Canadian College of Construction Lawyers

LEGAL UPDATE

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

L.U. #171

June 27, 2025

INSIDE THIS ISSUE:

Editors' Note

How much bias is permissible in an arbitration tribunal? The Ontario Court of Appeal has recently confirmed that the answer is "none", overturning a lower court decision that had upheld a tribunal's decision in the face of reasonable apprehension of bias because, among other reasons, the finding of bias against one of three tribunal members did not appear to have affected the unanimous result. The Court of Appeal rejected this reasoning in *Vento Motorcycles, Inc. v Mexico*, 2025 ONCA 82. Catriona Otto-Johnston and Chase Salembier summarize the essence of the decision this way: "a reasonable apprehension of bias is not a minor procedural defect. Rather, it is finding that undermines the integrity and legitimacy of the adjudicative process and is necessarily a major violation of procedural fairness." An unfair process thus cannot stand and must be set aside. Considerations such as whether the matter is a commercial arbitration and whether the decision of the tribunal was unanimous were irrelevant in the face of established reasonable apprehension of bias. Catriona and Chase conclude by reaffirming a message from their comment in Legal Update #170 on the *Aroma* case that early disclosure of potential conflicts of interest is the best advice for arbitrators offered multiple retainers by parties or counsel. That said, both Vento and Aroma are headed to the Supreme Court of Canada, so this may not be the final word.

Our next case comment discusses an interesting (and somewhat surprising) decision of the British Columbia Court of Appeal regarding interpretation of a wrap up insurance policy. Mike Preston and Shaun Johnston review *Honeywell International Inc. v XL Insurance*, 2024 BCCA 375, where the Court of Appeal overturned the trial judge's decision, finding that a manufacturer and supplier of a material used in the installation of windows in a downtown Vancouver high-rise met the definition of "insured", despite never having set foot on the project nor having any knowledge of it whatsoever until being served with a third party notice in the action. The authors provide helpful insight on practical implications arising from this decision, which are of interest to construction lawyers, underwriters and project participants alike.

Injunction proceedings are rather rare in construction contract termination cases, given the high bar for obtaining interlocutory injunctive relief at common law. They are even more difficult to obtain in a proceeding against the

Editors' Note

Editors' Note
LU #171 [2025]

CANADA

Brendan D. Bowles

Catriona Otto-Johnston

Crown where the Court is further constrained by statute. Conor O'Neil and Kate Irish review an interesting decision from the New Brunswick Court of King's Bench in *Julmac Contracting Ltd. v New Brunswick*, 2025 NKB 73. In *Julmac*, a contractor, whose right to continue working under three bridge contracts was terminated by the province, sought injunctive relief requiring the owner to allow them to continue. The Court applied New Brunswick's *Proceedings Against the Crown Act* and declined to find any common law or statutory exception to the principle that no such injunctive relief lies against the Crown. The termination stands and the contractor will need to prove its case for wrongful termination and damages at trial.

Mike Preston made the mistake at our recent Victoria conference of showing Brendan a decision released that day by the British Columbia Court of Appeal which declined to revisit the Court's 2003 *Shimco* decision establishing that in British Columbia there are two lien rights established by the statute: one against the land, the other against the holdback fund. Thankfully Mike was able to conscript Dirk Laudan into helping him put together a case comment rather quickly on *Kingdom Langley Project LP v WQC Mechanical Ltd*, 2025 BCCA 169, where the Court affirmed *Shimco*. This decision is of particular interest to practitioners advising BC clients on holdback release and the wording of orders posting security for liens. The authors note that although the "Shimco lien" for holdback has been affirmed, there is a move underway to modify the standard wording of an order posting security to allow the security to stand in place for both the lien against the land and the lien against the holdback, a development the authors believe is permissible under the *Kingdom* decision.

Jack Kent of Reynolds Mirth Richardson & Farmer LLP reviews a recent decision of the Alberta Court of King's Bench, *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324 where the court dismissed a lien action and released security from court for cancellation where the lien claimant had failed to set the action down for trial within 4 years and the case was nowhere near ready for trial. The fact that the owner had posted security for a sizeable delay claim and was faced with leaving that security in court indefinitely seemed to be a relevant factor for the court in exercising discretion to cancel the lien under section 46 of the *Prompt Payment and Construction Lien Act*. The summary will be very useful for counsel faced with similar circumstances in Alberta, and is also an interesting contrast for practitioners in provinces like Ontario where a lien automatically expires if not set down for trial within 2 years and the court has no discretion to refuse to vacate the registration of the lien from title or release security from court for cancellation as the case may be.

We conclude this issue with an overview of recent amendments to Manito-

Editors' Note
LU #171 [2025]

CANADA

Editors' Note

ba's lien legislation by Murray Sawatzky, which include the addition of prompt payment and adjudication regimes similar to those found in other Canadian provinces. While it is early days still in Manitoba, it will be interesting to see how that province adopts and makes use of these regimes on construction projects in the coming years.

With these six comments, we conclude Legal Update #171. Catriona, Brendan and the Legal Update Committee look forward to bringing you more thoughtful and topical content in the Fall. In the meantime, we wish you all a safe and happy summer. As always, if you have any suggestions for content, please send them to Catriona and Brendan for inclusion in the next issue.

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

In February 2025, the Ontario Court of Appeal issued its eagerly awaited decision in *Vento Motorcycles, Inc. v Mexico*, 2025 ONCA 82 ("***Vento***"), which considered the appeal of a decision from the Ontario Superior Court of Justice declining to set aside an arbitration award despite finding a reasonable apprehension of bias on the part of one arbitrator to a three member arbitral panel.

For the time being, the Court of Appeal's decision in *Vento* clarifies the consequences of a finding of a reasonable apprehension of bias in the context of commercial arbitrations and the scope of the court's discretion to assess the impact of bias to maintain an arbitration award, including where the award is rendered by a multi-member panel. In doing so, the Court of Appeal provides a definitive answer to the issue of whether the bias of one arbitrator in a tribunal "taints" the award of the tribunal, even where that award is unanimous. The United Mexican States has sought leave to appeal to the Supreme Court of Canada.

Background

The underlying dispute in *Vento* arose from a claim by Vento Motorcycles Inc. ("**Vento**") a US-based motorcycle manufacturer, against The United Mexican States ("**Mexico**"), brought under Chapter 11 of the North American Free Trade Agreement ("**NAFTA**"). Vento claimed that Mexico attempted to drive it out of the Mexican motorcycle market by denying preferential import tariffs to motorcycles assembled by Vento in the United States, impairing and ultimately destroying Vento's business for the sale and marketing of motorcycles in Mexico.

The dispute proceeded to arbitration, with Toronto being selected as the place of arbitration (the "**Arbitration**"). The arbitration panel was composed of three arbitrators. Vento and Mexico each appointed one member to the tribunal, with the chair of the tribunal being appointed by the International Centre for Settlement of Investment Disputes (the "**Tribunal**").

