Acting in Good Faith: A Requirement in Tendering

The concept of honesty and good faith between contracting parties has received a lot of attention since the Supreme Court of Canada issued its landmark decision in *Bhasin v. Hryniew* in late 2014. In that case, the Court recognized that good faith contractual performance is a general organizing principle of Canadian common law, and that parties to a contract are under a duty to act honestly in the performance of their contractual obligations.

Well before *Bhasin*, however, the duties of honesty and good faith had been recognized in contracts of insurance and of employment as well as the tendering process. It is an implied or unwritten rule of every tender process that the owner must act fairly and in good faith in its dealings with bidders throughout the process. The courts have imposed this requirement in order to protect the integrity of the tendering process. Without some assurance of proper treatment and a fair process, parties are not likely to commit the time and money required to submit a bid.

The essential requirements of the owner’s implied duty of good faith are to:

- treat all bidders fairly and equally;
- follow the rules of the tender; and
- evaluate proposals using the stated criteria, and only those criteria.

Three recent cases demonstrate the importance of honesty and good faith in the tendering process.

In *Elan Construction Limited v. South Fish Creek Recreational Association*, a not-for-profit community association issued a call for tenders for the $19-million expansion of an existing sports complex. The plaintiff, Elan, was one of 11 contractors to submit a bid. Elan submitted the lowest price, but its bid did not receive the highest score on the association’s evaluation process, which also considered project schedule and experience. Elan challenged the award, arguing that the community association breached the duty of good faith it was owed by failing to evaluate its bid fairly and in accordance with the stated evaluation matrix.

The Court reviewed the association’s evaluation process and identified several flaws that constituted a breach of the duty of good faith owed to bidders. In evaluating the bids’ proposed schedules, the association used a methodology that the Court described as “arbitrary” and something that “could not have been within the contemplation of the bidders”.

The Court also criticized the association for having placed greater emphasis on the bidders’ experience constructing arenas.

(Continues on page 2)
something that was not disclosed to bidders in the evaluation criteria. Although the association did not act dishonestly or with malice, the Court held that the implied duty of good faith required more than honesty. A bid evaluation that is conducted in an arbitrary manner or using undisclosed criteria, as the association was found to have done, will constitute a breach of good faith.

The Court concluded that Elan would have received the highest score, had the bids been properly evaluated. However, only nominal damages were awarded because the association was able to demonstrate that the project would not have been profitable.

Another recent case that considered the good faith obligation, Inter-Cité Construction v. Procureur General du Québec, concerned a provincial highway project near Gatineau, Quebec. The plaintiff, Inter-Cité, was the lowest conforming bidder. However, four months after the opening of the bids, the provincial ministry cancelled the tender and did not award the contract because it was unable to obtain all the environmental authorizations required to carry out the work. Inter-Cité argued that the ministry had not acted in good faith in doing so, and sued to recover the cost of keeping its management staff and machinery assigned to the project “on hold” for the period that preceded the cancellation.

The Court held that the ministry’s conduct leading to the cancellation did breach its obligation to act in good faith in two respects. First, the ministry told bidders in the tender documents that the necessary environmental authorizations had already been obtained, which was not the case. Second, when it was revealed that the authorizations had not been obtained, it led Inter-Cité to believe that they were “on their way”, which was also not the case.

Whether intentional or not, the Court held that the ministry lacked transparency in its dealings with bidders, contrary to its obligation of good faith. Inter-Cité was awarded damages to cover the costs of its labour and equipment having had to remain idle.

In M.G. Logging & Sons Ltd. v. British Columbia, the plaintiff was the unsuccessful bidder on a timber licence auctioned by the Ministry of Forests. After originally being identified as the lowest bidder, M.G. Logging was not awarded the contract because it was determined that its bid was unclear as to the identity of the bidder. It was intended that the bid be submitted on behalf of “M.G. Logging & Sons Ltd.”, which was a registered contractor and therefore eligible to bid for the licence. However, the bid form listed a related company, “M.G. Logging Ent. Ltd.”, as the bidder, a company which was not registered and therefore not eligible to bid.

