Canadian College of Construction Lawyers

LEGAL UPDATE

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CANADIAN COLLEGE OF CONSTRUCTION LAWYERS
LE COLLÈGE CANADIEN DES AVOCATS EN DROIT DE LA CONSTRUCTION

L.U. #170

March 21, 2025

INSIDE THIS ISSUE:

Editors' Note

In *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc*., an Ontario Superior Court judge set aside an award based on reasonable apprehension of bias because the arbitrator had not disclosed a subsequent retainer in an unrelated arbitration by the law firm acting for the successful party. The decision attracted significant scrutiny in Canadian arbitration circles. The underlying case is not a construction law matter but was of particular interest to the College given the relative prevalence of arbitration agreements in construction contracts and the relatively small pool of highly qualified and experienced Canadian construction law arbitrators. The Canadian construction law bar is also comparatively small, and one often encounters the same counsel on multiple matters. To what extent would these arbitrators and counsel be restricted from taking on multiple arbitration retainers? The temperature may have been taken down somewhat by the Ontario Court of Appeal's reversal of the application judge's decision to disqualify the arbitrator in *Aroma* as detailed in our first case comment by Catriona Otto-Johnston and Chase Salembier. However, the issue may not be settled as a leave application to the Supreme Court of Canada is pending.

Our second case comment also concerns an important decision in the world of arbitration from one of our provincial appellate courts. Corbin Devlin reviews the Alberta Court of Appeal's decision in *Husky v Technip*, where the court declined to compel a non-party beneficiary to a contract to arbitrate a dispute pursuant to an arbitration agreement to which they were not privy. As Corbin demonstrates, the Court's reasoning was based on lack of clarity in the contract as to whether the non-party beneficiary had bound themselves to arbitration and declined to deny their access to the courts in the face of this ambiguity. The author suggests that the result may have been different with more precise drafting, a suggestion which bears monitoring in future cases.

Our next case comment is also from the Alberta Court of Appeal and demonstrates the importance of understanding the specific requirements of provincial lien statutes and practices. Catriona Otto-Johnston reviews the history of a lengthy lien proceeding arising from an insolvency, *Chandos Construction Ltd. v Deloitte Restructuring Inc*. Briefly, the Court of Appeal

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Brendan D. Bowles

Catriona Otto-Johnston

ruled that in these circumstances where the lien had been vacated by posting of security with the court the *Prompt Payment and Construction Lien Act* permitted the lien to be perfected by the terms of a court order and that it was therefore unnecessary for the lien claimant to have issued a statement of claim within the limitation period provided by the Alberta *Limitations Act*. Although the Court's decision turned on the specific wording of the court order at issue, which was not in the usual template form, it is interesting to contrast these requirements with other jurisdictions with more stringent requirements. Under Ontario's *Construction Act,* for example, a lien must always be perfected with a statement of claim (your own or by sheltering under someone else's) and the time periods to preserve and perfect liens are always governed by the *Construction Act* and not the general limitations statute. One of the lessons here is that there is no substitute for local knowledge and expertise, particularly when it comes to liens.

In our fourth case comment, Brendan Bowles and Isa Dookie discuss the potential for a lawyer's personal liability for costs when that lawyer has either subjective knowledge that a lien is improper or is reckless or wilfully blind to the defects of the lien yet preserves or perfects it anyway. While the Court declined to award costs against counsel personally in *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc* (which decision was appealed, with the Court holding leave was required to appeal and denying said leave in *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, this decision stands as a good reminder to construction counsel across the country that diligence must be exercised when representing clients with liens.

We conclude this issue with a "how to" guide for calling on a bond to satisfy judgment obtained for a lien. Dan Fridmar and Jacob McClelland provide a step-by-step reference for this seldom-used procedure. While the checklist is specific to Ontario rules and procedures, it provides a helpful starting point for other jurisdictions as well. We suggest readers make note of this commentary for future reference, when you or others in your office are asked: "How do I seek payment of my client's judgment from a lien bond?".

With these five comments, we conclude Legal Update #170, our first edition of 2025. Brendan, Catriona and the rest of the Legal Update Committee look forward to bringing you interesting and helpful content throughout the year. As always, we welcome submissions for the next issue and encourage you to reach out with any suggestions or pieces. In this respect, while this issue focuses on case comments, we also welcome noteworthy submissions on statutory developments or contract issues.

The Aroma of Bias: Ontario Court of Appeal Clarifies an Arbitrator's Duty to Disclose New Mandates

The Aroma of Bias: Ontario Court of Appeal Clarifies an Arbitrator's Duty to Disclose New Mandates
2024 ONCA 839

LU #170 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
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Catriona Otto-Johnston

Chase Salembier

In November 2024, the Ontario Court of Appeal released the eagerly awaited decision of *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc., 2024 ONCA 839* ("***Aroma***"), which dealt with the appeal of a decision setting aside an arbitral award on the basis of finding a reasonable apprehension of bias on the part of an arbitrator due to the arbitrator's failure to disclose his appointment by counsel on an unrelated matter.

In doing so, the Ontario Court of Appeal clarifies the duty of disclosure for arbitrators and discusses the relationship between disclosure and the existence of a reasonable apprehension of bias. This decision is significant to arbitrators and counsel with an arbitration practice, providing important guidance on the disclosure obligations of arbitrators who are appointed for multiple matters by the same party or counsel, as well as when a reasonable apprehension of bias may be found where an arbitrator does not disclose the fact that they have been retained for a separate and unrelated mandate.

We note that leave to appeal to the Supreme Court of Canada has been sought. Leave to appeal to Canada's highest court is granted sparingly, however this case has attracted intense national interest. The leave decision is eagerly anticipated by the Canadian arbitration bar, and if granted, the eventual Supreme Court of Canada decision will be closely scrutinized.

Background

The background of this decision involves a franchise dispute between a master franchisee, Aroma Espresso Bar Canada Inc. ("**Aroma Canada**") and the franchisor, Aroma Franchise Company Inc. ("**Aroma Franchise**") relating to an alleged wrongful termination of a Master Franchise Agreement (the "**Agreement**").

The Agreement contained an arbitration agreement requiring that the dispute be submitted to arbitration before a sole arbitrator. With respect to the appointment of the sole arbitrator, the parties were required to "jointly select one (1) neutral arbitrator" who "has no prior social, business or professional relationships with either party". The arbitration was governed by the *International Commercial Arbitration Act,* 2017 which incorporates the *UNCITRAL Model Law on International Arbitration* (the "**Model Law**").

Following the delivery of a notice of request to arbitrate, counsel for the parties engaged in dialogue to identify an arbitrator. The parties proposed and rejected three potential arbitrators, including on the basis that one of the candidates had a number of previous appointments by the law firm representing Aroma Canada. The parties ultimately agreed to an arbitrator (the "**Arbitrator**") who had not previously acted as a mediator or arbitrator for

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either party and who confirmed that he had no conflicts and met the criteria for appointment.

The arbitration between the parties (the "**Arbitration**") occurred over a period of more than two years and ultimately culminated in an award finding that Aroma Franchise had wrongfully terminated the Agreement and awarding substantial damages to Aroma Canada as a result. The Arbitrator issued the final award of the arbitration (the "**Final Award**") on January 12, 2022 via an email to counsel for the parties.