The Arbitration hearing proceeded over five days in November 2019. The Tribunal issued its award on July 6, 2020, holding unanimously that Mexico did not breach its NAFTA obligations and dismissing Vento's claim on the merits (the "**Award**").

Vento subsequently discovered that the arbitrator appointed by Mexico (the "**Arbitrator**"), had engaged in undisclosed communications with Mexican trade officials throughout the Arbitration. In particular, the Arbitrator had communicated with lead counsel for Mexico in the Arbitration, who also served as the Director General of the Legal Office of International Trade at Mexico's Ministry of Economy (the "**Director General**").

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

Catriona Otto-Johnston

Chase Salembier

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

The first of these communications was initiated by the Arbitrator in January 2019, when the Arbitrator phoned the Director General to congratulate him on his new position in the Mexican Government. In May 2019, the Director General emailed the Arbitrator, inviting the Arbitrator to submit his CV to be presented as one of Mexico's candidates for a roster of 15 arbitrators eligible to serve as chairpersons of arbitral panels under the *Comprehensive and Progressive Agreement on Trans-Pacific Partnership* ("**CPTPP**"). Shortly thereafter, the Arbitrator wrote in response to the Director General to thank him and to confirm his willingness to serve on the list of arbitrators, enclosing his CV and expressing that he was honoured and grateful for the opportunity.

In March 2020, following the conclusion of the Arbitration hearing, but months prior to the release of the Award, the Arbitrator received an email from another Mexican official, copying the Director General, which invited the Arbitrator to submit his resume for consideration to the list of panelists eligible to hear disputes under the *Canada-United States-Mexico Agreement* ("**CUSMA**"). This correspondence also confirmed the Arbitrator's appointment to the roster of arbitrators eligible to chair arbitral panels under the CPTPP. The Arbitrator again responded to this correspondence, thanking the officials for his appointment, and enclosing his CV for consideration for the CUSMA panelists.

On July 2, 2020, the Tribunal signed the Award. That same day, the Arbitrator received confirmation that he had been appointed to the roster of arbitrators under CUSMA. Four days later, the Tribunal issued the Award to the parties.

Neither Mexico nor the Arbitrator had disclosed these communications or the fact that job opportunities on panels had been offered to the Arbitrator during the Arbitration. However, Vento discovered these communications through various means, including through access to information requests.

In light of its discovery, Vento applied to the Ontario Superior Court of Justice to set aside the Award on the following two grounds: (1) there is a reasonable apprehension that the Arbitrator was biased because while the Arbitration was ongoing, Mexico offered opportunities to him that were not disclosed; and (2) Vento was unable to present its case because the Tribunal refused to allow one of its witnesses to testify in response to a recording used to impeach his credibility.

The Lower Court Decision

The Ontario Superior Court of Justice found that the Arbitrator's conduct gave rise to a reasonable apprehension of bias. The lower court concluded

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

that the offers made by Mexico for the Arbitrator's benefit were valuable professional opportunities which were sufficient, in themselves, to give rise to a reasonable apprehension of bias, and this was compounded by the failure of both the Arbitrator and Mexico to disclose such offers and the related communications that took place during the Arbitration. In applying the objective test for bias, the lower court concluded that an informed person would conclude that the Arbitrator had an incentive to please Mexico after he was informed that he was being considered for these appointments and therefore could have a leaning, inclination or predisposition towards Mexico, or could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision.

Nevertheless, the lower court determined that, while a finding of a reasonable apprehension of bias provided a ground to set aside the Award, the court may exercise its discretion not to set aside the award. The lower court described the apprehension of bias as a "procedural error". Relying on the Ontario Court of Appeal's earlier decision in *Popack v Lipszyc*, 2016 ONCA 135 ("***Popack***"), the lower court stated that the essential question was whether the procedural error produced real unfairness or real practical injustice. The lower court adverted to a non-exhaustive list of factors relevant to that question, including the seriousness of the breach, its potential impact on the result, and the potential prejudice arising from the need to conduct the arbitration again if the award were set aside.

Applying this framework, the lower court found that the bias in question did not produce either a real unfairness or practical injustice. The lower court explained that the potential impact of the breach was the most important consideration and concluded that it was unlikely that the entire Tribunal had been biased by the Arbitrator's participation. In doing so, the lower court acknowledged that it did not have any evidence regarding the decision-making process of the Tribunal, and that based on the statement of costs of the Tribunal, it appeared that the Arbitrator had spent significantly more time on the case than the other two arbitrators and therefore may have done a significant part of drafting the Award. However, the lower court explained that this did not mean that the other two arbitrators were not involved in drafting the award and passively accepted the Arbitrator's views – as this would be contrary to the strong presumption of impartiality and independence that applied to the other two arbitrators. The lower court further emphasized that all arbitrators signed the Award and that all three arbitrators therefore shared the same view as to the disposition of the Arbitration and the reasons set out in the Award.

Accordingly, the lower court concluded that no reasonable person informed of the circumstances of the Arbitration would conclude that the other two members of the Tribunal were biased or "tainted" by the Arbitrator. The

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

court therefore held that the reasonable apprehension of bias in relation to the Arbitrator did not undermine the reliability of the result and did not produce real unfairness or real practical injustice. That is, the bias of one panel member was said not to taint the decision of the entire panel in the circumstances.

Although recognized to be of less weight, the lower court also considered two additional factors said to support the exercise of discretion not to set aside the Award: (1) the seriousness of the breach; and (2) the potential prejudice flowing from the need to redo the Arbitration. The lower court noted that there were no communications between Mexico and the Arbitrator regarding the Arbitration itself, and no financial compensation was directly made to the Arbitrator. The lower court also noted that the dispute took several years to complete, at significant cost, and determined that redoing the Arbitration would result in significant wasted time, resources and fees, and there would be concerns about the impact of the passage of time on witnesses' memories.

In the result, the lower court declined to set aside the Award based on a reasonable apprehension of bias. It is noted that the lower court also determined that Vento was able to fully present it case and therefore also refused to set aside the Award on the second ground. Accordingly, Vento's application was dismissed.

The Court of Appeal Decision

The Ontario Court of Appeal unanimously allowed the appeal and set aside the Award, holding that the lower court had erred in treating the reasonable apprehension of bias as a mere procedural defect subject to discretionary review. While Vento also appealed on the basis that the lower court erred in finding that Vento was able to fully present its case, the Court of Appeal only considered the issue of whether a finding of a reasonable apprehension of bias required setting aside the Award – holding that this issue was determinative of the appeal.

Mexico did not challenge the lower court's finding that a reasonable apprehension of bias had existed in the circumstances. Rather, Mexico argued that despite the finding of bias, the court nevertheless properly exercised its discretion in declining to set aside the Award.

The Importance of Procedural Fairness and the Effect of Fair Hearing Errors in Commercial Arbitration

The Court of Appeal began its discussion by reaffirming that procedural fairness is a core principle in both judicial and arbitral proceedings and empha-

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

sizing the seriousness of bias. The Court explained that while arbitration is a private dispute resolution mechanism, it remains subject to the fundamental requirements of procedural fairness, namely: (1) the requirement that decisionmakers hear both sides before deciding a dispute; and (2) the requirement that a decisionmaker be impartial or unbiased. The Court of Appeal emphasized that a reasonable apprehension of bias is not a minor procedural defect. Rather, it is finding that undermines the integrity and legitimacy of the adjudicative process and is necessarily a major violation of procedural fairness.

