Contractors Ltd. and Zurich Insurance Company Ltd.,
Sean Dewart and Brett Hughes as agents for Krista Chaytor and Max Gennis, the lawyers for Walsh Construction Company Canada and Walsh Construction Co.;

HEARD: April 24, 2025.

REASONS FOR DECISION

[1] This is a motion by Zurich Insurance Company Ltd. ("Zurich") and Gowing Contractors Ltd. ("Gowing") for an order striking the statement of defence of Walsh Construction Company Canada ("WCC") and Walsh Construction Co. (together "Walsh") in this action ("the Gowing Lien Action") without leave to amend, staying the action by WCC as against Zurich with action numbered CV-20-642913 ("the Walsh Bond Action"), and staying the action by WCC as against Gowing with action numbered CV-20-63505 ("the Walsh Civil Action"). The basis for the motion is the allegation that Walsh failed immediately to disclose to Zurich and Gowing a settlement Walsh reached with the City of Toronto ("the City") in a fourth action WCC commenced against the City with action numbered CV-20-647248 ("the Walsh City Action"), and that this amounted to an abuse of process. Walsh opposes this motion.

Background

[2] The moving parties filed an affidavit sworn by Gowing's principal, Jane Gowing. WCC filed an affidavit sworn by its former lawyer, Faren Bogach. I gleaned the following undisputed, background facts from the motion material, the submissions and my trial management directions.

[3] The underlying project concerned extensive upgrade and odour control work at the Ashbridge's Bay Wastewater Treatment Plant. The owner is the City of Toronto ("the City"). In May, 2013 the City entered into a prime contract with WCC to have WCC do this work. This will be called the "Prime Contract." The Prime Contract specified that WCC costs resulting from delays caused by the City or its consultant would be reimbursed, and that City costs resulting from delays caused by WCC or those engaged by WCC would be reimbursed as well. The Prime Contract also specified that disputes were to be resolved by a specified dispute resolution process.

[4] In July, 2013 WCC entered into a subcontract with Gowing whereby Gowing was to perform the specified mechanical scope of the project. This will be called the "Subcontract." The Subcontract specified that if Gowing was delayed by the City or its consultant, Gowing would be reimbursed its costs to the extent WCC received reimbursement from the City on account of Gowing. Also, there was a clause specifying that, in the event of a dispute between Gowing and WCC, WCC would not be liable for more than what WCC received from the City. There was no clause providing for Gowing participation in dispute resolution efforts between WCC and the City.

[5] On October 16, 2013 Zurich issued a performance bond in favour of WCC concerning Gowing's work.

[6] The project was initially scheduled to be completed in April, 2017. There was substantial delay. WCC and Gowing exchanged correspondence about a Gowing delay claim. In a letter to Gowing dated August 29, 2018 WCC referred to the above noted Subcontract terms and encouraged Gowing to join WCC in its efforts to obtain "contractual relief" from the owner. It also stated that it did not believe the City would meaningfully review a claim before substantial completion. In a letter to Gowing dated December 14, 2018 WCC stated that it intended to submit a claim to the City and incorporate a "justifiable cost impact for Gowing due to this delay."

[7] In July, 2019 Gowing's involvement came to an end before its scope was done amidst heated disputes between the parties about the delay and other issues. Gowing alleged sexual orientation discrimination. WCC made a demand on the Zurich performance bond. The last correspondence about the Gowing delay claim was a letter from Gowing to WCC on June 10, 2019.

[8] On July 31, 2019 Gowing registered and gave a claim for lien in the amount of $15.8 million. The claim concerned the alleged costs Gowing incurred on account of the delay. On October 9, 2019 Gowing purported to perfect its lien by commencing the Gowing Lien Action. It named WCC as a defendant. It included the City and the Toronto Port Authority as defendants pursuant to its lien claim and allegations that they were "owners" under the *Construction Act*. On November 4, 2019 WCC obtained an order vacating the Gowing claim for lien with WCC security.