However, in sending out the Final Award to the parties, the Arbitrator inadvertently copied another lawyer from Aroma Canada's law firm who had not been involved in the Arbitration. In subsequent correspondence, Aroma Franchise learned that approximately 17 months after the Arbitration began, the lead lawyer for Aroma Canada had engaged the Arbitrator to serve as arbitrator for a separate dispute involving another client of their firm (the "**Second Arbitration**"). The Second Arbitration involved different parties and issues from those involved in the Arbitration. The Second Arbitration also involved the lawyer who had been inadvertently copied by the Arbitrator when sending out the Final Award. Throughout the Arbitration, Aroma Franchise had been unaware that the Arbitrator had been involved in the Second Arbitration as the Arbitrator had not disclosed that he been approached, or had agreed, to conduct the Second Arbitration.

Upon learning of the Arbitrator's involvement in the Second Arbitration, Aroma Franchise brought an application to the Superior Court to set aside the Final Award, as well as ancillary awards of interest and costs the Arbitrator made in October 2022, on the basis that there was a reasonable apprehension of bias on the part of the Arbitrator, the Arbitrator had exceeded his jurisdiction, and the Arbitrator gave inadequate reasons.

The Ontario Superior Court's Decision

In March 2023, the Ontario Superior Court of Justice granted Aroma Franchise's application to set aside the Final Award and costs and interest awards and directed a new arbitration be conducted before a different arbitrator. The lower court concluded that the Arbitrator was required to disclose that he had been engaged for the Second Arbitration and that the Arbitrator's failure to provide such disclosure gave rise to a reasonable apprehension of bias, fatally tainting the result of the Arbitration.

In reaching these conclusions, the lower court placed considerable emphasis on the parties' expectations regarding disclosure derived from the correspondence exchanged between counsel for the parties before the Arbitrator was approached and then appointed. In that correspondence, counsel ex-

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plained their own relationships with potential arbitrators and asked certain questions about opposing counsel's relationships. This correspondence between the parties was never provided to the Arbitrator nor was he ever made aware of the expectations said to flow from it. Nevertheless, the lower court found that, based on this correspondence as well as the provisions of the arbitration agreement between the parties, it was clearly important to both parties that the selected arbitrator be neutral and not have a professional or personal relationship with either party or their counsel and that this would remain important throughout the Arbitration.

Although the parties did not adopt the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "**IBA Guidelines**") to govern the disclosure regime for the Arbitration, the lower court cited and heavily relied on them in coming to its decision. The IBA Guidelines list specific situations which may warrant disclosure or disqualification of an arbitrator, including potentially disclosing appointments made by the same party or the same counsel appearing before an arbitrator while the case is ongoing.

In concluding that a reasonable apprehension of bias had tainted the Arbitration, the lower court emphasized the expectations of the parties and the relevant circumstances – including that the Second Arbitration was hidden from Aroma Franchise for approximately 15 months while the Arbitration was ongoing and that the Second Arbitration was only discovered due to the inadvertent copying of unrelated counsel on an email by the Arbitrator.

Aroma Canada appealed the decision to the Ontario Court of Appeal, challenging the finding that disclosure was required by the Arbitrator and that a reasonable apprehension of bias arose as a result of the Arbitrator's non-disclosure. In the meantime, the decision by the Ontario Superior Court of Justice was significant to the arbitration sphere by signalling that increased disclosure by arbitrators for unrelated mandates for the same lawyers or law firms may be necessary.

The Court of Appeal Decision

In a unanimous decision, the Court of Appeal set aside the decision and found that the lower court erred in law in finding that the Arbitrator had breached his duty to disclose that he was appointed to the Second Arbitration and that a reasonable apprehension of bias arose in the circumstances. In doing so, the Court of Appeal first considered the issue of whether disclosure was warranted, followed by an analysis of whether a reasonable apprehension of bias could be established.

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The Duty to Disclose

In considering the issue of whether the Arbitrator should have disclosed the existence of the Second Arbitration, the Court of Appeal confirmed that required disclosure turns on the legal regime governing the arbitration. The Court considered the specific regime governing the Arbitration, being the Model Law. In particular, Article 12(1) of the Model Law sets out the applicable duty of disclosure by an arbitrator as follows:

> When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and through the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

The Court agreed with persuasive UK common law authority that the Model Law test dictating when an arbitrator must make disclosure is an objective one – like the test for disclosure prescribed by the common law. The question is whether relevant circumstances would likely give rise to justifiable doubts about the impartiality of the arbitrator from the perspective of a "fair-minded and informed observer", rather than the subjective perspective of the parties.

The Court reasoned that, unlike the Model Law, the IBA Guidelines are not a legal standard, and while the parties easily could have, the parties did not adopt the IBA Guidelines as the governing disclosure regime for the Arbitration. While recognizing that the standard for disclosure in the IBA Guidelines may be instructive, the Court clarified that the IBA Guidelines are not determinative, and in fact, they differed from the Model Law by implementing a subjective framework.

The Court of Appeal determined that the lower court failed to apply an objective test, as required by the Model Law, and instead erroneously applied a subjective test pursuant to the IBA Guidelines. In doing so, the lower court improperly relied upon the parties' subjective expectations as derived from their pre-appointment correspondence, although such correspondence was never shared with the Arbitrator. The Court confirmed that the unshared expectations and views of the parties could not inform the question of whether the Arbitrator had a duty to disclose, as the applicable test is an objective one which requires consideration of what was communicated to and known by the Arbitrator.

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In applying an objective test, the Court held that the Arbitrator did not have a duty to disclose the existence of the Second Arbitration given that the Second Arbitration did not involve either of the parties to the Arbitration nor did it have any meaningful overlap of issues. Accordingly, the Arbitrator had not breached the legal duty of disclosure.

It should be noted that in reaching this conclusion, the Court of Appeal also distinguished the circumstances from the UK decisions relied on by Aroma Franchise where the impugned arbitrators had accepted multiple appointments from the same party in relation to multiple claims concerning the same or overlapping subject matter, or where the arbitrator had accepted but not disclosed multiple appointments as arbitrator and multiple retainers as an expert or co-counsel to the law firm.

Reasonable Apprehension of Bias

The Court of Appeal then turned to the issue of bias and found that the lower court erred in determining that a reasonable apprehension of bias existed in the circumstances.

The Court of Appeal first discussed the relationship between a failure to disclose and reasonable apprehension of bias, holding that a finding that there was a breach of the legal duty of disclosure is germane to, although not determinative of, the inquiry of whether there is a reasonable apprehension of bias. The Court of Appeal observed that the test for disqualifying an arbitrator on grounds of bias imposed a higher threshold than the test for disclosure under the Model Law, given that Article 12(2) is limited to circumstances which "do" give rise to justifiable doubts, while the duty of disclosure under Article 12(1) of the Model Law applies to circumstances that are "likely" to give rise to justifiable doubts. The legal duty to disclose was said to cover a wider array of circumstances than those that, in the end, will justify disqualification of an arbitrator or setting aside an award for reasonable apprehension of bias. In the present case, given that the Court had determined that the Arbitrator's failure to disclose his appointment in the Second Arbitration did not breach the duty of disclosure, the path from the Arbitrator's non-disclosure to a reasonable apprehension of bias on the part of the Arbitrator disappeared.

The Court then considered whether any other basis could be established for finding a reasonable apprehension of bias, and in doing so, helpfully discussed the relevant tests and principles governing reasonable apprehension of bias. The Court emphasized that the test for disqualification of an arbitrator on the grounds of a reasonable apprehension of bias is an objective one and considers the relevant circumstances from the standpoint of a fair-minded and informed observer. The Court recognized that Article 12(2)

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of the Model Law permits a challenge to an arbitrator or an award that was made "if circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence". The Court reasoned that "justifiable doubts" regarding an arbitrator's impartiality under Article 12(2) of the Model Law is equivalent to a reasonable apprehension of bias under the common law. The Court recognized that the appropriate test is: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that the [arbitrator], whether consciously or unconsciously, would not decide fairly" (paras 128-129).