The Court assessed its power to remedy a breach of procedural fairness by first examining the historically strict approach of the common law in respect to breaches of procedural rights. The Court explained that, under the common law, it has never been necessary for an applicant seeking relief to establish that the outcome of the relevant decision would – or even might – have been different but for the unfair hearing procedure. The Court of Appeal stated that the rule against bias is stricter still; no matter what gives rise to a reasonable apprehension of bias, once the finding is made, the adjudicator is disqualified, and if a decision has already been reached, the decision is void. The Court explained that this approach reinforces the seriousness of an apparent failure of impartiality and stated that the importance of the rule against bias transcends the interests of the parties to a particular dispute as bias is intolerable in any system that aspires to the rule of law. The Court therefore held that "the finding of a reasonable apprehension of bias requires the disqualification of an adjudicator and the nullification of any decision they have made. Nothing less will do." (Para 32).

The Court of Appeal then considered breaches of procedural fairness in the context of commercial arbitration, recognizing the unique circumstances of commercial arbitration and the limits on the court's authority to set aside arbitration awards. The Court of Appeal acknowledged that commercial arbitration is designed to operate outside the judicial system and that the authority of the courts to set aside an arbitration award is limited by the operative legislation governing the arbitration.[1] The Court further recognized that procedural irregularities in commercial arbitration, or fair hearing errors, do not necessarily raise the same concerns as they do in the exercise of public authority and that countervailing concerns in the context of commercial arbitration, including the need for finality, limit the circumstances in which it is appropriate to set aside an award.

[1] In this instance, the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law"), adopted by the *International Commercial Arbitration Act*, 2017, S.O. 2017, c.2, Sched. 5, applied to the Arbitration and established and delimited the judicial authority to set aside an arbitration award to those grounds enumerated in Article 34(2) of the Model Law.

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

The Court of Appeal explained that the Canadian approach to setting aside arbitration awards on the basis of fair hearing breaches, as summarized by the Court of Appeal in its earlier decision in *Popack,* requires the court to engage in what is essentially a balancing exercise, considering both the extent that the breach undermines the fairness or the appearance of fairness of the arbitration and the effect of the breach on the award itself. The Court stated that, if, as at common law, every fair hearing breach – no matter how minor or inconsequential – were treated as a sufficient basis for voiding an arbitral award, the finality of arbitration awards would be severely compromised. As a result, the Court of Appeal stated that the courts should only interfere in arbitration awards where a fair hearing breach can be shown to have affected the substantive fairness of the hearing. Accordingly, the courts may exercise discretion to uphold an arbitral award despite relatively minor fair hearing breaches, such as the one dealt with in *Popack,* which was said to clearly not affect the outcome of the arbitration or undermine the appearance of fairness of the arbitration.

The Effect of Bias in Commercial Arbitration

While acknowledging that the treatment of fair hearing errors in commercial arbitration may differ from other contexts, the Court turned its attention to the specific issue of bias. Notably, the Court of Appeal clarified that the courts did not enjoy discretion to uphold an arbitral award in the face of more significant breaches of procedural fairness, and in particular, a reasonable apprehension of bias. The Court reiterated the seriousness of bias, emphasizing that a reasonable apprehension of bias is not a minor procedural breach - it is a finding that the integrity and legitimacy of an adjudicative process have been compromised irreparably.

The Court of Appeal stated that bias cannot be balanced away on the basis that it is not serious, that is thought to have had little impact on the result, or that it would be inconvenient and costly to rehear the arbitration if the award were set aside. The Court of Appeal therefore concluded that the result of a finding of a reasonable apprehension of bias is a disqualification of the adjudicator and the nullification of any award rendered.

The Bias of One Panel Member Taints the Decision of the Entire Panel

The Court of Appeal rejected the lower court's finding that a reasonable apprehension of bias of one panel member does not necessarily taint the decision of the entire panel. The Court of Appeal held that the decision to set aside an arbitration award does not depend on a demonstration that the participation of the disqualified member affected the outcome, such as demonstrating that the disqualified member cast the deciding vote in a split decision. Rather, the Court explained that the bias of one member neces-

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

sarily taints the tribunal. The rationale of this outcome was said to be plain; it is impossible for the courts to know whether – or to what extent – the participation of a biased member affected a panel's decision. The Court held that this issue could not be left to conjecture, nor could it be ignored by assuming that the presumed impartiality and independence of the other two members of the panel rendered it harmless. The Court of Appeal was therefore clear in holding that: "the participation of a biased member requires the decision to be set aside regardless of the unanimity of the panel" (Para 51).

After noting the long-standing support for this approach, both in Canadian and English jurisprudence, the Court of Appeal went on to clarify the proper application of the Supreme Court of Canada's decision of *Wewaykum Indian Band v Canada,* 2003 SCC 45 ("***Wewaykum***"), which had been relied upon by Mexico, and accepted by the lower court, as establishing that the unanimity of the panel precluded a finding that it was tainted. The decision of *Wewaykum* involved a claim of a reasonable apprehension of bias involving the participation of Justice Binnie in a decision that had already been rendered. In *Wewaykum,* the Supreme Court concluded that Justice Binnie was not subject to a reasonable apprehension of bias and was not disqualified. However, the Supreme Court also offered *obiter* comments on whether its decision would have been undermined had it ruled differently, noting that no reasonable person would have concluded that it was likely that the eight other judges of the decision were biased, or somehow tainted, by the apprehended bias affecting Justice Binnie in the decision.

The Court of Appeal in *Vento* clarified that *Wewaykum* does not change the law of bias and was not relevant to the decision in this case. The Court of Appeal noted that *Wewyakim* was not truly a bias case and held that the Supreme Court's *obiter* comments about the consequences that would have flowed from a different finding of bias were based on the Supreme Court's unique decision-making processes and applied only to this distinct decision-making process.

The Court of Appeal therefore held that the lower court erred in assuming that the impartiality of the other two members of the Tribunal justified the refusal to set aside the Tribunal's Award. The impartiality of the other two members of the Tribunal was said to be irrelevant to the question before the lower court. The Court of Appeal held that the reasonable apprehension of bias on the part of the Arbitrator sufficed to require that the Tribunal's award be set aside. Accordingly, the Court determined that there was no basis to conclude that the Arbitrator's participation was somehow harmless, rather, such participation necessarily tainted the Tribunal and required that its Award be set aside. Finally, the Court of Appeal took issue with the lower court's reasoning that the seriousness of the breach of the Arbitrator was

One Biased Arbitrator Spoils the Award: Ontario Court of Appeal Affirms Importance of Impartiality in Arbitration

Vento Motorcycles, Inc. v Mexico
2025 ONCA 82

LU #171 [2025]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
Catriona Otto-Johnston, Partner, Rose LLP and Chase Salembier, Associate, Rose LLP

CanLii Reference:
2025 ONCA 82

ONTARIO

somehow softened by several considerations, holding that such considerations were not relevant.