The plaintiff argued that the mistake in identifying the bidder was inadvertent and did not have a material impact on the evaluation of bids. There was also evidence that the ministry understood the true identity of the bidder. In light of those circumstances, the plaintiff argued that it was not treated fairly and that the ministry should have taken steps to resolve any uncertainty in the identity of the bidder.

The Court rejected this argument, noting that the obligations of fairness and good faith arise only upon the submission of a compliant bid. An owner does not owe the duty of fairness and good faith until a party submits a bid that substantially complies with the requirements of the tender call. Because the plaintiff’s bid was not compliant, it had no basis to argue that the ministry had not treated it fairly or breached some obligation arising under the implied duty of good faith.

Although it is an unwritten or implied rule, the owner’s obligations under the duty of good faith is an essential component of the tendering process, and the basis upon which many tendering disputes are decided. Understanding the scope and implications of these obligations is important for any tendering authority or party responding to a call for tenders.

For more information on the duty of good faith or the tendering process in general, please contact STEVE BEREZOWSKYJ sberezowskyj@singleton.com

The electronic version of this article at www.singleton.com contains links to the cases mentioned above.

Few areas of construction law have attracted as much oversight by our courts as the topic of construction tenders. For more than 30 years now, the courts have been shaping the rules under which owners and potential bidders for construction work interact during the tendering phase. In 1981, the Supreme Court of Canada said the process by which bidders submit their proposals in the hopes of winning a project is one that requires its integrity to be maintained. From that starting point, concepts such as procedural fairness and transparency have evolved, with the intent of protecting the interests of both the owner and those who bid for the work. Steve Berezowskyj’s article in this issue of Letter of the Law comments on three recent court decisions which clarify the need for overall fairness in the tendering context and provide excellent examples of the circumstances where parties can run afoul of these procedural safeguards. All those involved in the tendering process will want to read this article with interest.

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The British Columbia Court of Appeal recently considered the applicability of a pollution exclusion clause contained in a commercial general liability insurance policy. The policyholder, Precision Plating Ltd., operated a metal plating business in which chemicals used in the plating process were stored in large, open vats.

When a fire occurred on the premises the automatic sprinkler system was activated, causing water to enter the tanks containing the chemicals. The sprinklers continued to run for a period of time until the fire department was able to control the fire. In the meantime, the water from the sprinklers caused the chemical tanks to overflow, sending chemicals into the premises as well as neighbouring businesses. Precision sustained damage to their own property and claims were brought against them by neighbouring businesses, which likewise suffered damage.

When Precision presented the claim, its insurer denied coverage arguing that the policy excluded damages caused by the release of pollutants. The policy defined pollutants to include, amongst other things, “acids and chemicals” but also “thermal irritants, smoke, soot, and fumes”.

Precision challenged the denial of coverage in the Supreme Court of British Columbia. They argued that the exclusion for pollution-related damages should not be given effect because it was ambiguous. As well, they said that the policy clearly covered damages arising from fire, and fire was, indeed, the originating cause of the loss in this instance.

Precision also pointed to the fact that the pollution exclusion clause purported to exclude damages arising from “thermal irritants”, including “smoke” and “soot”, which are typically associated with fire. How could it be, they argued, that the policy could, on the one hand, cover fire losses but exclude the very things that fire causes such as thermal irritants, soot and smoke?

The trial judge agreed and found that the clause was ambiguous in that the policyholder could reasonably expect to have coverage for fire losses in these circumstances notwithstanding the fact there was also damage due to the release of pollutants. The trial judge held that the pollution exclusion clause could not exclude coverage for the escape of pollutants caused by a fire.