[9] On March 5, 2020 WCC commenced the Walsh Civil Action claiming damages from Gowing in the amount of $10 million on account of the delay. WCC alleged many contract breaches by Gowing and an abandonment of the project by Gowing.

[10] On June 23, 2020 WCC commenced the Walsh Bond Action claiming indemnification from Zurich for WCC's alleged damages on account of Gowing's contract defaults.

[11] On June 29, 2020 WCC submitted to the City a request for time extension and impact damages ("EOT"). It was marked "without prejudice." It contained a $834,670 delay claim from Gowing. WCC asserted 1,159 days of total delay, 417 days of which it blamed on the City, 390 days on concurrent delay, and 352 days on WCC. WCC did not state its position as to Gowing's liability for delay. There was no settlement at this time.

[12] On September 4, 2020 the project reached substantial performance.

[13] On September 11, 2020 WCC commenced the Walsh City Action claiming damages from the City of $10 million on account of the delay. The allegations were that the City generated unreasonable and excessive changes.

[14] On October 20, 2020 Gowing discontinued the Gowing Lien Action against the Toronto Port Authority. On December 1, 2020 Gowing defended the Walsh Civil Action and included a counterclaim against WCC and the City. The pleading concerning the City were primarily about the City's alleged failure to stop WCC's alleged sexual orientation discrimination. On December 16, 2020, Gowing discontinued the Gowing Lien Action against the City. On June 2, 2021 Gowing removed its counterclaim against the City in the Walsh Civil Action before the City defended it.

[15] The pleadings in these various actions proceeded, were amended and eventually came to a close in November, 2023. In the meantime, another lien claimant obtained a judgment of reference that pertained to the lien actions on the project. I became seized of the reference at the first trial management conference on October 19, 2020. I divided the reference into streams. In the Gowing stream I conducted 13 trial management conferences. During that time the Walsh Civil Action and the Walsh Bond Action were referred to me for management and trial; but not the Walsh City Action.

[16] On October 28, 2021 WCC and the City reached a settlement of the WCC EOT claim. The City agreed to pay WCC $4,972,993 plus HST in return for a release and a dismissal of the Walsh City Action without costs. There was a term requiring that the settlement be kept confidential subject to exceptions, including as required by law or on consent of the parties. There was no agreement to cooperate. There was no admission of liability. Ms. Bogach said that WCC planned to disclose the quantum of the settlement before any settlement with or damages award concerning Gowing.

[17] WCC did not disclose this settlement immediately. There was a mediation on November 28 and December 12, 2022. During this mediation, WCC disclosed copies of the Minutes of Settlement and other documents relating to the settlement. There was no settlement.

[18] Gowing and Zurich then brought a motion before me for production including production of the settlement documents. I heard the motion on June 8, 2023 and rendered my decision on July 28, 2023. I ordered that the settlement documents be produced subject to the right of the City to move to set aside at that order as the City had not been served and was not present. The City eventually decided not to move to set aside the order and WCC produced the settlement documents in October, 2023.

Settlement disclosure test

[19] The court has an inherent discretion to prevent abuse of process. This discretion is codified in section 106 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 and Rule 21.01(3)(d) of the *Rules of Civil Procedure* where it is specified that the court may dismiss or stay an action that is an abuse of process. This discretion, however, must be exercised only in the "clearest of cases;" see *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141 (CanLII), at para. 27.

[20] It is well established that a party's failure immediately to disclose a partial settlement that entirely changes the litigation landscape is such an abuse of process; see *Poirier v. Logan*, 2022 ONCA 350 (CanLII) at para. 41. This is because the non-settling parties must be made aware of this new arrangement immediately to make strategy and other decisions that may flow from it. The severity of the stay or dismissal remedies is justified to enable the court to enforce this process; see *Poirier, supra,* at para. 42.

[21] Generally, a settlement changes entirely the landscape of the litigation if it changes the adversarial position of the parties as set out in the pleadings or as expected in the litigation into a cooperative one; see *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 (CanLII) at para. 39. Essentially, it is an agreement that involves a party "switching sides." This may be a complex determination as parties may be adverse about some issues, but not others. The court must assess the entirety of the litigation landscape; see *Handley Estate, supra.,* at para. 40.