As a result, the Court of Appeal allowed the appeal and set aside the Tribunal's Award.

Takeaways

The Ontario Court of Appeal's decision in *Vento* is significant in clarifying the consequences of a finding of a reasonable apprehension of bias and the authority of the courts to set aside an arbitration award because of bias. The Court of Appeal was clear in holding that once a reasonable apprehension of bias is established, the adjudicator is disqualified, and any substantive decision must be set aside. In circumstances where the decision is made by a multi-member panel, the presence of a single biased adjudicator is sufficient to taint the entire panel, irrespective of the unanimity of the panel. Bias is a critical defect of procedural fairness, not a procedural irregularity that can be assessed on a case-by-case basis or balanced away by surrounding circumstances.

The Court of Appeal's ruling underscores the preeminent importance of impartiality, notwithstanding the court's recognition of the importance of finality and efficiency in commercial arbitration and its effort to balance procedural fairness against these values in the context of other fair hearing breaches.

Finally, it should be noted that this decision reiterates the importance of disclosure, as highlighted more specifically in the Ontario Court of Appeal's recent decision in *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc.,* 2024 ONCA 839 (***"Aroma***"). In *Vento,* the Arbitrator's failure to disclose the appointments offered to him and his communications with Mexico was said to indicate a lack of impartiality and to ultimately bolster the finding of a reasonable apprehension of bias. Arbitrators should be proactive in disclosing any relationships or interactions that could be perceived as compromising their independence to ensure the integrity of the proceedings and avoid challenges to the validity of their awards.

BC Court of Appeal Sends Manufacturers an Invite to the Project Wrap-Up Party

Honeywell International Inc. v XL Insurance
2024 BCCA 375

LU #171 [2025]

Primary Topic:
XIII. Insurance
Jurisdiction:
British Columbia
Authors:
Mike Preston,
McLean & Armstrong LLP
and Shaun Johnston,
Wylie-Crump

CanLii Reference:
2022 BCSC 766

BRITISH COLUMBIA

Mike Preston

Shaun Johnston

When you walk around Vancouver these days, longtime locals often comment that the downtown core has become a city of glass. Something that's not new in Vancouver – it rains. Residents of the 62-storey Shangri-La glass tower – completed in 2009 – noticed their spectacular view of the mountains and ocean was getting foggy. Excess moisture had started building-up between the windows panes of the insulated glass units.

As per standard operating procedure, the condo owners sued everyone they could name – the developer, the contractors, the subcontractors, the food truck caterer who served coffee on-site, etc. Those defendants then third-partied everyone they could name.

The windows ("insulated glass units" or "IGUs") were installed by the subcontractor Advanced Glazing Systems Ltd. Behind them was the supplier Garibaldi Glass Industries Inc. who had designed and fabricated them.

One of the many ingredients Garibaldi needed to fabricate the IGUs was a desiccant – a substance designed to adsorb moisture. Garibaldi purchased the desiccant from the industrial manufacturer/supplier Honeywell International.

Honeywell International's sole role was to manufacture the desiccant and supply it to Garibaldi. Honeywell had no involvement in the project. In all likelihood, the first time Honeywell had ever heard of the Shangri-La project was when it was served a third-party notice alleging its desiccant was defective.

The Wrap-Up Policy

Sometime after Honeywell became involved in the litigation as a third-party, it heard there was a wrap-up liability policy in place for the Project (the "Wrap-up Policy").

As usual, the "Insured" included subcontractors on the Project. Per the definitions section:

> 4. "Contractors" and "sub-contractors" include all persons or organizations who perform any part of the work under the Insured Project but do not include:
>
> a. Suppliers whose only function is to supply materials, machinery or other supplies to the project and

BC Court of Appeal Sends Manufacturers an Invite to the Project Wrap-Up Party

Honeywell International Inc. v XL Insurance
2024 BCCA 375

LU #171 [2025]

Primary Topic:
XIII. Insurance
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Shaun Johnston, Wylie-Crump

CanLii Reference:
2022 BCSC 766

BRITISH COLUMBIA

> who do not carry out any installation, construction, or supervisory work on the Insured Project.

At risk of being cavalier about the delicate art of contract interpretation, the intention is fairly obvious. Anyone swinging a hammer on the project, should be covered. Suppliers of the materials used in the construction should not. Having said that, some companies both supply and install the materials. The wording is clear that:

- a supplier who also installs, is an Insured;
- a supplier who does nothing other than supply is not an Insured.

In contrast to us cavaliers, Honeywell took a scalpel to the words: an Insured does not include, "Suppliers whose only function is to supply materials…" Honeywell then thought to themselves, 'well, it's a good thing we didn't just supply the desiccant, we also manufactured it'.

On the basis that they were not just a supplier, Honeywell sought indemnity for defence costs already incurred. The insurer XL Insurance Company Ltd. denied coverage.

The Summary Trial Judge

In *Strata Plan BCS 3206 v KBK No. 11 Adventures*, 2022 BCSC 766, Justice Blok noted that the essential nature of a wrap-up policy, "is to provide coverage for those involved in a construction project". Honeywell's literal reading of one phrase in the Wrap-Up Policy led to an unrealistic result where those who delivered the product directly to the gate of a project would not be covered, but a party many steps removed in the supply chain and completely unaware of the project would be covered.

As to the express wording, Justice Blok found himself having to go beyond the literal meaning of the words, and reach for that which is revealed in a full and fair reading of the disputed clause. Never the safest place to be as the court of first instance.

In the 1980 decision of *Consolidated-Bathurst v Mutual Boiler*, the Supreme Court of Canada held the objective is to search for the interpretation which, from the whole of the contract, would appear to advance the true intent of the parties:

BC Court of Appeal Sends Manufacturers an Invite to the Project Wrap-Up Party

Honeywell International Inc. v XL Insurance
2024 BCCA 375

LU #171 [2025]

Primary Topic:
XIII. Insurance
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Shaun Johnston, Wylie-Crump

CanLii Reference:
2022 BCSC 766

BRITISH COLUMBIA

> Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted.
>
> [emphasis added by Justice Blok]

Honeywell did not fit well within the "commercial atmosphere" of a wrap-up policy because it was many steps removed in the supply chain and not involved in the project in any way.

Justice Blok concluded the mere fact that Honeywell was also a manufacturer did not make it the kind of "supplier" that was intended to be covered by the Wrap-Up Policy. For a "supplier" to be covered, it had to have done something on the project itself, and Honeywell had not.

The BC Court of Appeal

As sometimes occurs, where a trial judge might strive to arrive at a pragmatic or common sense result, the appellate court prefers a legally sanitized ruling.

In *Honeywell International Inc. v XL Insurance*, 2024 BCCA 375, the BC Court of Appeal found that Justice Blok had erred. Honeywell did fall under the Wrap-Up Policy's definition of a "sub-contractor".