The insurer did not accept this decision and brought an appeal to the British Columbia Court of Appeal. The Court of Appeal firstly observed that the claims brought against Precision by all but one of the neighbours alleged that it was the release of chemicals from Precision’s premises that caused their damages. Only one alleged that, in addition to the escape of the chemicals, Precision was also liable to them for damages resulting from a “hostile fire”.

The Court of Appeal was asked whether Precision’s liability for the release of pollutants, which was not a covered peril under the policy, could nonetheless still result in coverage if a concurrent cause of the damage was a covered peril. The Court held that since the pollution exclusion clause specifically referred to property damage “caused by, or contributed to” by the release of pollutants, it meant that the policy would not cover liability associated with such a release, regardless of whether it was the sole or concurrent cause of the loss.

The Court of Appeal also dealt with the issue of ambiguity that had motivated the trial judge to conclude the pollution exclusion clause should not operate in this instance. The Court found that the policy was unambiguous in excluding coverage for the release of pollutants and there was no controversy that the chemicals stored on Precision’s premises met the definition of “pollutant”.

The Court of Appeal found that Precision would have had a reasonable expectation that it would be covered for any liability for damage to neighbouring properties from fire, but it could have no reasonable expectation that it would be covered for the escape of chemicals from its premises. The Court was not satisfied that this presented any ambiguity and, accordingly, found that the insurer was not under any obligation to defend Precision in respect of the claims brought by its neighbours since those claims would never be covered under Precision’s liability policy.

Following the result in the B.C. Court of Appeal, Precision sought leave to the Supreme Court of Canada. However, Canada’s highest Court has declined to hear the appeal and thus the B.C. Court of Appeal’s decision on coverage in this instance will stand.

Because of this ruling, businesses engaged in the handling of products that could meet the definition of pollutant should discuss with their insurance professional the extent of coverage available under any given commercial liability policy. Most standard commercial policies will contain exclusion causes for pollution. However, specialty insurance policies are available when coverage for pollution losses is desirable, albeit it will likely come with a higher premium cost.

As this case reveals, it is best to ensure you fully understand the coverage you are purchasing before a loss occurs.

For more information on this decision and insurance law in general, please contact Jeffrey Hand, jhand@singleton.com

The electronic version of this article is available at www.singleton.com.

Were it not for the advancement in building technologies and the introduction of new building products, we might still be living in caves. On the other hand, those who have been victims of failed new technologies and faulty new building products may conclude that living in a cave was not such a bad idea after all.

Those “victims” include people responsible for specifying or employing the technologies and products in question, often because there was inadequate due diligence in selecting them or, sometimes, simply because the law concludes that they ought to have known better. Let me give some examples of such transgressions.

All those involved in the building industry, of course, remember the asbestos problem. When the use of asbestos as a fireproofing material was first introduced into the building industry, it was widely accepted and used in tens of thousands of buildings to retard the spread of fire. As it turned out, the product was later widely condemned as presenting a health risk to occupants or workers when certain types of asbestos fibres became embedded in the lung cavity, resulting in various forms of lung cancer. So the manufacturers and distributors of asbestos became involved in thousands of lawsuits, which resulted in multiple bankruptcies and damage awards for bodily injury and property damage in the billions, if not trillions, of dollars.

But it was not just the manufacturers and distributors who became the “victims” of these damage awards; it was also those who specified the product in the first place or who were responsible for its installation. Using or specifying the product when the available literature identified the human health risk of doing so amounted to negligence on the part of designers and builders or, at least, unreasonable reliance on the representations that had been made by the manufacturers and distributors. It was a very hard lesson for the industry.

More recently, the leaky condo debacle in British Columbia dealt another hard lesson. Some would say a new building technology—face-sealed design—was the root cause of this problem, which generated more than 1,500 claims and $2 billion in damages. The design, a by-product of the energy crisis in the early 1980s, was seen as a panacea for solving energy inefficiencies by preventing infiltration of moisture into and exfiltration of warm air out of the building envelope. In practice, however, the technology allowed both phenomena, resulting in moisture buildup in the building envelope and subsequent rotting or rusting of structural components.

