Canadian College of Construction Lawyers

LEGAL UPDATE

CCCL | CCAC

L.U. #174

May 3, 2026

INSIDE THIS ISSUE:

Editors' Note

We hope you enjoy the first issue of Legal Update in 2026. Legal Update #174 starts with a comment by Paul Ivanoff and Emma Smith on a case from the Northwest Territories involving claims arising under an Integrated Project Delivery contract, a contract model which is premised in large part on the lack of inter-party disputes. The authors note correctly that this is one of the few reported Canadian decisions arising from an IPD contract. Although this form of contract is meant to be collaborative, the authors review what amounts to a very traditional construction dispute with competing allegations of breach of contract, claims for payment and counterclaims for damages between the contracting parties and a claim upon a labour and material payment bond.

Next, we hear from Brendan Bowles, Jessica Gahtan and John Du Vernet regarding the Ontario Divisional Court's decision in *Sayers Foods Ltd. v. Gay Company Ltd.*, focusing on Sayers' application for judicial review of an adjudicator's decision and the Court's findings, which confirms that the scope of judicial review of adjudication determinations is narrow and that the parties ought not to expect a "re-do".

Corbin Devlin and Sarra Kerbic of McLennan Ross summarize *Kuipers v NEP Limited GP Inc*., a decision of the Alberta Court of King's Bench which permitted an owner to assert a claim for liquidated damages against a contractor even after termination of the contract, where the clause clearly provided for this possibility and the owner was not responsible for the delay.

In Legal Update #171, we included a case comment on *1951789 Alberta Ltd. v Britannia Block General Partnership Inc.*, where the Applications Judge dismissed a lien action and released security from court due to passage of time. That decision was appealed to a Justice, and in this issue of Legal Update, Catriona Otto-Johnston and Elisa Stewart provide a comment on the appeal decision.

Next, as construction practitioners are well aware, it is not uncommon in construction disputes for partial settlements to be reached at various stages of an action. In Ontario, drafters of new Rule 49.14 of the *Rules of Civil Procedure* attempt to provide a level of certainty as to when and how these types of partial settlements must be disclosed. Brendan Bowles and Robyn

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Brendan D. Bowles

Catriona Otto-Johnston

Jeffries discuss this new Rule and the fact that, while the new Rule does provide some clarity and associated timelines for disclosure of partial settlement agreements, it does not resolve all uncertainty. This is particularly so when it comes to timing of disclosure of settlements that have been agreed to verbally, but not yet reduced to writing, whether any disclosure is required to be made to parties in related actions and whether an automatic stay of proceedings continues to be a default remedy where a partial settlement that entirely changes the adversarial landscape is not disclosed in a timely manner.

We close with another article on the Earth Boring matter, an Ontario CCAA proceeding which has generated numerous reported decisions. In Legal Update #172, we included a case comment on the decision staying performance bond claims against the insolvent company's surety. In this issue we are pleased to include a case comment from Fraser Mackinnon Blair, Kenneth Kraft, Dragana Cerovina and Francesca Vilardi of Dentons on the latest instalment in the Earth Boring insolvency. A subcontractor obtained a favourable determination against Earth Boring in adjudication. The funds awarded by the adjudicator were held in escrow pending judicial review. However, the claimant was unable to recover since the funds in escrow were found by a Commercial List judge to be the property of the debtor's estate and not subject to a clearly defined trust. The terms of the escrow agreement were insufficient to establish a trust, and the fact that the funds were determined as owing pursuant to an adjudication was insufficient to protect the claimant.

On behalf of the Legal Update Committee, Brendan Bowles and Catriona Otto-Johnston hope you enjoy this issue. Wishing everyone a wonderful Spring.

Canadian Court Interprets "Integrated Project Delivery Contract"

Onec Construction Inc. v NWT Energy Corp. Ltd. et al
2025 NWTSC 56

LU #174 [2026]

Primary Topic:
III. Building Contract
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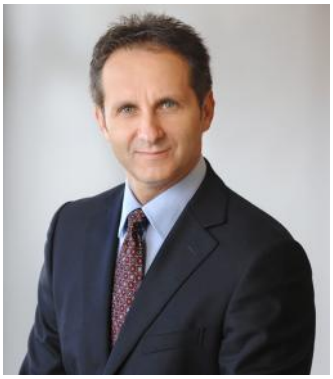

Paul Ivanoff

Emma Smith

The construction industry is witnessing a growing interest in collaborative contract models. Parties continue to weigh the pros and cons of contract models such as Integrated Project Delivery ("IPD"), with some project participants electing to employ less traditional contract models in the hope of increasing the likelihood of achieving positive project outcomes. Despite the growth in interest in IPD, there continues to be little judicial consideration of IPD contract models in Canada, leaving project participants with questions as to how Canadian courts might resolve disagreements arising from such contract models.