The Court further determined that arbitrators benefitted from the same strong presumption of impartiality as judges in Canada. The Court recognized that failing to impose this presumption to privately appointed arbitrators would undermine the integrity of the arbitration system. Accordingly, it was held that the objective test for reasonable apprehension of bias must be applied against the backdrop of a strong presumption of impartiality.

The Court recognized that the objective nature of the test is context sensitive and fact-specific and reasoned that a fair-minded and informed person would consider the facts and circumstances which were objectively known and would therefore focus on what was communicated to the Arbitrator. In the circumstances, given that the correspondence between counsel for the parties regarding the selection of arbitrators was not shared with the Arbitrator, such information comprised the subjective views of the parties and was improper to consider. The Court determined that the lower court erred in considering the expectations of the parties which had not been shared with the Arbitrator in the analysis of reasonable apprehension of bias. In the Court of Appeal's view, the lower court not only treated the parties' subjective views as relevant, but as determinative, which was a change to the objective test and an error of law.

The Court confirmed that a failure of an arbitrator to disclose according to an expectation of the parties that was not shared with the arbitrator does not raise or confirm the existence of a reasonable apprehension of bias. The Arbitrator's failure to disclose his selection in a subsequent matter therefore did not give rise to bias on his part. The Court concluded that, applying the standard of a reasonable apprehension of bias objectively, the presumption of impartiality on the part of the Arbitrator was not displaced by his acceptance of a retainer to arbitrate a second matter that did not involve any of the parties to the Arbitration nor any overlapping issues of significance. As a result, the Court of Appeal concluded there was no reasonable apprehension of bias in the circumstances.

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The Court of Appeal allowed the appeal and set aside the lower court's decision quashing the Arbitrator's award on the basis of a reasonable apprehension of bias.

Takeaways

The Court of Appeal's decision in *Aroma* clarifies that multiple appointments of an arbitrator may not automatically give rise to a reasonable apprehension of bias, nor will it necessarily mandate disclosure by the arbitrator. The Court's conclusion is likely to be well-received by arbitrators and counsel in the construction law sphere, where a limited number of arbitrators with necessary expertise and experience may be able to adjudicate certain disputes and where multiple appointments of sought-after arbitrators by law firms is not uncommon. As aptly stated by the Court of Appeal: "High stakes arbitrations often involve arbitrators who are in high demand, sophisticated parties, and experienced lawyers. This gives rise to the prospect that an arbitrator might have had prior engagements or be asked to undertake future ones, in which the parties or lawyers have some involvement" (para 4).

The Ontario Court of Appeal's decision illustrates that the choice of rules governing the arbitration will inform the scope of the disclosure obligations. For international arbitrations using the Model Law, the Court of Appeal's decision can be relied on to ensure an objective test for disclosure and bias is implemented, thereby avoiding the problems and potential unfairness associated with relying on correspondence and expectations which are not communicated and are unknown to an arbitrator. A different result, such as the one reached by the lower court, may be determined where parties select the IBA Guidelines as the legal regime governing disclosure obligations for an arbitration.

It is cautioned that, even where objective tests are applied, the Court of Appeal's decision in *Aroma* does not establish that an arbitrator's failure to disclose subsequent appointments will never give rise to breach of the duty to disclose or to a reasonable apprehension of bias. Rather, the Court of Appeal's reasoning indicates that the facts and circumstances objectively known, including what is communicated to arbitrators, will inform the respective tests. Accordingly, if a party is concerned that an arbitrator may take on subsequent matters with one of the parties during the course of the arbitration, those concerns should be disclosed to the arbitrator and opposing counsel prior to the potential engagement, so as to objectively inform the duty to disclose and potentially give rise to a reasonable apprehension of bias in the absence of such disclosure. Practically, arbitrators may also remain well-advised to err on the side of disclosure, particularly where there are overlapping parties and issues.

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Finally, the Court of Appeal's decision in *Aroma* is notable for also clarifying that private arbitrators enjoy the same strong presumption of impartiality as judges. To establish a reasonable apprehension of bias on the part of an arbitrator, a party will need to rebut this strong presumption.

In closing, while arbitration counsel and arbitrators alike will no doubt be keeping a watchful eye to see whether the Supreme Court of Canada grants leave to appeal, in the meantime, prudent practice suggests that disclosure is always the safest course of action.

Case Comment: Update on Appeal of Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2024 ABCA 369

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Author:
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CanLII Reference:
2024 ABCA 369

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Corbin Devlin

Case Comment – Update on Appeal of Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc

Can a third-party beneficiary of a contract litigate contractual warranties in its favour when the contract requires "all disputes" under the contract to be arbitrated? This topic was reviewed in Legal Update #165 in relation to the King's Bench decision in *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, 2023 ABKB 545. That decision was subsequently overturned, but the decision of the Alberta Court of Appeal has left open the possibility that a contract may indeed, with the right language, bind a non-party to mandatory arbitration.

Husky (the project owner) sued a subcontractor to enforce warranties contained in the subcontract between the general contractor and subcontractor. The warranties were for the express benefit of Husky as the owner of the property. The defendant subcontractor applied to strike Husky's claim based on a mandatory arbitration clause in the subcontract.

In the first instance, the applications judge agreed with Husky, concluding the contract could not impose an arbitration burden on a non-signatory. On appeal to the Court of King's Bench (a hearing de novo), Justice Lema allowed the appeal and struck the claims in contract. Interpreting the terms of the subcontract, Justice Lema found that Husky was bound to arbitrate, referencing the express subcontract provision that all warranties are for the benefit of both the general contractor and Husky, as well as a broad subcontract provision requiring "all disputes" to be resolved by arbitration. Justice Lema concluded that benefit of the warranty provisions came with the limitation that any related dispute must be resolved by arbitration ("…by seeking to enforce its warranty right, Husky effectively signed on to the accompanying arbitration mechanism and, by extension, became a party to it.")

The King's Bench decision resulted in Husky's contractual claims being struck from its Statement of Claim (i.e. the claims to enforce Husky's warranty rights under the subcontract). The limitation period to arbitrate had passed, so Husky was left with no contractual remedy.

On further appeal to the Alberta Court of Appeal, Husky argued in effect that "it never agreed to arbitrate and so should not be forced into arbitration and out of the courts." The Court of Appeal agreed with the chambers judge that whether Husky was "subject to the [sub]contract's arbitration judge's provisions" is a question of mixed law and fact, appropriate for determination on affidavit evidence upon a stay application.

The Court of Appeal emphasized "[t]he doctrine of privity stands for the proposition that a contract cannot, as a general rule, confer rights or impose obligations on any person except the parties to it," referencing *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299. However, the Court of Appeal recognized that a "principled exception" applies

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where non-parties seek to rely on contractual provisions made for their benefit.

In the result, Husky's appeal was allowed. The Court of Appeal found that a "required threshold" of clarity was not met in this case for the non-party to be bound by the subcontract; the requirement for Husky to arbitrate was not "manifest." As the subcontract did not expressly state that Husky must pursue the warranty claim by arbitration, it was inappropriate to deprive Husky of access to the courts. Relying on principles of contract interpretation to determine that a non-party is bound by an arbitration clause is not permissible because "contract interpretation considers in part 'circumstances known to the parties at the time of formation of the contract' and determines 'the intent of the parties and the scope of their understanding'," referencing *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53. A non-party cannot be bound by a contract interpretation that depends on circumstances, intentions and understandings of which the non-party is unaware.