Some would say there was a point in time when designers, builders and product suppliers should have known that this new technology, as well intentioned as it was, presented a foreseeable and unwanted risk to the structural integrity of the buildings incorporating it. If the exercise of due diligence would have disclosed this risk, then those responsible for incorporating this technology into buildings would face certain liability for the extensive costs incurred to repair those buildings.

Multiple other examples exist where new building products or technologies have brought significant adverse financial consequences to both builders and designers. Many of these examples involve reliance on the certification of building products or technologies by certification agencies, both here and abroad.

For instance, when it first appeared in the market, plastic-coated electrical cable was certified to be fire resistant. Certification resulted from laboratory testing that ignited cable in a horizontal tray and then measured the length of time it took for the fire to expire. This, according to many manufacturers and distributors, assured the industry that the product was safe to use. But in fact it was not.
What the tests failed to take into account was that not all cables run only horizontally. Once in a while they have to rise vertically to enter into mechanical or electrical rooms to be affixed to the components they are designed to supply power to. In a vertical configuration, the cable was anything but fire resistant. It tended to act, according to experts, like a dynamite fuse, and rather than being fire resistant actually propagated the spread of fire. Cases that found their way into litigation demonstrated the importance of exercising due diligence in choosing new products, including satisfying oneself about the nature of the testing and certification by testing agencies.

The case of manufacturing copper pipe illustrates a similar example. There have been instances of designers and builders relying on “seals of approval” found on copper pipe manufactured in other parts of the world. These “seals of approval” had been relied on by many as certifying that the pipe, as manufactured, was fit for its intended purpose. In fact, the seal represented nothing of the sort.

If one were to have exercised due diligence and looked behind the “seal of approval”, one would have seen that all that was being certified was that the manufacturer of the pipe had the capability of manufacturing in accordance with applicable codes and standards, not that the pipe in question actually met those standards. To come to this realization after kilometres of copper piping had been replaced in a series of buildings was a rude awakening.

It should be readily apparent from these examples that designers and builders should hesitate and exercise due diligence before accepting or adopting any new building product or technology to ensure they have a very clear understanding of any limitations to representations being made by those marketing these new products or technologies. The key is remembering that what you see, or what you think you see, is not necessarily what you get. Unless, of course, you live in a cave.

For more information on construction law and using new technologies wisely, please contact

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An electronic version of this article is available at www.singleton.com.

NEW PARTNERS, NEW FACES

ALANA DALE-JOHNSON
VERONICA ROSSOS

It was an auspicious start to the New Year as ALANA DALE-JOHNSON and VERONICA ROSSOS joined the SU partnership January 1. Each brings 10+ years of valuable legal experience, effective leadership skills and demonstrated business acumen. Alana focuses on Business Law, Estate Planning and Administration while Veronica concentrates on Workplace Law (including Labour Law), Commercial Litigation and Privacy Law. Congratulations!

Continuing with the momentum, SU welcomes HELMUT JOHANNSEN as Associate Counsel. Helmut draws on his extensive background both as a construction lawyer and as a Registered Professional Engineer to focus on construction, engineering, procurement and infrastructure. His diverse domestic and international practice includes strategic advice; risk mitigation; advising on project delivery systems; and all aspects of contract law. He is also a Chartered Arbitrator (ADR Institute of Canada) and Member of the Chartered Institute of Arbitrators, and has acted as both counsel and arbitrator on numerous arbitrations involving construction, engineering, procurement and technical matters. Helmut may be contacted at hjohannsen@singleton.com.

We also welcome NICHOLAS COSULICH as Associate. Nicholas is a member of SU’s Business Law Group, focusing on Corporate Commercial Transactions, Commercial Real Estate, and Financing. Prior to joining SU, he completed his articles at a leading western Canadian business law firm and earned a Juris Doctor from Dalhousie University. You can reach Nicholas at ncosulich@singleton.com.