To ground its approach, the Court of Appeal noted that a narrow reading of an exclusion clause is not limited solely to the "Exclusions" section of a policy. Any clause that has the effect of narrowing the grant of coverage should be construed restrictively – no matter where it happens to appear in the policy.

Suppliers were persons who "perform any part of the work" under a project. The fact that the definition was so broad is the very reason why the Wrap-Up Policy then had to exclude some of those suppliers – that is, those suppliers whose only function was to supply.

By implication, a supplier was included in coverage if:

- they carried out some installation work on the project; or
- they performed any function other than just suppling the material.

So maybe, say, something like, off-shore international manufacturing of the material counts as another function?

BC Court of Appeal Sends Manufacturers an Invite to the Project Wrap-Up Party

Honeywell International Inc. v XL Insurance
2024 BCCA 375

LU #171 [2025]

Primary Topic:
XIII. Insurance
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Shaun Johnston, Wylie-Crump

CanLii Reference:
2022 BCSC 766

BRITISH COLUMBIA

Honeywell Fits the Bill

As a supplier of desiccant used in part of the work on the Project, Honeywell was one of the persons "who perform any part of the work" under the Project. Consequently, the burden was then on XL to establish that Honeywell was excluded as one of the "suppliers whose only function is to supply…" XL failed to meet that burden because Honeywell was not only a supplier, it was also a manufacturer.

As for the intent found by Justice Blok, the Court of Appeal suggested that if that were the parties' intention, then the wording should have been:

> Insured sub-contractor does not include: "*Suppliers who perform none of their work on site*".

The Court of Appeal also noted that other wrap-up policies had chosen the express wording that "off-site fabricators" were specifically excluded. Again, no such wording was used in the Wrap-Up Policy here.

In the result, after finding Honeywell was an Insured, the matter was remitted to the trial court for determination of the other grounds on which XL had denied coverage.

The Practical Implications

One of the benefits of implementing a wrap-up liability policy for a construction project – beyond the obvious compliance with lender and other stakeholder requirements – is the provision of a consistent level of liability insurance coverage for all contractors on site. The premise being that it will encourage and maintain a more productive job site in the event of a claim (because it alleviates the finger pointing between contractors and their insurance companies as to who is responsible). The unintended inclusion of manufacturers with no on-site operations will have little benefit to achieving this objective, and almost certainly generate no cost savings either.

Six months have passed since the Court of Appeal's decision was handed down. Nonetheless, in our informal survey of the industry this standard form term is still being widely used in new wrap-up policies throughout Canada. That carries some practical implications for you, dear astute reader:

1. All construction insurance coverage counsel working with fabricators and manufacturers (no matter how far up the supply chain) should check if the applicable wrap-up policy uses this standard form wording;

2. Underwriters who do not intend to provide coverage to fabricators and manufacturers need to abandon this standard form wording (perhaps

BC Court of Appeal Sends Manufacturers an Invite to the Project Wrap-Up Party

Honeywell International Inc. v XL Insurance
2024 BCCA 375

LU #171 [2025]

Primary Topic:
XIII. Insurance
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Shaun Johnston, Wylie-Crump

CanLii Reference:
2022 BCSC 766

BRITISH COLUMBIA

replacing it with some of the examples suggested by the Court of Appeal); and

3. Project sponsors, Owners, and General Contractors should consider their intent in procuring a wrap-up policy for their project. Inadvertently providing insurance for all off-site players (other than pure suppliers) could lead to uncontemplated claims, depleted insurance funds, and increased premiums for future projects. Although wrap-up policies with the standard form wording may still be presented to you, the policy could be endorsed to exclude manufacturers, suppliers, vendors and other firms who have no on-site operations.

Julmac Contracting Ltd. v New Brunswick
2025 NBKB 73

LU #171 [2025]

Primary Topic:
VI. Termination of Building Contract
Jurisdiction:
New Brunswick
Authors:
Conor O'Neil, Partner, Stewart McKelvey and Kate Irish, Student at Law, Stewart McKelvey

CanLii Reference:
2025 NBKB 73

NEW BRUNSWICK

Conor O'Neil

Kate Irish

Case Comment – Update on Preliminary Motion Decision on Availability of Injunctive Relief under PACA

In *Julmac Contracting Ltd. v New Brunswick*, 2025 NBKB 73, Julmac (the "Contractor") was removed from three bridge projects for various defaults. The Contractor sought injunctive relief against the Province of New Brunswick ("PNB"), asking the Court to reinstate its right to continue with the work. The decision deals with the availability of an injunction against the Crown, and in particular in the context of New Brunswick under its *Proceedings Against the Crown Act*, RSNB 1973, c P-18 ("PACA"). The Court reaffirmed that Crown immunity under PACA is a strong and deliberate barrier to injunctive relief, and exceptions must be strictly construed.

PNB opposed the motion, arguing that such relief was barred under s. 14 of PACA, which codifies the Crown's immunity from injunctive proceedings. The case ultimately turned on whether the exceptions to this immunity, developed at common law and interpreted in appellate jurisprudence such as *Smith v. AG* (NS), 2004 NSCA 106, could be invoked on the facts.

The Contractor argued that although PACA's s. 14(2) precludes injunctive relief against the Crown itself, s. 14(4) permits such relief against Crown officers or agents. Subsections 14(1), 14(2) and (4) of PACA provide:

> *14(1) Subject to this Act, in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person; and the court may make any order, including an order as to costs, that it may make in proceedings between persons, and may otherwise give such appropriate relief as the case may require.*
>
> *14(2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties.*
>
> *...*
>
> *14(4) The court shall not in any proceedings grant an injunction or make an order against an officer or agent of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown but, in lieu thereof, may make an order declaratory of the rights of the parties.*

Case Comment – Update on Preliminary Motion Decision on Availability of Injunctive Relief under PACA

Julmac Contracting Ltd. v New Brunswick
2025 NBKB 73

LU #171 [2025]

Primary Topic:
VI. Termination of Building Contract
Jurisdiction:
New Brunswick
Authors:
Conor O'Neil, Partner, Stewart McKelvey and Kate Irish, Student at Law, Stewart McKelvey

CanLii Reference:
2025 NBKB 73

NEW BRUNSWICK

The Contractor argued that PNB's actions were taken in bad faith, constituting an abuse of contractual discretion, and amounted to unlawful conduct in excess of their statutory powers. The Contractor relied on *Smith*, in which the Nova Scotia Court of Appeal affirmed the availability of injunctive relief against Crown servants in limited circumstances. The Contractor further argued that the Crown, when acting in a commercial capacity, should not be entitled to the same scope of immunity.

PNB countered that the motion was directed squarely at the Crown, not at any identifiable officer or servant. As such, PACA provides an absolute bar on injunctive relief against the Crown. Further, PNB argued that even under s. 14(4), the exceptions were narrow and inapplicable. The Contractor's allegations did not amount to *ultra vires* conduct or personal liability on the part of any Crown officer, but rather amounted to contractual disputes, best left to be resolved by ordinary damages.