Recently, a Canadian court considered a dispute involving an IPD contract in connection with the construction of a wind turbine project in Inuvik, Northwest Territories. In *Onec Construction Inc. v NWT Energy Corp. Ltd. et al*, 2025 NWTSC 56, an application for summary judgment was brought before the Supreme Court of the Northwest Territories in respect of disputes arising on the Inuvik High Point Wind Project (the "Project"). NWT Energy Corporation (03) Ltd. ("NTE") was the owner of the Project. ONEC Construction Inc. ("ONEC") and Northland Builders Ltd. ("Northland") were construction businesses involved in the completion of the Project. Liberty Mutual Insurance Company ("Liberty") was ONEC's surety under a labour and material bond.

During the performance of the Project, disputes arose between the parties. ONEC filed a Statement of Claim against NTE and Northland. Northland filed a counterclaim against ONEC, Liberty and NTE. Northland sought summary judgment dismissing ONEC's claim against Northland and granting Northland's counterclaim against ONEC, Liberty and NTE.

The Court was faced with the task of contractual interpretation, including the interpretation of a contract titled "Integrated Project Delivery Contract". Following the hearing of the Application, the Court partially granted the application for summary judgment.

Background

In November 2020, NTE obtained permits and licenses for the construction of the Project, which included the construction of a wind turbine, a battery storage system, an access road, and a distribution line connecting to existing lines near Inuvik's Mike Zubko Airport.

The nature of the contractual relationships between the parties was in dispute. On December 27, 2021, NTE entered into a Prime Contract (the "Prime Contract") for the construction of the access road with ONEC. ONEC

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argued that Northland was also a party to the Prime Contract as a contractor, acting in partnership with ONEC. NTE and Northland took the position that Northland was not a party to the Prime Contract.

On March 15, 2022, ONEC and Northland entered into a contract titled "Integrated Project Delivery Contract" (the "IPD Contract"), which related to the construction of the access road. At the application hearing, the parties did not agree on the nature of this contract. ONEC and Liberty submitted that this was a partnership agreement, while Northland argued it was a subcontract. The IPD Contract set out how ONEC would pay Northland for its participation in the construction of the access road.

On February 3, 2022, ONEC executed a Labour and Material Payment Bond (the "Bond") with Liberty in favour of NTE. The Bond provided that claimants who have a direct contract with ONEC for labour and material used or reasonably required for use in the performance of the Prime Contract could seek compensation from Liberty if ONEC defaulted in payment.

In early 2022, work on the construction of the access road started. ONEC's role was the management of the Project, procuring materials, surveying, supervision and quality control. In the application, Northland's involvement was in dispute. Northland took the position it was supplying labour and materials for the preparation of the site and performing civil work, while ONEC submitted that Northland also played an important role in managing the Project in partnership with ONEC.

During the performance of the Project, Northland invoiced ONEC monthly. ONEC made payments to Northland. ONEC claimed some of these payments were advances because Northland did not have the necessary funds to perform the work. ONEC disputed the accuracy of Northland's invoices and claimed that they did not comply with the terms of the IPD Contract. Northland took the position that ONEC approved the method of invoicing and that further payments were due under the IPD Contract.

On September 23, 2022, in accordance with the IPD Contract, Northland sent a Notice of Default to ONEC for the outstanding amount it claimed was owed for the work performed. ONEC did not make any payments to Northland following the receipt of this notice.

On November 9, 2022, ONEC directed Northland to stop work on the construction site due to a dispute between ONEC and NTE. Northland complied with this direction and never returned to work on site.

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On January 14, 2023, Northland terminated the IPD Contract with ONEC for non-payment of the outstanding amounts it claimed were due. About one month later, on February 10, 2023, NTE sent Northland a "Notice to Sub-contractors of ONEC Construction Inc." indicating that NTE had terminated its contract with ONEC and that any subcontractor who had performed work for the Project may be eligible to claim under the Bond.