SU NEWS BEYOND THE OFFICE

JOHN SINGLETON, Q.C. has been busy as a guest speaker recently. His engagements have included speaking at the Affinity Institute’s conference on Construction Claims on the topic “The Importance of Design”; addressing the topic “Risks Associated with Design and Field Services” for the architects at DIALOG; and addressing “Pre-Contract Award Due Diligence” at the Canadian Institute’s annual event, Managing Risks in Construction Contracts. With the assistance of CLAIRE IMMEGA, John also spoke on the risks associated with new materials and building technologies at the Buildex Conference in Vancouver. In April he will speak at an insurance risk management conference and, in June, at the Pacific Business Law Institute’s conference on The Construction Industry: Major Projects.

Congratulations to VERONICA ROSSOS, who was recently named by Lexpert in the “Lawyers to Watch” category. She was also a finalist in the Lexpert 2015 Rising Stars “Leading Lawyers Under 40” Awards.

SPORTING NOTES

An avid rower, SU Associate BETSY SEGAL was elected as the Vancouver Rowing Club’s 1st Vice President on the Executive of the Board of Directors. Betsy was previously 2nd Vice President.

The SU Ski Team got in some early spring skiing at Whistler at the annual BC Law Firm Ski Race Championships. As well, SU was excited to be a corporate sponsor of the 2016 Karate Canada National Championships, attended by hundreds of athletes in Richmond, B.C.
Builders’ Liens: Know Your Legal Paths to Resolution

In its first construction lien decision in some time, the Supreme Court of Canada confirmed what many British Columbians have known since the 2003 Court of Appeal decision in Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd., namely, that lien claimants are not confined to pursuing only one statutory remedy at any one time.

In this more recent case from Manitoba, the Supreme Court of Canada confirmed in Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel that unpaid subcontractors can seek compensation simultaneously via builders’ liens and statutory trusts. As well, the Court ruled that security posted for one remedy may not act as security for all remedies. This is good news for those pursuing such claims. Here, briefly, is how the case unfolded.

Dominion Construction Company, a general contractor, was hired by BBB Stadium to construct Investors Group Field, a new football stadium at the University of Manitoba. As construction proceeded, Dominion withheld payment from its steel subcontractor, Structal Heavy Steel, originally citing a delay in receiving progress payments from the owner, BBB Stadium. Eventually, however, Dominion changed its stated reason for withholding the payments to Structal, advising Structal that it was using the unpaid amounts for back charges that resulted from what Dominion claimed were delays attributable to Structal.

Structal then registered a builders’ lien against the property totalling in excess of $15 million, prompting Dominion to file a lien bond in the full amount of the builders’ lien in the Manitoba Court of Queen’s Bench. The bond’s effect was to ensure that Structal would be paid the amount of any lien judgment it obtained against Dominion, in the event that Dominion did not satisfy the amount of the lien judgment (up to the maximum bond amount).

Structal approved the bond and discharged its lien. In the meantime, Dominion continued to receive progress payments from the owner, but refused to make further payments to Structal on the basis that it was entitled to deduct from those amounts the back charges attributable to Structal’s delays and that Structal was already fully secured by the lien bond. Structal responded by requesting that the owner withhold payment from Dominion or face an action for violating the trust provisions of Manitoba’s Builders’ Lien Act.

The owner obliged, and Dominion brought an application to the Manitoba Court of Queen’s Bench seeking a declaration that it satisfied its trust obligations to Structal under the Act. If granted, Dominion could pay the amount the owner was withholding from it to other trust claimants and, once they were paid, to other creditors.

The Court of Queen’s Bench ruled that the lien bond secured Structal’s trust claim, whereupon the holdback being maintained by the owner was paid to Dominion, which used it to pay other contractors and itself. The matter proceeded to appeal.

On appeal, the Manitoba Court of Appeal reversed the lower court’s ruling, concluding that, under the Act, subcontractors have two separate and distinct rights beyond the common law right to sue for breach of contract: the right to the statutory trust and the right to file a lien claim against the property.