This may not be the last word on the topic. The Court of Appeal expressly declined to decide "whether imposing an obligation to arbitrate, absent the advance consent of the affected party, is possible." Yet the Court's reasoning implies that a non-party can be bound to arbitrate with sufficiently "clear and explicit" language, including "at minimum" an express statement that (e.g.) the non-party beneficiary seeking to rely on subcontract warranty provisions is bound to arbitrate. We would expect that some parties will act on this decision by introducing or tightening provisions to expressly require non-party beneficiaries of warranty provisions to arbitrate any dispute.

A Statement of Claim by any Other Name...

A Statement of Claim by any Other Name... What Constitutes a Commencement Document in Lien Enforcement Proceedings? A Comment on Chandos Construction Ltd. v Deloitte Restructuring Inc. 2024 ABCA 403

LU #170 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
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Author:
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CanLII Reference:
2024 ABCA 403

ALBERTA

Catriona Otto-Johnston

Introduction

In December 2024, the Alberta Court of Appeal released its decision in *Chandos Construction Ltd. v Deloitte Restructuring Inc.*, 2024 ABCA 403 [*Deloitte ABCA*], reversing the decision of the Chambers Justice, which affirmed, for different reasons, a decision of the Applications Judge finding that Deloitte, in its capacity as trustee for the insolvent contractor, Capital Steel ("CS"), failed to commence proceedings for a remedial order within the applicable limitation period.

While both lower courts found in favour of Chandos, meaning the lien registered on behalf of CS by Deloitte ceased to exist, the Court of Appeal allowed Deloitte's appeal, finding that Deloitte had sought a remedial order within the meaning of the *Limitations Act*, and that the consent order used to remove the lien on deposit of security constituted a commencement document for lien enforcement proceedings under the *Prompt Payment and Construction Lien Act* ("PPCLA"). As a result, Deloitte's lien did not expire, and the matter was remitted to the Applications Judge to determine validity and quantum of the lien.

This decision comes after years of protracted litigation between the parties over what amounts to a comparably small amount of money at issue. It is a reminder to all that attention to deadlines and proper calculation of limitation periods can avoid lengthy, expensive disputes over procedural issues.

Background

Chandos was the contractor on a condominium development, and CS was its subcontractor. In September 2016, CS became insolvent. Deloitte was appointed as bankruptcy trustee for CS. In October 2016, Deloitte filed a builders' lien on behalf of CS. In November 2016, Chandos obtained a s.48 Order, by consent, removing the lien and depositing security in its place, thereby commencing the "lien action". No further steps were taken in the lien action until September 2021, nearly five years later. In the meantime, much was taking place in the bankruptcy action.

The Bankruptcy Proceedings

In March 2017, Deloitte applied in the bankruptcy action for a determination as to whether Chandos was entitled to rely on a provision of its subcontract with CS which provided that in the event CS went bankrupt, it forfeited 10% of the subcontract price to Chandos. Deloitte also sought a direction that if Chandos was not entitled to rely on this provision, the lien security be paid to Deloitte. Deloitte did not include a declaration of lien validity as part of its application.

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The Justice in the bankruptcy proceedings found that Chandos was able to rely on the contractual provision in question. Deloitte appealed the decision, and in January 2019, the Court of Appeal reversed the Justice's decision.[1] Chandos appealed to the Supreme Court of Canada, and in 2020, the Supreme Court of Canada affirmed the Court of Appeal's decision.[2]

The Lien Action – Lower Court Decisions

In September 2021, Deloitte applied before an Applications Judge in the lien action to have its lien declared valid and for release of the security to Deloitte. Chandos cross-applied for return of its security, citing Deloitte's failure to commence an action to enforce the lien within the applicable limitation period. In response, Deloitte argued that its application in the bankruptcy proceeding constituted a "request for a remedial order" under the *Limitations Act* and stated that this application was brought within the corresponding limitation period. Deloitte also argued that the limitation period was suspended pending the Supreme Court of Canada's decision on the enforceability of the contractual set off provision, suggesting that Deloitte would not know whether it had suffered an injury until the Supreme Court of Canada handed down its decision.

Notably, the lien was secured off prior to implementation of the template s.48 Order, and the Consent Order at issue was silent on how, and when, the issues between the parties would be determined, simply saying "the determination of the issues between the parties is adjourned *sine die*". The Applications Judge said that the bankruptcy application might meet the definition of a remedial order under the *Limitations Act*, but the matter before him was not for a remedial order requested in the bankruptcy proceeding, and Deloitte did not pursue that application in the bankruptcy proceeding.[3] Rather, Deloitte filed a lien validity application in the lien action. Further, the Applications Judge disagreed that the limitation period was stayed pending release of the Supreme Court of Canada's decision, finding that Deloitte's limitation period began to run once the Court of Appeal issued its decision confirming Chandos' inability to rely on the subcontract provision at issue in the bankruptcy proceedings.

Deloitte appealed the Application Judge's decision to a Justice in Chambers, which was an appeal *de novo*. Deloitte attempted to introduce as evidence in the appeal certain statements that Chandos had made and positions it had taken in the bankruptcy proceedings, arguing these were relevant to the lien action. Chandos took the position that the bankruptcy proceedings

[1] *Capital Steel Inc (Trustee of) v Chandos Construction Ltd*, 2019 ABCA 32.
[2] *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2020 SCC 25.
[3] *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2022 ABQB 78.

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were not properly before the court in the lien action and were irrelevant. The Chambers Justice agreed with Chandos on this point, finding that the lien action and the bankruptcy proceedings are legally and procedurally distinct. However, the Chambers Justice did say that if Deloitte had pointed to evidence it relied on when deciding when, how or whether to commence an action in accordance with the requirements of the lien legislation, that might be different. As it was, there was nothing before the Court to suggest Chandos did or said anything that influenced Deloitte's consideration of whether to comply with the *Builders' Lien Act* (the "BLA", as it then was). In fact, the Court pointed out that Deloitte had no intention of ever issuing pleadings in accordance with the BLA.

On appeal to the Chambers Justice, Deloitte argued that it was not required to commence any action at all in order to pursue its lien claim. In making this argument, Deloitte relied on the template s.48 Order, despite the fact that it was not used by the parties in the lien action. Deloitte argued that because the template order reflects a number of different ways to pursue a lien claim, not restricted to filing a Statement of Claim, it supports the argument that a Statement of Claim is not always necessary, and failing to file one is not necessarily fatal to a lien claim. The Chambers Justice was not persuaded by this argument, finding that the template s. 48 Order actually reflects how seriously the Order takes the requirements of the BLA, not that the BLA requirements do not strictly apply. The Chambers Justice dismissed Deloitte's appeal, finding that Deloitte was required to commence an action to preserve the lien, and having failed to do so, the lien was extinguished.[4] Given this conclusion, the Chambers Justice said it was unnecessary to determine when the limitation period had commenced.

The Lien Action – Court of Appeal Decision

In December 2024, the Court of Appeal released its decision allowing Deloitte's appeal of the Chambers Justice's decision. The issue before the Court was whether Deloitte, on behalf of CS, was barred from enforcing its lien due to expiration of the limitation period.