Threshold issue

[22] Walsh argues that there is a threshold hurdle that Gowing and Zurich have not crossed. It is grounded in precedent. The argument is that the court have never applied this disclosure doctrine to benefit parties who are not parties to the litigation that is the subject of the settlement.

[23] Mr. Hughes pointed out that all court decisions concerning this doctrine have described it as applying only to the parties in the proceeding in which the settlement took place; see *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898 (CanLII) at para. 13; see *Handley Estate, supra.,* para. 39; see *Kingdom Construction Limited v. Perma Pipe Inc.*, 2024 ONCA 593 (CanLII) at paras. 1, 31 and 51. In *Greyson & Eberhardt v Echelon General Insurance Co.*, 2024 CanLII 18786 (ONSC) Justice Koehnen dealt with just such a claim by a defendant in an action to have the doctrine applied in its favour concerning the settlement in another action. His Honour stated the following: "All prior cases involving this principle have involved situations where a plaintiff settles with some defendants in an action but does not settle with other defendants in that same action." Without relying on this precedent, His Honour rejected the motion. The courts are understandably reluctant to expand this disclosure doctrine as it involves a compromise of the core principle of settlement confidentiality.

[24] I am, however, not prepared to base my ruling on this precedence point. First, there is no explicit authoritative prohibition against applying this doctrine to non-parties.

[25] Second, there is an argument that a precedent does exist for the application of the doctrine to non-parties where the other action is derived from the settled action. As Mr. Yehia argued, in *Aecon* the Court of Appeal dealt with a case where a contractor entered into an agreement with the owner prior to litigation whereby the contractor agreed to cap its damages against the defendant owner to what the owner could obtain by third party claim from the owner's consultant. The statement of claim was issued and served, as was the third party claim. The pleadings masked the reality that the contractor was the true adversary of the consultant. Prior to the service of the third party defence, this agreement was disclosed. The Court of Appeal stayed the action finding that, despite the absence of prejudice from the delayed disclosure, the agreement should have been disclosed immediately. Mr. Yehia reminded me that a third party claim is a separate proceeding.

[26] The facts before me indicate that there may be a similar nexus between the Gowing Lien Action and the Walsh City Action. In its pleadings concerning Gowing, Walsh relies on the pay-if-paid provisions of the Subcontract, namely that Walsh's liability to Gowing is capped by what Walsh can obtain from the City. Walsh carried a Gowing claim in its EOT document. In this regard, the Walsh City Action is like a third party claim derived from the Gowing Lien Action. It is also alleged that the settlement of the Walsh City Action changed the adversarial relationship in both actions, the Walsh City Action and the Gowing Lien Action. The precedent argument, therefore, does not convince me.

Litigation landscape

[27] On the other hand, having considered the evidence and submissions, I have decided that the subject settlement did not change entirely the litigation landscape of the Gowing Lien Action, the Walsh Civil Action and the Walsh Bond Action. The following are my reasons.

[28] First, there is no evidence of an ongoing and close cooperation between Gowing and Walsh (concerning Walsh pursuing the Gowing claim with the City) right up to the settlement. Prior to the litigation, in its August 29, 2018 and December 14, 2018 letters, WCC undertook to pass a "justifiable" Gowing claim on to the City as a part of the WCC claim at the end of the project. WCC eventually did do so. But this was not the result of some special relationship of cooperation between Gowing and WCC. As the letters indicate, this was done on account of the pay-if-paid provisions of the underlying Subcontract and the reality that Gowing had no recourse against the City directly. Furthermore, and most importantly, correspondence concerning cooperation came to an end in June, 2019 amidst acrimonious allegations between the parties. The litigation then ensured. Gowing and Walsh became bitter adversaries and remain so. I note that Ms. Gowing in her affidavit states that she did not know about the subsequent Walsh EOT submittal and the Walsh City Action and was not aware of any settlement discussions between Walsh and the City. At the time of the settlement discussions there obviously was no cooperation between Walsh and Gowing.