In upholding the Appellate Court’s ruling, the Supreme Court recognized the distinct operation of lien and trust provisions, a concept that was rooted in previous iterations of the Act.

The Court held that the Act itself contemplates that lien and trust remedies may be pursued concurrently. Dominion argued that, where a lien bond has been filed with the Court, the bond should stand as security for any potential claim. The Supreme Court disagreed, finding that a reading of both the lien and trust provisions of the Act reveals that filing a lien bond has no effect on the existence and application of a trust remedy. Nothing in the Act suggests that lien and trust provisions do not remain as two separate remedies.

The Court recognized that holding that a trust claim is extinguished by filing a lien bond would undermine the purpose of the statutory trust, which is to assure that monies payable by owners, contractors and subcontractors flow with the contractual rights of those engaged in the building project, and money “is not diverted out of the proper pipeline.”

If a judgment were issued invalidating the lien because it failed to comply with the requirements in the Act, liability under the lien bond would be extinguished. The claimant would then find itself with no access to the funds guaranteed by the bond. Nonetheless, a contractor or subcontractor may still have a trust claim independent of the lien claim; the lien bond would not have secured this trust claim. This is consistent with the law in B.C., which recognizes that a subcontractor may

(Continues on page 7)
On February 16 the B.C. government announced the 2016 budget and introduced a number of significant changes with respect to the province’s property transfer tax (PTT) regime. Property transfer tax is payable in accordance with the Property Transfer Tax Act, which provides that PTT applies to any transfer of title to real estate in B.C., subject to certain exemptions.

Previously, property transfer tax was calculated at a rate of 1% on the first $200,000 of the fair market value of a property and 2% on the remaining portion. A new tax rate of 3% is now applicable to the transfer of properties with a fair market value greater than $2,000,000. Accordingly, PTT will now be charged at a rate of:

- 1% on the first $200,000;
- 2% on the portion of the fair market value greater than $200,000, up to and including $2,000,000; and
- 3% on the portion of the fair market value greater than $2,000,000.

The above rates apply to all transfers registered on or after February 17, 2016; they do not apply retroactively to transfers registered before February 17, 2016.

The B.C. government also established a new exemption from the payment of property transfer tax with respect to newly built homes, including, for example, a house or a new apartment in a newly built condominium building. In order to qualify for the exemption, the purchaser must be a Canadian citizen or permanent resident, and must move into the home within 92 days after the date when the transfer is registered in the applicable Land Title Office. As well, the purchaser must occupy the home as their principal residence for not less than one year after the registration date, subject to certain exceptions.

If a transaction qualifies for the exemption, a purchaser of a home with a fair market value of up to $750,000 is eligible for a full exemption from the tax. Further, a purchaser of a home with a fair market value of up to $800,000 is eligible for a partial exemption. Similar to the new PTT tax rate, the newly built home exemption is not available retroactively and may only be claimed with respect to transfers registered on or after February 17, 2016.

Effective immediately, purchasers claiming the newly built home exemption will be required to comply with the following requirements:

(a) disclosure of the purchaser’s citizenship, with a corporate purchaser required to disclose the citizenship of each of its directors; and

(b) disclosure of any bare trust relationship, with the purchaser also required to provide the name, address and citizenship of the beneficial owner(s).

These disclosure requirements will apply to all purchasers in the near future.

For more information on changes to the PTT regime and real estate law in general, please contact

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The electronic version of this article at www.singleton.com contains a link to the Property Transfer Tax Act.
Obtaining Evidence: A Challenge in the Internet Age

In litigation, evidence is essential; in the online era, much of that evidence is internet-based. But online evidence can be difficult to bring before the court in British Columbia.

Many internet companies are headquartered and house their data on servers in the United States and other countries, introducing complex questions of jurisdiction when that data becomes evidence. The rewards of grappling with these questions can be enormous, as browsing histories, emails, IP addresses, metadata or deleted content can be crucial to your case.