In coming to its conclusion, the Court of Appeal noted that under s.43 of the BLA (which remains the same in the PPCLA), a lien "ceases to exist unless…"an action is commenced under this Act" to realize on the lien" within 180 days of registration, but that where security is paid into court in place of the lien, s.44 expressly provides that "the limitation period in s.43 does not apply. Instead, the general limitation period in the *Limitations Act* comes into play".[5] Turning to s.3 of the *Limitations Act* and the test for when a limitation period commences, the Court of Appeal noted that the

[4] *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2023 ABKB 349.
[5] *Deloitte ABCA* at para 12.

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"first two components of the test are clear", since CS (Deloitte) "knew of its "injury", that is the amounts potentially unpaid on its subcontract, no later than the date it filed its lien. It also knew that Chandos was the party to whom that injury was attributable. The remaining issue was when the injury, assuming liability, warranted bringing a proceeding."[6]

The Court of Appeal aptly noted that "...commencement of the limitation period does not depend on the plaintiff's assurance or belief that the claim will ultimately be successful", and as such, the dispute over the enforceability of the subcontract provision did not "delay commencement of the limitation period until that issue was resolved".[7] Deloitte also advanced arguments regarding its knowledge of the value of its claim vis a vis commencement of the limitation period, which were rejected by the Court of Appeal, given that "...limitation statutes are triggered by discoverability of facts, not knowledge about questions of law" and "...it is not necessary for the quantum of the claim to be crystallized before the limitation period starts to run".[8]

Ultimately, the Court of Appeal found that the limitation period for Deloitte to commence an action on the lien was "no later than the date the lien was filed", being October 26, 2016.[9] At that time, CS (Deloitte) knew it had suffered an injury that, assuming Chandos was liable, warranted proceedings. As a result, Deloitte was required to seek a remedial order no later than October 26, 2018. Deloitte argued it had done so by commencing the lien action by filing of the s.48 Consent Order on November 8, 2016, and also by bringing the application in the bankruptcy proceedings directing that the security be paid to Deloitte.

In response, Chandos cited s.49 of the BLA (which remains unchanged in the PPCLA), that says proceedings to enforce a lien "shall be commenced by a statement of claim", Chandos argued that this requirement is mandatory, and having failed to file a Statement of Claim, Deloitte's claim was statute-barred. The Court of Appeal disagreed, acknowledging that while s.49 of the BLA is mandatory, it does not necessarily follow that failure to comply with it is fatal or incurable. Instead, the Court said that the question is whether "any incurable prejudice arises from the defect".[10] The wording of the Consent Order at issue was important, since (unlike the template s.48 order) it specified that it would be the commencement document for the lien enforcement action. The Court held that the Consent Order went beyond simply depositing security in place of the lands, but actually "contemplated reso-

[6] *Deloitte ABCA* at para 13.
[7] *Deloitte ABCA* at para 14.
[8] *Deloitte ABCA* at para 16.
[9] *Deloitte ABCA* at para 18.
[10] *Deloitte ABCA* at para 21.

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lution in the action it started of all issues respecting the validity and quantum of the lien".[11]

The Court of Appeal went on to discuss the template s.48 Order and how it recognizes that when security is substituted in place of the lien, the commencement document might be something other than a Statement of Claim, such as a Statement of the Plaintiff's Claim or Originating Application. As noted by the Court of Appeal, "this provision of the order therefore appears to contemplate that lien enforcement proceedings could be commenced by a document other than a statement of claim, notwithstanding the requirement in s. 49 that "Proceedings to enforce a lien shall be commenced by a statement of claim".[12] As a result, the Court found that the Consent Order was "effectively a proceeding for a remedial order that satisfied the requirements of the *Limitations Act*", and that using an Order to commence the action instead of a Statement of Claim was "at most a procedural irregularity but not a nullity".[13] Having reached this conclusion, it was not necessary for the Court of Appeal to decide whether Deloitte's application in the bankruptcy proceedings could be considered a proceeding in which a remedial order was sought.

Accordingly, the Court held that Deloitte's claim was commenced in time by filing of the s.48 Consent Order, and the matter was remitted to the lower court to determine the issues of lien validity and quantum.

Last but not Least: An Interesting Footnote Regarding the Template Section 48 Order

Although the template s.48 Order was not the form of Order at issue in *Deloitte ABCA*, the Court of Appeal included interesting commentary in obiter, which appears, without expressly saying so, to touch on the decision in *Lesenko v Wild Rose Ready Mix Ltd.*, 2024 ABKB 333 ("*Lesenko*"), which this author discussed in detail in Legal Update #168. Specifically, in the June 2024 decision of the Chambers Justice in *Lesenko*, the Court held that the 180-day deadline for a lien claimant to commence an action to enforce its lien, when included in a Consent Order, violated both the PPCLA and the *Limitations Act*, and as such was unenforceable. The *Lesenko* decision was somewhat confounding, given that the template s.48 Order, which includes the 180-day deadline, had been approved by the Courts and widely used throughout Alberta since 2017. In fact, not only was it "approved by" the Courts, the Court of Appeal in *Deloitte ABCA* refers to the template as being "published by the Court".[14]

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[11] *Deloitte ABCA* at para 31.
[12] *Deloitte ABCA* at para 26.
[13] *Deloitte ABCA* at para 32.
[14] *Deloitte ABCA* at paras 20, 26 and 32.

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Interestingly, in a footnote to its decision, the Court of Appeal says that including a deadline to commence an action to enforce a lien in a consent Order is entirely appropriate and enforceable, and that "a consent order is still an order of the court, not a contract".[15] These comments are in direct contrast to the findings of the Chambers Justice in *Lesenko*.

The *Lesenko* decision raised much discussion amongst construction lawyers in Alberta, causing some to strike the 180-day deadline from the template Order and ultimately leading to variances in practice when removing liens under s.48 of the PPCLA; one of the very things the template Order was designed to avoid. While the *Lesenko* decision was not appealed, the Court of Appeal's comments in obiter in *Deloitte ABCA* provide helpful guidance and comfort that use of the template Order, including the procedural deadline to commence an action, is acceptable and enforceable, even where the matter goes by consent. As per the Court of Appeal (and despite what the lower Court found in *Lesenko*), a consent Order is not a contract and "...there is no reason why the court cannot make a procedural order setting a deadline within which steps must be taken".[16]

Takeaway

The Court of Appeal's discussion in *Deloitte ABCA*, together with the earlier decisions rendered in this litigation, are a good reminder that words matter, even when drafting what appear to be routine Consent Orders, and to keep limitation periods (and associated deadlines) front of mind. Further, it should not be assumed that an Order, whether by consent or otherwise, whereby security is deposited in place of a lien, and which technically commenced a court action, will negate the requirement to file a commencement document. Strictly speaking, the PPCLA requires lien enforcement proceedings to be commenced by way of Statement of Claim. Despite the Court of Appeal's decision in *Deloitte ABCA*, a lien claimant would be wise to commence its action by Statement of Claim within the applicable limitation period.

[15] *Deloitte ABCA* at footnote 4 to para 26.
[16] *Deloitte ABCA* at footnote 4 to para 26.

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Ontario's *Construction Act* provides that a court can impose costs liability on a lawyer in certain circumstances. When are lawyers personally liable for preserving or perfecting a lien? Should a lawyer be liable if they register a lien which they objectively should have known was without foundation or wilfully exaggerated? Or must a lawyer subjectively know the lien was bad to be liable? Can a lawyer be liable where they recklessly, or with wilful blindness disregard facts establishing that they are preserving and perfecting a bad lien? Good questions, however, there is surprisingly little caselaw in Ontario addressing these issues.