Shortly after that, on March 3, 2023, Northland submitted a notice of claim to the surety, Liberty, for payment of the outstanding amounts it claimed ONEC owed Northland for labour and materials used or reasonably required for the performance of the Prime Contract. Liberty denied the claim asserting that Northland did not fall into the definition of a "claimant" under the Bond.

On April 27, 2023, ONEC filed a Statement of Claim against NTE and Northland alleging that Northland:

- induced NTE and ONEC's subcontractors to breach the Prime Contract and subcontracts,
- in committing the inducements, breached the terms of the IPD Contract,
- caused damage to equipment belonging to ONEC, and
- continued to use fuel provided by third parties under contract with ONEC after the termination of the IPD Contract.

On September 21, 2023, Northland filed a Statement of Defence and Counterclaim. The counterclaim alleged ONEC breached the IPD Contract by failing to pay the outstanding invoices and stand-by charges incurred when ONEC directed Northland to stop work. Northland sought contractual damages for this breach. Northland also argued that it squarely falls within the definition of "claimant" under the Bond and that Liberty was liable for the amount owed by ONEC. In the alternative, Northland claimed that the Defendants by Counterclaim, including NTE, were liable for unjust enrichment.

Roughly one year later, Northland filed an application for summary judgment seeking the dismissal of ONEC's action against Northland, as well as judgment against the Defendants by Counterclaim (NTE, ONEC and Liberty).

The Court's Findings

In its decision, the Court considered each element of Northland's motion for summary judgment.

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1) ONEC's Claim

First, the Court determined ONEC's claim against Northland.

a) Inducing Breach of Contract

With respect to ONEC's claim of inducing breach of contract, the Court determined that, due to the lack of evidence supporting the essential elements of the tort of inducing breach of contract, Northland successfully demonstrated that this claim by ONEC had no merit.

b) Breach of the IPD Contract

With respect to ONEC's allegation that Northland breached the IPD Contract, ONEC argued that Northland breached the IPD Contract when it terminated the contract and refused to remobilize to the work site after the dispute that arose between ONEC and NTE in November 2022 was resolved. ONEC submitted that Northland's claim for payment of the outstanding invoices was not justified under the IPD Contract. As a result, ONEC claimed that the decision to terminate the contract on that basis was equally unjustified and was a breach of the IPD Contract.

The Court found ONEC's allegations problematic as, among other things, they were not pled in the Statement of Claim. The Court ruled that Northland met its burden to establish that ONEC's claim that Northland breached the IPD contract had no merit.

c) *Damage of Equipment and Use of Fuel Claims*

ONEC also sought compensation alleging Northland damaged equipment owned by ONEC and for the costs of fuel charged to ONEC and stored at Northland's facility. The Court found that ONEC's claims related to the damage of equipment and the use of fuel had no merit.

2) Northland's Counterclaim

The Court then addressed Northland's counterclaim. In this regard, the Court concluded that the affidavit evidence before it provided sufficient context for the Court to determine who the parties were to the Prime Contract and the nature of the IPD Contract. The Court also noted that it could decide whether Northland fell into the definition of "claimant" under the Bond, and as a result, could resolve the questions related to liability of ONEC and Liberty. However, the Court found that due to conflicting evidence and credibility issues regarding Northland's invoicing, it could not decide on the scale of the damages.

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The Court noted that the main point of contention between ONEC and Northland was whether Northland's invoices to ONEC were compliant with the terms of the IPD Contract and any other agreements reached by the parties and, as a result, whether Northland was entitled to further payments from ONEC. ONEC did not dispute that under the IPD Contract it had the obligation to reimburse Northland for the costs Northland incurred in the performance of the IPD Contract. The terms that governed the reimbursement of Northland's costs were stated at Article 5 of the IPD Contract and stipulated that "Reimbursable Costs" were actual costs supported by receipts, invoices and other suitable documentation. The Court noted that the real issue was whether Northland had proven that it had incurred reimbursable costs in an amount that exceeded what ONEC had already paid. The Court determined that whether the contract was a partnership or a subcontract did not change ONEC's legal obligation to pay for admissible reimbursable costs.