Online data can help prove crucial facts, such as an individual’s identity, their knowledge at a point in time, or even the presence of actionable damages in all types of lawsuits, including defamation, fraud, and commercial disputes. Unsurprisingly, then, such evidence is increasingly a critical piece of modern litigation strategy. But admitting it at trial often involves a number of procedural hurdles.

Despite the 21st century’s increasing interconnectivity, obtaining evidence in B.C. from foreign jurisdictions remains resolutely old-fashioned. In Equustek Solutions Inc. v. Jack, Madam Justice Fenlon aptly noted that the internet frustrated traditional territorial jurisdiction of the courts, and that the courts must adapt to the changing nature of human commerce and information interchange in the “borderless electronic web of the internet”. Unfortunately, the B.C. Rules of Court have not caught up.

When a witness (individual or corporate) is located in a foreign jurisdiction, will not attend trial willingly, and cannot be compelled to attend because of the court’s limited jurisdiction, but their evidence is necessary to a claim or defence, litigants can apply to the court for what are known as “letters of request” or “letters rogatory”. The court can issue a letter of request to the foreign court, seeking judicial assistance and requesting that the foreign court compel the witness to attend the deposition.

The letter of request is then given effect by counsel in the foreign jurisdiction where the witness resides. The procedure for giving effect to the B.C. order varies by jurisdiction. In California, for example (where Google and Facebook are headquartered), the Code of Civil Procedure allows a lawyer to issue a “foreign subpoena” without resorting to the court. In other jurisdictions, such as Washington (where Microsoft does business) and Arizona (the home of GoDaddy), an application to the state court for assistance, aided by counsel in the foreign jurisdiction where the witness business) and Arizona (the home of GoDaddy), an application to the state court for assistance, aided by counsel in the foreign jurisdiction where the witness resides, is required. The procedure for giving effect to the B.C. order varies by jurisdiction. In California, for example (where Google and Facebook are headquartered), the Code of Civil Procedure allows a lawyer to issue a “foreign subpoena” without resorting to the court. In other jurisdictions, such as Washington (where Microsoft does business) and Arizona (the home of GoDaddy), an application to the state court for assistance, aided by counsel in the foreign jurisdiction where the witness resides, is required.

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The process is unwieldy, and involves sending letters of request to the Undersecretary of State for External Affairs of Canada in Ottawa, to be forwarded through diplomatic channels, and then to the foreign court for assistance, aided by counsel. The evidence then meanders back to the parties through the same channels, and the process could take years. The first of many problems with this clunky procedure is this: The Undersecretary of State for External Affairs is no longer a position in Canada’s federal government. (Cabinet positions may change, but some rules stay the same.)

Luckily, more expeditious channels exist. However, coordinating a process consistent with B.C. law, international law and the law in the foreign jurisdiction requires strategy and finesse. It also depends on the kind of evidence to be admitted and the jurisdiction where it is to be found.

B.C.’s process for obtaining foreign evidence is also out of step with many other jurisdictions, which have turned to Mutual Legal Assistance Treaties (MLATs) instead. These treaties seek to replace the common law’s reliance on letters of request with a more efficient and reliable process. However, for complex constitutional reasons, Canada’s federal structure precludes it from being a signatory to MLATs.

While the specific steps involved in obtaining letters of request may change in the coming years (one wonders, for instance, how long a non-existent civil servant can play a starring role), the overall process for obtaining foreign evidence is likely to remain complex in Canada due to our federal structure.

Combine that stubborn fact with our society’s ongoing online migration, and it is more important than ever that litigants have an effective strategy for identifying and obtaining foreign evidence where necessary.

When your litigation may turn on evidence of online activities, turn to counsel with the expertise to get that evidence before the courts.

For more information on civil litigation and obtaining foreign evidence, please contact

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KYLE THOMPSON, articling student, assisted with research and writing of this article.