These questions were recently answered by the Ontario Superior Court in *Viceroy Homes*.[1] In *Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, (the **"Superior Court Decision"**), Associate Justice Wiebe held that the test for lawyers' liability for preserving or perfecting a bad lien is subjective. The Superior Court Decision was appealed. In *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519 (the **"Divisional Court Decision"**), the Divisional Court held that leave was required to appeal the Superior Court's decision on costs pursuant to s. 86(1) of the *Construction Act*. The Divisional Court denied leave.

KEY TAKEAWAYS

1) For a lawyer (or other representative) who preserves or perfects a lien to be held personally liable for costs under s. 86(1)(b)(i) of the *Construction Act*, the lawyer must subjectively know that the lien is without foundation, frivolous, vexatious, an abuse of process or for a wilfully exaggerated amount at the time of preservation or perfection, or have been reckless or wilfully blind to the defects in the lien.

2) Leave is required to appeal a costs order made under s. 86 of the *Construction Act*.

THE VICEROY HOMES CASES

The underlying lien claim

Viceroy Homes instructed their lawyers to register a claim for lien in the amount of $3,310,000 for 39 days of work. Viceroy's principal provided their lawyers with a copy of a signed contract for $20 million in work to be done within eight months in which Viceroy was exposed to liquidated damages of $50,000 per day of delay. But the contract also stated that construction costs were not to exceed $500,000 until a collateral transaction

[1] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608.

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concerning the project lands was finalized; that transaction was never completed, so the condition remained unfulfilled.

Viceroy's lawyers received from Viceroy a breakdown of the $3.3 million in work it allegedly performed for the defendants. The lawyers questioned why the price of the work exceeded the $500,000 cap when the condition was not fulfilled, and Viceroy's principal explained that there had been a subsequent unsigned agreement for a higher cap and that Viceroy had been instructed by the defendants to perform the work. Viceroy did not supply any further supporting documents before the lien was preserved. Viceroy's principal only showed Viceroy's lawyers chat messages between him and the defendant's principal on his phone.

Viceroy's lawyers sent to Viceroy's principal an authorization and direction form with the draft lien attached. He signed and returned the form, and the lawyers registered the claim for lien.

After preserving Viceroy's lien, Viceroy's lawyers pursued Viceroy's principal for supporting documents to substantiate the lien before perfecting it. Viceroy's lawyers requested, amongst other documents, contracts, correspondence, invoices, pictures, and videos. Viceroy's principal repeatedly promised he would provide the supporting evidence but delayed in doing so. He met with one of Viceroy's lawyers at a coffee shop and showed her videos, pictures of the work, and chat messages with the defendant's principal on his phone. He promised to send these recordings and more, but he did not follow through.

Faced with the impending deadline to perfect the lien, Viceroy's lawyers proceeded to prepare a statement of claim and send the claim to Viceroy's principal who reviewed it and gave comments which were incorporated into the claim. The lawyers again asked for Viceroy's supporting documentation but Viceroy's principal failed to provide it. With time running out, the lawyers had the statement of claim issued and, at Viceroy's principal's instruction, served the claim on the defendants.

Shortly after, Viceroy's lawyers received a letter from one of the defendants' counsel saying that the work Viceroy claimed it had done had not been done at all. The defendants said Viceroy's claim for lien was frivolous, vexatious, and abusive. They demanded that the lien be discharged, otherwise the defendant would initiate a cross-examination under s. 40 of the *Act*.

Viceroy's lawyers sought Viceroy's instructions on the letter. Viceroy's principal denied the allegations, insisted that he would provide proof of the claim, and said he was willing to attend cross-examination. The lawyers again sought from Viceroy documentary corroboration of its claim. In response,

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Viceroy's principal sent materials receipts, a signed subcontract, and chat messages with a would-be project manager.

Viceroy's principal was eventually cross-examined, after the cross-examination had been postponed twice at his request. On cross-examination, it came to light that the defendants were right – Viceroy had not done large parts of the work described on Viceroy's claim for lien.

Viceroy's lawyers advised Viceroy that some of its lien, at the very least, was indefensible. The lawyers emphasized the importance of delivering corroborating evidence and answering the undertakings to support the remainder of the lien. Viceroy's principal promised to provide that.

The defendants then gave Viceroy's lawyers notice of a motion to discharge Viceroy's lien. After further attempts to obtain supporting documentation from Viceroy's principal, it became clear to Viceroy's lawyers that Viceroy could not substantiate its lien. The lawyers strongly advised Viceroy to voluntarily discharge the lien before the defendants' motion or they would take themselves off the record. Viceroy did not give instructions to voluntarily discharge the lien, so Viceroy's lawyers removed themselves from the record before the defendants' discharge motion was heard.

Associate Justice Wiebe heard the motion. Viceroy was now unrepresented and did not attend the hearing of the motion, which proceeded uncontested. The associate justice held that Viceroy's lien was indeed frivolous, vexatious and an abuse of process. He ordered that the lien be discharged. He then ordered that Viceroy's principal should pay the defendants' costs on a substantial indemnity basis along with Viceroy.

The defendants' motion for costs against the lien claimant's lawyers

The defendants then brought a motion for the court to order that Viceroy's lawyers pay costs to the defendants pursuant to s. 86 of the *Act*. They argued that Viceroy's lawyers should have known the lien was frivolous because of the high value of the lien for the short duration of work, because Viceroy exceeded the $500,000 cap stated in the signed contract, and because of the paucity of supporting documentary evidence provided by Viceroy to their lawyers at the time of preserving and perfecting the lien. The lawyers, the defendants argued, had a duty as a gatekeeper to avoid registering bad liens, and they failed in that duty.

The statutory language

The motion decision revolved around the language of s. 86(1)(b)(i) of the *Act*:

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"Costs

86 (1) Subject to subsection (2), any order as to the costs in an action, application, motion or any other step in a proceeding under this Act is in the discretion of the court, and an order as to costs may be made against,...

(b) a person who represented a party to the action, application or motion, where the person,

(i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for a lien is without foundation, is frivolous, vexatious or an abuse of process, or is for a wilfully exaggerated amount, or that the lien has expired,..."

(Underlining added)[2]

The Superior Court Decision

Associate Justice Wiebe held that no order for costs should be made against Viceroy's lawyers because:

a) For costs to be ordered against the lawyers, they must have actual knowledge or be reckless or willfully blind to the baselessness of Viceroy's lien.[3]

b) There was no evidence that the lawyers subjectively knew the Viceroy lien was baseless when it was preserved and perfected, and that point was not disputed.[4]

c) There was simply nothing that indicated a high risk that the Viceroy lien was groundless.[5]

The Appeal to the Divisional Court

The defendants appealed. They argued that:

1. Leave was not required to appeal the Superior Court Decision on costs. They argued that s. 86 of the *Construction Act* made the entitlement to costs a substantive issue, not interlocutory. They relied on s. 71 of the

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[2] Contrast the subjective language in the Ontario statute to section 40 of Alberta's Prompt Payment and Construction Lien Act, RSA 2000, c – P 26.4, which uses more objective language.
[3] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc,* 2024 ONSC 1608 at para 56 .
[4] *Ibid* at para 57.
[5] *Ibid* at para 64.

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Construction Act, which provides that an appeal lies to the Divisional Court from a judgment under that *Act,* to argue that they could appeal the decision as of right.