Having determined that ONEC had an obligation to pay Northland, the Court went on to address the liability of the surety, Liberty. The Court noted that the nature of the contractual relationship between NTE, ONEC and Northland was relevant to Liberty's liability. Liberty claimed that Northland was a party to the Prime Contract, acting in partnership with ONEC. It also noted that the IPD Contract set out that ONEC and Northland shared a common purpose and interest in the Project and had equal right of control in the Project. Liberty highlighted that the IPD Contract created a "risk pool" condition that indicated the parties intended on sharing both the profits and any losses of the Project. Liberty argued that this created a contractual relationship between Northland and ONEC that was different from a traditional subcontract. As a result, Liberty submitted that Northland did not qualify as a "claimant" under the Bond.

At the hearing, both Northland and NTE took the position that Northland was not a party to the Prime Contract but rather a subcontractor. Northland also submitted that irrespective of the label attached to the IPD Contract, Northland fell within the definition of "claimant" under the Bond.

The Court held that it was satisfied that Northland was not a party to the Prime Contract. It noted that on the cover page of the Prime Contract, in the box "Name of Contractor" the following appeared: "ONEC Construction Inc In Partnership with Northland Builders Ltd". The Court indicated that two affiants explained in their respective affidavits that Northland's participation in the Project was essential to securing the bid for the Prime Contract because Northland was a Gwich'in business and the prominent role of Gwich'in businesses was key to obtaining this contract. The Court went on to state that this explained why Northland's name had to appear on the

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Prime Contract, whether it was a party to the contract or not. The Court held that the simple mention of Northland on the cover page of the contract was not determinative of this question. Moreover, the Court noted the signature page identified only two parties to the Prime Contract: ONEC and NTE. ONEC and NTE were also the only parties identified under "Notice Address" in the Prime Contract.

Ultimately the Court found that, considering the text of the Prime Contract and the circumstances known to the parties at the time they entered the Prime Contract, an objective and reasonable person would conclude that Northland was not a party to the Prime Contract.

Liberty argued that the conditions of the IPD Contract regarding the sharing of responsibilities as well as the sharing of profits and losses created a partnership, such that Northland did not fall within the definition of "claimant" under the Bond. The Court agreed with Liberty that the IPD Contract created a form of collaboration between ONEC and Northland that was not typical of a construction subcontract. However, the Court went on to state that "Article GC 2.1.2. specifically states that "[a]lthough the Contract establishes a relationship of mutual trust and good faith [...], it does not create an agency relationship, fiduciary relationship, partnership, or joint venture" (emphasis added)." The Court added that the Bond defines a "claimant" as "one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the contract", and found that this language was broad and did not limit claimants to traditional subcontractors.

The Court went on to find that, in this case, the IPD Contract identified the "Owner" as ONEC and the "Contractor" as Northland, creating a form of subordination. The Court further found that Article 5 Reimbursable Costs and Article A-6 Payment set out an obligation on ONEC to pay Northland all actual costs supported by receipts, invoices and other suitable documentation it incurred in performing the contract, plus overhead of 8%. The Court determined that these terms set out a direct contract between ONEC and Northland for labour, material, or both, reasonably required for use in the performance of the contract.

In the end, the Court concluded that ONEC and Liberty were liable for the costs Northland incurred for the work performed on the Project. Lastly, having found that Northland was not a party to the Prime Contract and that ONEC and Liberty were liable to Northland for any proven outstanding amounts, the Court found that the owner, NTE, was not liable to Northland.

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Remarks

Although the facts of this case may not depict a typical scenario involving the use of an IPD contract model, the decision in *Onec Construction Inc. v NWT Energy Corp. Ltd.* is one of the few cases in which Canadian courts have weighed in on the interpretation of a contract the parties have termed as an IPD contract. As interest in collaborative contracting models continues to rise, it is reasonable to anticipate Canadian courts will increasingly be asked to interpret these models as disputes involving these relatively novel contractual frameworks come to light.