The Court acknowledged the seriousness of the allegations and the potential for harm but emphasized the importance of jurisdictional clarity. It observed that the Contractor's motion lacked sufficient specificity in targeting any particular Crown officer, instead naming only the Crown in the style of cause.

While acknowledging the decision of *Smith* remains good law, the Court declined to extend its reach in this case, finding that there was no allegation that the Minister of the Department of Transportation and Infrastructure or any Crown officer acted without or beyond any statutory authority.

The Preliminary Motion was dismissed, as the Court found the case to involve a contractual dispute lacking exceptional circumstances to justify an interim order.

This decision confirms that even where contractual disputes with the Crown threaten serious commercial consequences, injunctive relief remains largely unavailable under PACA. For contractors engaged in complex public infrastructure projects, the judgment serves as a cautionary tale on the limits of injunctive relief against the Crown and the critical importance of properly structured pleadings when challenging Crown decisions.

5-out-of-5 Appellate Justices Agree: a Builders Lien (in BC) Remains a 2-Headed Hydra

Kingdom Langley Project LP v WQC Mechanical Ltd
2025 BCCA 169

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and
Dirk Laudan, Partner, Borden Ladner Gervais LLP

CanLii Reference:
2025 BCCA 169

BRITISH COLUMBIA

Mike Preston

Dirk Laudan

It's not often a Court of Appeal in Canada sits 5 Justices to hear a lowly builders lien case.[1] So the stage was set to break new ground in *Kingdom Langley Project LP v WQC Mechanical Ltd*, 2025 BCCA 169. Nerdy construction lawyers throughout the province tuned into the webcast. Alas, in the end the decision was less, "the revolution will be televised", and more, "not much to see here folks".

Backgrounder: Builders Liens are a Bit Weird on the Left Coast

Just like any of the lien acts in Canada, the BC *Builders Lien Act*, SBC 1997, c 45, (the "*Act*") has a holdback requirement (here it's 10%). But then there's an odd provision. A plain reading of s. 4(9) says the unpaid subtrade has a lien against the holdback fund itself:

> (9) … a holdback required to be retained under this section is subject to a lien under this Act…

Other snippets seem to buttress that idea. Section 8(4) states the holdback cannot be released if, "… proceedings are commenced to enforce a lien against the holdback".

So, in the late 1990's the question arose, did this mean the unpaid subtrade had a lien against the land and a further separate lien against the money in the holdback account? Fortunately, in 2001 there was a lien claimant who failed to file a lien properly and who was motivated to find the answer.

The BC Court of Appeal's 2003 *Shimco* Decision

A subtrade named Shimco Metal had properly filed the claim of lien at the Land Title Office. They later commenced the enforcement Action within the 1-year limitation period but neglected to file the Certificate of Pending Litigation. So, the claim of lien against the land was extinguished.

Realizing the error, the subtrade quickly commenced a new action in court claiming a lien directly against the holdback funds that were still sitting in the owner's bank account. Assuming such a right of lien did exist, there was nothing in the *Act* to indicate it was subject to the same annoying 1-year steps to perfect the claim. Instead, the holdback is perfected simply by

[1] The authors note the complete absence of any builders lien presentations at the 2026 CCCL AGM… ahem, Phil Scheibel.

5-out-of-5 Appellate Justices Agree: a Builders Lien (in BC) Remains a 2-Headed Hydra

Kingdom Langley Project LP v WQC Mechanical Ltd
2025 BCCA 169

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Dirk Laudan, Partner, Borden Ladner Gervais LLP

CanLii Reference:
2025 BCCA 169

BRITISH COLUMBIA

commencing an action in the Supreme Court of British Columbia to enforce a lien against the holdback. The effect of commencing this action, even without filing a valid lien, against the land, is that the claimant has an in rem right against the holdback, and the owner may not validly release the holdback to the general contractor.

On appeal, the owner argued that recognizing a right of lien directly against the holdback fund would be "awkward" and "impractical" and "unfair". The Court of Appeal was not impressed. What governed was the "clear and unambiguous" wording of the *Act*. Thus, the BC Court of Appeal grudgingly acknowledged the 'Shimco Lien', or holdback lien, unleashing decades of confusion and chaos among the BC construction law bar.

An interlude in 2013: the Shimco problem and an ingenious solution

After Shimco was decided, practitioners worried about several of its implications, starting out with how an owner could be certain that no holdback lien action had been commenced, at the point the owner is considering holdback release. (BC has a multiple holdback system so the same question could apply down the contractual chain as well.) Checking whether a holdback lien action is commenced is more complicated and less certain than simply checking that title was clear of liens. But it soon became apparent that the real problem was a different one.

The problem arises, in its simplest form, where the general contractor posts security for a lien, thereby clearing title. Before Shimco, the invariable expectation, at this point in the process, was that the owner could release the holdback. Allowing contract money to flow, after all, is the whole point of posting security for the lien under the statutory mechanism (section 24). But after Shimco, the problem arose that the subtrade might still plead, in its lien action, a claim for a lien against the holdback. If you assume, as the court did in Shimco, that the holdback lien remains in full force despite the fate of the land lien, the subsequent holdback precludes release of the holdback even though title is clear of liens.

This exact problem came before the court in the 2013 case *Preview Builders International Inc. v. Forge Industries Ltd*., 2013 BCSC 1532.[2] There, the court concluded it was possible (despite there being no statutory term allowing it) to make the lien security stand as security for the holdback lien *as well as* the lien against the land, and this would allow the owner to release

[2] Yes, it took an entire decade for this arguably obvious problem to come into focus. The BC Bar does not like to deal with these things in an unseemly rush. It took even longer for the next shoe to drop.

5-out-of-5 Appellate Justices Agree: a Builders Lien (in BC) Remains a 2-Headed Hydra

Kingdom Langley Project LP v WQC Mechanical Ltd
2025 BCCA 169

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Dirk Laudan, Partner, Borden Ladner Gervais LLP

CanLii Reference:
2025 BCCA 169

BRITISH COLUMBIA

the holdback safely to the general practitioner. In his reasons, Mr. Justice N Brown grounded the jurisdiction of the court to take this surprising though useful step on the court's right under applicable court rules to dismiss the specific relief sought against the holdback while preserving the claim in principle, and at the same time, establish security for such a claim. His Lordship's ingenious solution to the Shimco problem was well received by the profession, and standard form lien security orders were published that provided for this effect – or so we thought.

Fast forward to the Present Day: Kingdom Development Project

The next step in this saga, approximately 12 years later, arose in connection with a multi-unit residential project in Langley Township, British Columbia. Kingdom was the owner-developer. The general contractor was Metro-Can Construction. Around 2021 they got into a dispute over alleged lack of payment. In turn, some "pay when paid" clauses meant various subtrades went unpaid. Things snowballed and eventually 22 subtrades filed claims of lien against the land title.