[29] Second, the evidence indicates that the Walsh claims against Gowing and Zurich are distinct from Walsh's claims against the City. Walsh's claims against Gowing and Zurich concern Gowing's performance of the mechanical scope of the project, whereas Walsh's claims against the City concerned alleged excessive and unreasonable changes to the project requirements. The settlement of the Walsh claims against the City did not, therefore, based on the evidence, change the dynamic of the Walsh claims against Gowing and Zurich.

[30] Third, there is no evidence that the settlement between Walsh and City included an agreement as to delay liability and to have the City cooperate with Walsh in its claims and defences concerning Gowing in any way. The settlement involved a payment of an amount by the City to Walsh in return for a release and a dismissal of the Walsh City Action without costs. As Mr. Dewart pointed out, in virtually every other case where a settlement was found to be subject to the immediate disclosure obligation, the settlement involved some form of cooperation agreement. In *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66 (CanLII) the settling defendant agreed to provide the plaintiff with an affidavit that contradicted its previous position about the existence of a leaseback agreement. In *Poirier* the settling defendant agreed to provide the plaintiff with an affidavit that contradicted his representations to the co-defendants with whom he had

previously cooperated. In *Waxman v. Waxman,* 2022 ONCA 311 (CanLII) the settling defendants agreed to provide the plaintiff with affidavits and private cross-examinations and to stay in the action with the action to be dismissed against them only if the plaintiff remained satisfied with their evidence, all in return for financial incentives. The reason for this is that such new cooperation indeed changes the adversarial position of the parties. There was no evidence of that here with WCC and the City. In short, there is no evidence that the City became an ally of WCC against Gowing and Zurich in the settlement.

[31] Fourth, while the settlement may affect the quantum of the Gowing claim and indeed its very existence, those points are not at all clear at this point. Ms. Gowing referred to a letter from someone named Simon Hopton to Walsh dated August 24, 2021 which attaches a breakdown of the City's offer that appears to compose the eventual settlement amount. Ms. Gowing alleged that this did not contain any compensation for the Gowing delay claim. This document is not that clear to me. Furthermore, there was no affidavit from Mr. Hopkins (or anyone from Walsh) explaining the contents of the settlement amount. In any case, it seems to me that this risk of claim compromise through settlement, if it happened, is inherent in the pay-if-paid provisions and other limitations of the Subcontract that Gowing agreed to and that Zurich bonded. Gowing and Zurich cannot now complain that a potentially adverse consequence of the process they agreed to in the Subcontract amounts to a change of adversarial positions that triggers the immediate settlement disclosure obligation. Furthermore, as Mr. Dewart pointed out, Gowing and Zurich have not lost their right to claim at trial that WCC reached an unreasonable settlement that prejudiced them and that should release them from the claim limitations in the Subcontract.

[32] In short, I find that Gowing and Zurich have failed to meet their heavy onus of proving that the settlement between WCC and the City entirely changed the litigation landscape of the Gowing Lien Action, the Walsh Civil Action and the Walsh Bond Action.

Conclusion

[33] For these reasons, I dismiss this motion.

[34] Concerning the costs of this motion, the parties filed costs outlines. The costs outline of Gowing and Zurich shows $36,927.95 in partial indemnity costs, $54,835.96 in substantial indemnity costs and $60,805.30 in actual costs. The WCC costs outline shows $21,572.27 in partial indemnity costs and $35,953.78 in actual costs.

[35] The parties are encouraged to settle the costs of this motion. Walsh was the obviously successful party and should get costs. Barring unforeseen factors, the question should only be the quantum. If the parties cannot so agree, written submissions on costs are to be submitted as follows:

- Walsh must deliver written submissions on costs of no more than two (2) pages on or before May 7, 2025;

- Gowing and Zurich must deliver written submissions on costs of no more than two (2) pages on or before May 14, 2025; and

- Walsh may deliver reply written submissions of no more than one (1) page on or before May 17, 2025.

DATE: April 30, 2025

ASSOCIATE JUSTICE C. WIEBE