Practical Lessons for Construction Lawyers from *Sayers Foods Ltd. v. Gay Company Ltd.*

Sayers Foods Ltd. v. Gay Company Ltd., 2026 ONSC 918

LU #174 [2026]

Primary Topic:
XV Adjudication
Jurisdiction:
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Authors:
Brendan D. Bowles, partner, and Jessica Gahtan and John David Du Vernet, associates, Glaholt Bowles LLP

CanLII References:
2026 ONSC 918
2026 ONSC 1589

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Brendan D. Bowles

Jessica Gahtan

John David DuVernet

INTRODUCTION

Ontario's adjudication regime under the *Construction Act* was designed to provide rapid, interim resolution of payment disputes in the construction industry. Since the onset of statutory adjudication in 2019, the Divisional Court has been called upon with increasing frequency to delineate the boundaries of judicial oversight of adjudicators' determinations. *Sayers Foods Ltd. v. Gay Company Ltd.*, 2026 ONSC 918, is not only the latest notable Divisional Court pronouncement on statutory adjudication, but it also addresses matters of general importance beyond the *Construction Act*: allegations of fraud, delay claims, adjudicator bias and the treatment of evidence on judicial review.

BACKGROUND

Sayers Foods Ltd. ("**Sayers**") hired Gay Company Ltd. ("**Gay**") under a CCDC 2 Stipulated Price Contract to construct a replacement grocery store after the original building had been destroyed by fire.

Sayers alleged that Gay caused project delays and delivered Notices of Non-Payment under the Construction Act for two of Gay's invoices notwithstanding the Consultant had certified the disputed invoices. Gay then commenced two statutory adjudication processes under the *Construction Act* which the parties agreed to consolidate into a single adjudication. The adjudication process included a hearing conducted on Zoom.

The Adjudicator ordered Sayers to pay $685,574.91, plus interest (the "**Determination**"). The quantum of Gay's invoices was undisputed; the central issue was whether Sayers had established any basis to withhold payment of the certified invoices.

THE ADJUDICATOR'S DETERMINATION

Sayers gave three reasons for non-payment: it was retaining notice holdback, it believed Gay had delivered false statutory declarations, and it intended to claim against Gay for delay costs.

On notice holdback, the Adjudicator found that Sayers acknowledged there was no written notice of lien in the prescribed form, and that its counsel agreed there was no obligation to retain notice holdback.[1]

[1] Notably, this is no longer the case as a result of the 2026 amendments to the *Construction Act*, but at the time of the adjudication determination in 2024, this was an accurate statement. The Divisional Court also released an endorsement (*Sayers Foods Ltd. v. Gay Company Ltd.*, 2026 ONSC 1589) declining submissions with respect to the applicability of these amendments to the Adjudicator's Determination.

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On the alleged false statutory declarations, the Adjudicator found that they were accurate when submitted, and noted he was "reluctant to make any such finding of fraud or untrue statement" absent cross-examination—an important practical consideration for parties alleging fraud in adjudication.

On delay, which the Adjudicator considered the "primary reason for non-payment," he found there was no contractually binding schedule and that Sayers did not follow the contractual process for claiming a credit for delay.

PRELIMINARY ISSUES AT THE DIVISIONAL COURT

1. Approach to Facts on Judicial Review

The Divisional Court took issue with Sayers providing a summary of facts citing the adjudication record rather than the Determination. On judicial review, the starting point is the Adjudicator's findings of fact and analysis—it is not a new hearing. Sayers's approach amounted to an attempt to re-argue the adjudication rather than explaining why the Adjudicator's findings were unreasonable in light of the record. The Divisional Court has clarified that facts in a judicial review are derived from the adjudicator's determination, just as on an appeal the factual record is derived from the lower court decision. To overturn the facts as established by an adjudicator requires palpable, overriding error.

2. Introduction of New Evidence

The Divisional Court rejected Sayers's argument that a more permissive standard for the introduction of fresh evidence should apply for judicial reviews of *Construction Act* adjudications. Sayers argued that the short timeframes for adjudication caused unfairness, but the Divisional Court declined to relax the general standard. It found the proposed fresh evidence would not have impacted the outcome in any event, and that if Sayers had complied with its contractual obligations in a timely manner, it would have had the evidence prior to the adjudication. The Divisional Court also declined to admit the evidence because it contained impermissible material, including factual and legal argument, inadmissible opinion evidence, and hearsay.

ARGUMENTS ON THE MERITS

Sayers applied to the Divisional Court for judicial review, relying on numerous grounds including the Adjudicator's treatment of Sayers' three reasons for non-payment.