As the project went along, the general contractor posted funds in court (more accurately, a lien bond held in counsel's trust) to act as substitute security. Using the standard post-*Preview* form of order, which was agreed upon by all counsel, the Consent Order stated that upon the lien bond being posted, the claims of lien on the land title could be cancelled. The wording included a standard term that the posted lien bond would also act as security for Shimco liens. The term did not expressly suspend any such lien rights against the holdback, although it was commonly understood among practitioners up to this point that the order had that effect. Spoiler alert: how wrong we were!

Later on, Metro-Can itself filed a very sizeable lien of its own against title to the project, which was much greater than the aggregate value of all the subtrade liens. Given the great size of Metro-Can's lien, the developer must have been subject to an overriding economic incentive to use the holdback fund as part of the security for the lien, rather than having to raise considerable funds to be used simply as (partially duplicative) lien security.

After this point, Kingdom took the view that any claims by the subcontractors against the holdback (now in court as security for the Kingdom lien) were transferred to the lien bonds as a result of the lien bond security orders. This theory, if correct, would have had a great strategic benefit for the developer in the litigation. The developer had considerable backcharges

5-out-of-5 Appellate Justices Agree: a Builders Lien (in BC) Remains a 2-Headed Hydra

Kingdom Langley Project LP v WQC Mechanical Ltd
2025 BCCA 169

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Dirk Laudan, Partner, Borden Ladner Gervais LLP

CanLii Reference:
2025 BCCA 169

BRITISH COLUMBIA

against the general contractor. If the holdback was clear of liens, the developer could set-off against the freed-up holdback fund for its valid backcharges, without worrying about the subtrade liens, essentially giving the developer security for its own backcharges. The general contractor, on the other hand, felt that now the holdback was in court, the subtrade liens were fully secured and the lien bonds, therefore, were not needed. Consequently, the general contractor asked that the lien bonds be released, which would spare the general contractor the cost of ongoing premiums for the lien bonds. From the perspective of the lien claimants, there was no doubt they now had double security.

What Kingdom was not banking on, in this complicated dispute, was a subtrade named WQC Mechanical becoming a fly in the ointment.

WQC Mechanical had signed a Consent Order for posting lien bond security. Accordingly, its claim of lien against the land was cancelled. Be that as it may, WQC then brought an application seeking a declaration that it had a valid *Shimco* lien directly against the owner's holdback despite the bonds already being security for that holdback lien. The chambers judge agreed with WQC, declared the holdback lien to be valid, and ordered that the owner pay WQC's proportionate share out of the account.

For understandable reasons, this did not a happy owner make. Kingdom argued that when WQC accepted the substitution of security which cancelled its lien against the land, that must have also cancelled its claim of lien against the holdback fund.

On top of that, convinced the law should not allow an unpaid subtrade to have two separate liens, Kingdom went for broke and sought a 5-member appeal panel to overturn the *Shimco* decision itself and return to the pre-2003 view that claims against the holdback lived or died with the land lien

Revisiting *Shimco* – From Fanfare to Fizzle

Unfortunately for the developer, the Court of Appeal rejected all of its arguments. The *Act* says what it says about holdback liens. The Court cannot write words into it. For 20 years now the Legislature has refused to amend the wording that established the independent holdback lien, despite numerous appeals to the court to do so.

As for the Consent Order, yes it stated the lien bond would be security for WQC's Shimco lien. But it did not expressly get rid of the Shimco lien. The

5-out-of-5 Appellate Justices Agree: a Builders Lien (in BC) Remains a 2-Headed Hydra

Kingdom Langley Project LP v WQC Mechanical Ltd
2025 BCCA 169

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
British Columbia
Authors:
Mike Preston, McLean & Armstrong LLP and Dirk Laudan, Partner, Borden Ladner Gervais LLP

CanLii Reference:
2025 BCCA 169

BRITISH COLUMBIA

Court of Appeal did not state it overruled *Preview*, but certainly the form of order used here entirely lacked the beneficial intended effect of the order envisaged in the *Preview* case. It seems a new form of order, at a minimum, is required.

As to whether the subcontractor lien claims should be paid by the cash posted as security by the owner, or the lien bonds posted as security by the general contractor, the Court of Appeal agreed it should be the holdback. When two forms of security are available to pay out the claim, it was within the discretion of the chambers judge to decide which one should pay.

Notes for Practicing Construction Lawyers

Counsel in BC will note the Court's clear direction that the posting of the lien bond here meant the unpaid subtrade still retained its options in this case. If it was not paid the proportionate share it was entitled to under the *Act*, then it could collect from either security: the lien bond or the holdback fund. Here, the chambers judge exercised his discretion to allow WQC to collect from the holdback account and go home.

In commenting on *Preview*, the Court of Appeal said it was not willing to "go so far as to say that a judge could not order the cancellation of a holdback lien". Having said that, apparently, "Even then, the cancellation of the holdback lien would not affect the lien claimant's underlying right to share *pro rata* in the holdback" (paragraph 105). With respect, these *obiter dicta* are unhelpful. Nevertheless, we suggest that, despite them, the court retains the jurisdiction to make the form of order conceived in *Preview* that will allow the release of the holdback, so long as it very clearly states its effect, which is that the subcontractor's lien against the holdback is "dismissed" or "otherwise disposed of" (in the words of the *Preview* case), as far as that specific relief is concerned, and that the Shimco claim thereafter attaches itself to the security only. There are questions still to be answered, including the impact on priorities of such an order, and the rateable distribution of holdback funds among claimants. The standard form of order published by the Continuing Legal Education Society of British Columbia (CLEBC) in their *British Columbia Builders Lien Practice Manual* (looseleaf and online) is, at the date of writing of this update, in the process of being revised to include what appear to be the necessary changes.

In the glacial way this area of law evolves in British Columbia, perhaps we will learn after another decade or so what the full implications of those changes are.

Alberta Court Issues Warning to Lien Claimants: Prosecute Promptly or Forfeit Security

1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,
2025 ABKB 324

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Jack G. Kent, Partner, Reynolds Mirth Richards & Farmer LLP

Canlii Reference:
2025 ABKB 324

ALBERTA

Jack Kent

In *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324, Application Judge J.R. Farrington exercised his discretion under Section 46(2) of the *Prompt Payment and Construction Lien Act* (the "**PPCLA**") to release the security paid into court by the defendant that stood in place of the subject land against which the plaintiff had registered a lien and certificate of lis pendens.

Section 46(2) of the PPCLA permits a party to apply to have the certificate of lis pendens vacated and the lien to which it relates discharged where no trial has been held within two years from the date of registration of the certificate of lis pendens. Where section 48 of the PPCLA has been used to vacate the lien, section 46(2) applies to the security standing in place of the land.

After reviewing the PPCLA's intention to balance the security for lien holders (where there would otherwise be none) against the financial cost to the party posting security by imposing a "two-year goal", Application Judge J.R. Farrington decided to apply section 46 of the PPCLA to release the security of the lien on the basis that the parties were well past the "two-year goal" and the matter was not close to trial.

This decision serves as a reminder to lien claimants that the security granted under the PPCLA is a special remedy, which requires lien claimants to advance their claims promptly or risk losing their claim's security.