2. The lien claimant's lawyers had a duty as a gatekeeper to determine whether their client's lien was valid, and they failed to do so. They argued that Viceroy's lawyers ought to have known the lien was frivolous and without foundation and that Associate Justice Wiebe was wrong in holding that s. 86 required the lawyers to subjectively know the lien was bad to be personally liable for costs for registering a frivolous, baseless or exaggerated lien.

LawPro counsel argued for Viceroy's lawyers that leave was required to appeal the Superior Court Decision because s. 133(b) of the *Courts of Justice Act* stipulates that leave is required to appeal discretionary costs orders. By the express words of s. 86, the order was a discretionary costs order. Section 71 of the *Construction Act*, LawPro counsel argued, was not inconsistent with s. 133 of the *Courts of Justice Act* because s. 133 dealt specifically with costs orders while s. 71 related to appealing judgments to the Divisional Court, generally.

On the substantive issue, LawPro counsel argued that the test for lien representatives' liability under s. 86(1)(b)(i) was subjective for three reasons:

1. The language "knowingly participated" in s. 86(1)(b)(i), in its entire context, could only be reasonably construed as subjective knowledge;

2. The caselaw on s. 86; and

3. Good policy and the wider law on balancing lawyers' duty to their clients and to the court.

The Divisional Court's decision

Justice O'Brien gave the judgment of the Divisional Court, with Justices McSweeny and Davies concurring.

The Divisional Court agreed with LawPro counsel – leave was required.

Section 133(b) requires leave to appeal the discretionary costs order and nothing in the *Construction Act* is inconsistent with that provision. Section 71 of the *Construction Act* relates to a "judgment" and Rule 1.03 of the *Rules of Civil Procedure* defines a judgment as "a decision that finally disposes of an application or action on its merits." The Divisional Court held that the costs order did not constitute a judgment because it was an order

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that followed the result in the lien proceeding and not a separate action or application.[6]

Further, s. 71 of the *Construction Act* does not address costs, whereas the *Courts of Justice Act* expressly requires leave be obtained from an order only as to costs that are in the discretion of the court. Subsection 86(1) of the Construction Act states that costs under that provision are "in the discretion of the court."[7]

COMMENTS

Lawyers' liability when registering liens

Associate Justice Wiebe's decision in *Viceroy Homes* expands upon Master Albert's decision in *Fletcher*,[8] heretofore the leading case on lien representatives' liability when preserving and perfecting liens.

The Superior Court Decision in *Viceroy Homes* makes it clear that the standard for liability of lien representatives when preserving and perfecting liens is not mere negligence. Negligence involves an objective standard, but s. 86(1)(b)(i) imports a subjective test.

Lawyers should take note, however, that while actual knowledge that a lien is baseless or wilfully exaggerated is an essential precondition to a costs order against a lawyer for preserving or perfecting that lien,[9] actual knowledge could be imputed if the lawyer is reckless or wilfully blind to major issues with the lien. Recklessness or wilful blindness requires a level of knowledge that is the moral equivalent of actual knowledge. While such conduct is well beyond mere negligence or laziness underlying a failure to inquire, Associate Justice Wiebe said recklessness and wilful blindness involves knowledge of an actual risk that is at the level of a "clear probability" and then a failure to act to avoid the risk or make inquiries.[10]

Associate Justice Wiebe's comments on recklessness and wilful blindness are the first commentary in Ontario jurisprudence on the applicability of the judicial concepts of recklessness and wilful blindness to a costs determination under section 86(1)(b)(i). Counsel undertaking a retainer for a lien claimant will need to be mindful that they do not "turn a blind eye" to facts

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[6] *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519 (CanLII), at para 6.
[7] *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519, at para 7.
[8] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc.*, 2009 CanLII 81402 (ON SC).
[9] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, at para 47.
[10] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, at para 53.

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that would lead the lawyer to understand that the lien is without foundation or exaggerated. Otherwise, counsel risk liability for costs due to such reckless or wilfully blind conduct.

The authors believe that the Superior Court Decision is consistent with good policy. It aligns with the general principle that an order of costs should be made against a lawyer rarely and only where serious misconduct has been shown.[11] As Master Albert observed previously, putting lawyers at risk of costs orders against them personally would have a chilling effect on the lawyer-client relationship; the presumption is that the lawyer followed the client's instructions.[12]

Lawyers could be liable to their clients for failing to preserve the client's lien rights in time. There are strict statutory deadlines for preserving and perfecting liens. To preserve their client's rights in time, lawyers may sometimes have to register liens without the benefit of perfect information.

However, it would be a mistake to conclude that *Viceroy Homes* had diminished the lawyer's gatekeeping role. Lawyers should require supporting documentation from their clients at the earliest opportunity, then assess the validity of the lien with reasonable diligence and promptness and advise their clients accordingly. If a client has misled their lawyer into registering a bad lien, the lawyer should advise the client that the lien may have to be voluntarily discharged, or the lawyer may have to take steps to remove themselves from the record. If a lawyer becomes aware of facts that, unless ignored, would lead them to conclude that their client has misled them into registering a bad lien, it is time to contact their insurer, or risk exposure to liability for costs arising from reckless disregard of a lien they would know to be without foundation but for their wilful blindness. These are all elements of the important gatekeeping role of a lawyer acting for a lien claimant.

Leave to appeal costs orders

The Divisional Court Decision now makes it clear that leave is required to appeal costs orders made under s. 86 of the Act. Although only s. 86(1)(b)(i) was at issue in *Viceroy Homes*, the Divisional Court's ruling, in our view, will apply to all costs orders made under s. 86 because, by the express words of that section, s. 86 orders are in the discretion of the court. Section 133(b) of the *Courts of Justice Act* stipulates that leave is required to appeal all discretionary costs orders. The Divisional Court Decision also reinforces the position that a costs order is not a substantive "judgment".

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[11] *Pierce v. Baynham*, 2015 BCCA 188, at para 41.

[12] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc.*, 2009 CanLII 81402 (ON SC) at para 38.

Lawyer liability and appealing costs orders under the Construction Act: Viceroy Homes

LU #170 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Brendan Bowles, Partner, and Isa Dookie, Associate, at Glaholt Bowles LLP

CanLII Reference:
2024 ONSC 1608
2024 ONSC 6519

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Lawyer liability and appealing costs orders under the Construction Act: Viceroy Homes

In the authors' view the Divisional Court's ruling requiring leave to appeal is a reasonable limit on the right to appeal a discretionary costs order made under section 86 of the *Construction Act*. It would be odd if an action brought under the *Construction Act* was the only type of proceeding in Ontario Superior Court which allows discretionary costs orders to be appealed as of right. We believe this finding should be understood as confined to discretionary costs orders made under section 86, and that this decision does not undermine precedent where the Court of Appeal has applied a broader definition of "judgment" for the purposes of section 71 of the *Construction Act* in different context than a discretionary costs order.[13]

CONCLUSION

The Superior Court Decision and the Divisional Court Decision in *Viceroy Homes* will be useful precedent on making and appealing costs orders against lien representatives going forward. We can expect that in future cases the issue will be to what extent counsel has recklessly disregarded or wilfully blinded themselves to facts that show that they are preserving, perfecting, or representing a lien claimant at trial, with a bad lien. Even though *Viceroy Homes* solidifies a subjective standard for lawyer liability when registering liens, lawyers should remain vigilant – an ounce of prevention is better than a pound of the cure.

[13] *MGW-Homes Design Inc. v. Pasqualino*, 2024 ONCA 422, at para 3.

Calling on a Lien Bond – A Handy Reference Guide for Construction Lawyers in Ontario

Calling on a Lien Bond – A Handy Reference Guide for Construction Lawyers in Ontario (and a helpful starting point for lawyers across Canada)

LU #170 [2025]

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IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
Dan Fridmar, Principal at Fridmar Professional Corporation, and Jacob McClelland, Partner at Glaholt Bowles LLP

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Dan Fridmar

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It is not uncommon for a construction lien to be vacated in accordance with Section 44 of the *Act* by the issuance and posting of a Financial Guarantee Bond – *Form 15.1* or equivalent form (a "**Lien Bond**"). This Lien Bond typically sets out the following information:

1) The surety who guarantees the bond;
2) The principal who issues the bond (*typically the party vacating the construction lien*); and
3) The obligee under the bond. If a Lien Bond is posted to vacate a construction lien, the form requires that the obligee under the bond be the Accountant of the Superior Court of Justice of Ontario (the "**Accountant**").

As one may recall, the purpose of vacating any construction lien is to replace the security attaching to the premises or holdback against which the lien is secured with the security posted in Court. The ultimate purpose in replacing this security is that – following a determination and judgment under the lien – the lien claimant may satisfy that judgment by looking to payment from said security. Where the security posted is cash, the procedure is simple: request release of the funds from the Court. Obtaining payment from a Lien Bond is a bit more complex. As a result, the authors have prepared a summary of the steps involved in calling on a Lien Bond, which can be used as a quick reference for anyone needing to do so:

1) **Obtain Judgment**: depending on whether the lien claimant secures judgment following a trial or other summary disposition, if you expect you might need to call on the Lien Bond to satisfy your judgment, the first step in receiving payment from a Lien Bond is ensuring that the draft Judgment to be signed by a Judge or Associate Judge (*as the case may be*) contains the following paragraphs directing payment from the Lien Bond:

> THIS COURT FURTHER ORDERS AND DIRECTS the Accountant of the Superior Court of Justice (the "**Accountant**") to make a demand for payment for [*the amount Ordered with respect to the principal judgment of the lien and any costs*] in the total sum of $_____ (the "**Principal and Costs**") from the Financial Guarantee Bond obtained by [*the principal*] from [*the surety*] (the "**Surety**") and issued as Bond No. _____in the sum of $_____ (the "**Bond**"), which was posted by [the principal] with the Accountant as permitted by the Order of the Honourable [Judge or Associate Judge], dated _____, 20__ into the Accountant's file no. _____ (the "**Bond Demand**").

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> THIS COURT FURTHER ORDERS AND DIRECTS that, once the Surety remits payment of the Principal and Costs Judgment from the Bond to the Accountant pursuant to the Bond Demand, the Accountant shall release payment of such monies to [*the lien claimant or the lien claimant's legal representative in trust, as the case may be*].

Once the Judgment is signed by the respective Judge/Associate Judge, the lien claimant must ensure that the Judgment is issued and entered. If the lien claimant does not receive an original, wet-ink copy of Judgment and instead receives a digital copy by E-Mail or fax, they will have to obtain a notarial certificate that certifies: 1) that the Judgment is indeed a true copy of the Judgment issued by the Court; 2) by whom, when, and how the Judgment was received by the lien claimant; and 3) appending a copy of the E-Mail, CaseLines page, fax, or other method in which the electronic copy of the Judgment was received.

2) **Contacting the Accountant**: the next step will depend on whether the lien claimant obtained Judgment by consent or following a contested disposition (*trial, summary judgment, etc.*). If the Judgment was obtained by consent, the Judgment must contain language confirming that the provisions of Rule 72.03(2)(c)(ii) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "***Rules***") are struck. If, however, the Judgment was obtained following a contested disposition, in accordance with Rule 72.03(2)(c)(ii) of the *Rules*, the lien claimant must ensure that the time to appeal the Judgment has expired. In accordance with Sections 71(1) and (2) of the *Act*, an appeal under a Judgment for a construction lien lies to the Divisional Court and must be made within fifteen (15) days of the date of the Judgment (*unless the parties agree otherwise or the appealing party brings a motion to extend the time to a single judge of the Divisional Court*).

Once the appeal deadline is expired (*and if no motion to extend this deadline is brought by any party*), the lien claimant must prepare a package in accordance with Rule 72.03(2)(c)(ii) of the *Rules* to be filed with the Accountant containing the following:

> a) a Letter with a written request for payment out of court, detailing that the payment must be made in accordance with the Judgment and reflective of the inserted language pertaining to making a claim for payment from the Surety in accordance with the terms of the Lien Bond;

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b) the original or notarized copy of the Judgment as set out above; and

c) an Affidavit confirming that the time prescribed for the appeal of the Judgment has expired and that no appeal is pending.

This package may be served delivered to the Accountant personally or by courier. The lien claimant would also benefit from contacting the Accountant simultaneously by E-Mail or fax with electronic copies of the documents enclosed in the package to ensure that the Accountant is expecting same and for ease of communication and coordination with the Accountant while payment is awaited.

If the Accountant takes issue with the wording of the Judgment and requires an amendment, the authors recommend moving for an Order to amend the Judgment, *nunc pro tunc*. The Court has the authority to issue such an Order under Rule 59.06 and Rule 54.05 of the *Rules*. Additionally, if the Court is willing to waive the need for the moving party to prepare and file motion materials, pursuant to Rule 37.01 and 2.03 of the *Rules*, the moving party may simply file a draft Order for the Court's consideration. It is also advisable to have the Accountant approve the draft Order amending the Judgment before proceeding with these steps.

3) **Optional – Contacting the Surety**: Pursuant to the terms of the Judgment and the Lien Bond, the Surety may only accept a demand of payment under the Judgment from the Accountant. However, it is prudent to assist the Accountant in expediting this process by contacting the Surety and letting them know that a request is imminent. To identify the contact person, you can search Government websites to identify the various sureties and their attorneys for service. Contacting the Surety may also assist in obtaining the precise contact person who deals with payment in such circumstances (*adjusters or otherwise*), whose contact information may then be shared with the Accountant to expedite payment from the Lien Bond.

4) **Coordination between the Accountant and the Surety**: Once the Accountant accepts the lien claimant's package as set out above, the Accountant will take direct steps in coordinating with the Surety in obtaining payment. The timing and duration of this process is entirely dependent on the Surety, and there is no limit or time as to how long it may take. It may be prudent to follow up

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every few days or once a week with the Accountant with a friendly reminder and request for an update/status of the Surety's payment. Politeness in communicating with the Accountant is strongly encouraged.

5) **Receiving payment from the Accountant**: Once the Accountant receives payment from the Surety, the Accountant will proceed to release said funds to the party identified in the Judgment. Presently, the Accountant's preferred form of payment is through wire transfer or electronic funds transfer. As such, if the lien claimant wishes to receive the funds directly, they must provide this information to the Accountant in the letter initially requesting the funds. Alternatively, if the lien claimant is agreeable to having their legal representative receive the funds in trust, the lien claimant must ensure that the Judgment clearly directs the Accountant to do so. If any portions of the Judgment are unclear to the Accountant, the lien claimant may have to return to the Judge/Associate Judge signing the Judgment to make such necessary revisions or amendments. Accordingly, it is important to have the correct information in the Judgment at the time it is obtained.

The authors' intention in providing the above summary is to provide a helpful reference guide for lawyers who find themselves in the somewhat rare position of calling on a Lien Bond in Ontario.

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Next Legal Update — watch for it!