Background

In February 2020, 1951789 Alberta Ltd. operating as Urban Interiors Group (the "**Lien Claimant**") registered a lien against land owned by Britannia Block General Partnership Inc. (the "**Owner**"), which was perfected by the Lien Claimant in June 2020 by filing a statement of claim and a certificate of lis pendens.

A year later, in July 2021, the Owner posted security for the lien in the form of a $1,595,842.50 bond in exchange for removing the lien and certificate of lis pendens.

Approximately three years later, the Owner brought an application to release the security on the basis that a trial had not been held within two years from the date of the registration of the certificate of lis pendens and, in the alternative, to reduce the portion of the security related to delay claims. The application was heard in April 2025.

1951789 Alberta Ltd. v Britannia Block General Partnership Inc., 2025 ABKB 324

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Jack G. Kent, Partner, Reynolds Mirth Richards & Farmer LLP

Canlii Reference:
2025 ABKB 324

ALBERTA

Alberta Court Issues Warning to Lien Claimants: Prosecute Promptly or Forfeit Security

Legislation

Section 46 of the PPCLA states:

> **46(1)** A lien that has continued to exist by reason of registration of the certificate of lis pendens relating to that lien continues to exist until
>
> (a) the proceedings are concluded, or
> (b) the certificate of lis pendens is discharged,
>
> whichever occurs later.
>
> **(2)** Notwithstanding subsection (1), if no trial has been held within 2 years from the date of the registration of the certificate of lis pendens, any interested party may apply to the court to have the certificate of lis pendens vacated and the lien to which it relates discharged.

Release of Security Based on Failure to Prosecute

The Owner's primary argument was that the security should be removed due to the Lien Claimant's delays in the enforcement process and the resulting unfairness and expense placed on the Owner by the continued posting of security.

The Court agreed with the Owner's arguments and confirmed that section 46(2) is intended to set limits on the Owner's financial impact of indefinitely posting security. Application Judge J.R. Farrington stated that "[a] builders' lien is a powerful remedy" that "does not come without a cost to the owner" who is defending an unproven claim.[1] He recognized both the costs of liens remaining on title (alienation and restrictions on other financial uses of the land) and the cost of security (including loss of use of posted funds or bond premiums), before concluding that "a party posting security cannot be expected to do so indefinitely".[2] In his view, section 46(2) of the PPCLA balances the benefit to the lien claimant of securing a claim (where there would otherwise be none) with the financial burden to the party posting security by requiring lien claimants to pursue lien claims more promptly than other types of claims.[3]

---

[1] *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324 at para 16.
[2] *Ibid.*
[3] *Ibid.*

Alberta Court Issues Warning to Lien Claimants: Prosecute Promptly or Forfeit Security

1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,
2025 ABKB 324

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Author:
Jack G. Kent, Partner, Reynolds Mirth Richards & Farmer LLP

Canlii Reference:
2025 ABKB 324

ALBERTA

The Court agreed with Master Robertson in *1361556 Alberta Ltd v Ristorante Cosa Nostra Inc,* 2021 ABQB 157, that the two-year period in section 46(2) was a "guideline" but, since the legislation did provide a "target", some explanation for the delay was required to avoid consequences.

The Court determined this was an appropriate case to apply section 46(2) because the matter was significantly past the two-year mark (almost four years from the registration of the CLP filing of the lien) and appeared nowhere near trial.[4] Although not explicitly referenced as a factor in his conclusion, the Application Judge recognized the high cost of the security in his decision, which was approximately $30,000 per year.[5] There was no reference in the decision to the Lien Claimant's explanation for the delay.

As a final comment, the Court stated that even if section 46 did not apply, "the substitution of security for land is discretionary and subject to oversight by the Court".[6] Accordingly, given the state of the action and the nature of the claim (which included a sizeable delay claim that was arguably related to the improvement on the land), the Owner had maintained the security for a reasonable period of time and it was reasonable to release the security.

Key Takeaway

Lien claimants must advance their claims promptly and with regard to the two-year period in section 46(2) of the PPCLA or risk losing their claim's security.

[4] *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324 at para 22.
[5] *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324 at para 20.
[6] *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.,* 2025 ABKB 324 at para 23.

PROMPT PAYMENT LEGISLATION ARRIVES IN MANITOBA

LU #171 [2025]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Manitoba
Author:
Murray R. Sawatsky, Partner, McDougall Gauley LLP

CanLii Reference:
2020 NLSC 158

MANITOBA

Murray R. Sawatsky

On April 1, 2025, Manitoba implemented amendments to *The Builders' Liens Act*, CCSM c B91 [*Act*] that align with similar prompt payment legislation in force in Saskatchewan, Alberta, and Ontario.

The prompt payment amendments, enacted through *The Builders' Liens Amendment Act (Prompt Payment)*, SM 2023, c 30, aim to minimize the number of slowdowns that occur in construction projects caused by overuse of the builders' lien scheme.

Similar to legislation in force in other provinces, owners in Manitoba must pay contractors within 28 days of receiving a "proper invoice" (*Act*, s 90(1)). Contractors then have 7 days to pay their subcontractors (*Act*, s 94), who in turn must pay their subcontractors in 7 days (*Act*, s 97(1)), and so forth.

Owners may dispute an invoice delivered by a contractor within 14 days of receiving it by providing notice of non-payment: *Act*, s 90(2). A contractor that receives a notice of non-payment from an owner must advise its applicable subcontractors without delay: *Act*, s 91.

Binding adjudication is also available under the *Act*. Any payment ordered pursuant to adjudication must be made within 10 days (*Act*, s 121(1)).

As with legislation in other provinces, the decision made by an adjudicator can be overturned by the Court: *Act*, s 120. Manitoba has exempted architects and engineers from the definition of "services" set out in the *Act* (*Act*, s 1(1)). Recent amendments also extend the lien registration timeline from 40 days to 60 days.

It will be interesting to see whether (and to what extent) the addition of a prompt payment regime to the *Act* impact the construction industry in Manitoba, as well as how the industry avails itself of the adjudication mechanisms in the *Act*.

Canadian College of Construction Lawyers

Legal Update Committee Co-Chairs:

Brendan D. Bowles

Catriona Otto-Johnston

Members:

Dirk Laudan
Mike Preston
(British Columbia)

Donald C.I. Lucky, KC
Corbin Devlin
(Alberta)

Collin Hirschfeld, KC
Murray Sawatzky, KC
(Saskatchewan)

David Marr
(Manitoba)

Paul Ivanoff
Jason Annibale
(Ontario)

Patrice Morin
(Quebec)

Greg Moores
Conor O'Neil
(Atlantic Provinces)

cccl.org

CANADIAN College of CONSTRUCTION Lawyers Inc. | Le Collège CANADIEN Des Avocats en droit de la CONSTRUCTION INC.

Contact the Legal Update Committee:
c/o Brendan D. Bowles
&
Catriona Otto-Johnston
E-mail: brendanbowles@glaholt.com
E-mail: catriona.otto@rosellp.com

Legal Update Newsletter Design and Desktop Publishing:
Nicholas J. Dasios

Next Legal Update — watch for it!