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Practical Lessons for Construction Lawyers from *Sayers Foods Ltd. v. Gay Company Ltd.*

1. Notice Holdback

The Divisional Court found the Adjudicator's analysis was reasonable: notice holdback obligations for an owner do not arise unless written notice of lien is given in the prescribed form. Sayers's argument that its discovery of liens registered on title constituted such notice is wrong in law, and there was no evidence it had received written notices of lien in the prescribed form.

2. Alleged Fraudulent Misrepresentation

Sayers argued that Gay was dishonest for arguing in a dispute with its subcontractor that the subcontractor was offside a construction schedule while denying the existence of an agreed schedule in the dispute with Sayers. The Divisional Court disagreed: subcontract terms do not have to mirror the prime contract, a subcontractor could be bound by a schedule while the contractor is not, and it is not dishonest for Gay to take the position that it incurred losses from subcontractor delay while maintaining it has no contractual liability to the owner for delay. Parties are entitled to advance alternative theories in litigation.

3. False Statutory Declarations

The Adjudicator found the statutory declarations were true at the time they were made. The Divisional Court agreed, finding that the failure to pay subcontractors by the time of the adjudication was a consequence of Sayers's failure to pay Gay, not dishonesty justifying non-payment.

PROCEDURAL FAIRNESS ARGUMENTS

1. Adjudicating Multiple and Complex Matters

Sayers argued that adjudication may only address a single matter. This was rejected because both parties consented to consolidation, and the subject matter does not change because of a defence. While the Court acknowledged that pursuing a set-off defence in adjudication may be challenging, it stated that "[o]wners who wish to be able to pursue a set-off claim for delay, in the context of a prompt payment adjudication, will bear the burden, in the adjudication, of establishing the contractual basis of their entitlement." Sayers was not precluded from pursuing its delay claim in court.

2. Reversing the Order of Submissions

Sayers argued it was unfair that it was required to submit first. The Divisional Court disagreed: the only substantive issue was Sayers's defence, for which it bore the burden of proof, and the party bearing the burden usually goes first. In any event, the order was agreed by the parties.

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3. Non-Compliance with Section 13.11 and GC 6.6

Sayers challenged Gay's compliance with section 13.11 of the *Construction Act* regarding provision of the contract to the adjudicator. The Divisional Court found no procedural fairness issue, as Sayers had an opportunity to address the matter and any issues with the version should have been apparent at the outset.

Sayers also raised an argument regarding its failure to advance its claim for credit under GC 6.6 of the Contract. The Divisional Court stated this was not a question of procedural fairness and accordingly not within the court's prescribed jurisdiction for judicial review. The Court commented that the Adjudicator's concern was not that Sayers failed to "complete" its claim, but that it failed to "advance" it over the nine months between giving notice and the adjudication.

STANDARD OF PROOF AND THE INJUNCTION ANALOGY

Sayers argued that adjudications are akin to injunctions and the "serious issue to be tried" standard should apply to defences. The Divisional Court rejected this. It said a better analogy would be an award for interim support in family law: the legislature has concluded that payment cannot await a fulsome trial and money must continue to flow. Holding that prompt payment adjudication is unavailable whenever an owner advances a complex delay claim would defeat the purpose of adjudication. The Divisional Court also noted that owners can protect themselves from risks associated with prompt payment through contractual terms, including processes for determination and remedies, and performance bonds.

REASONABLE APPREHENSION OF BIAS

Sayers argued the Adjudicator was biased, pointing in part to his refusal to release a Zoom recording of oral submissions. The Divisional Court found there is no obligation on an adjudicator to record argument, keep a recording, or release it. The Divisional Court responded to the assertion that the reasons read like a pre-decided result by noting that "[r]easons are not supposed to set out the intellectual journey of the decision-maker. They are not a chronicle of the hearing. They are a decision, supported by reasons." Nevertheless, the Divisional Court cautioned that in future cases it would be helpful for adjudicators to issue a record of important concessions or determinations made before the conclusion of the hearing.

SERVICE OBLIGATIONS FOLLOWING LEAVE TO APPEAL

The Divisional Court noted that where leave for judicial review has been granted, the applicant must serve the Notice of Application on the Ontario

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Attorney General under the *Judicial Review Procedure Act* and should serve a copy on the Ontario Dispute Adjudication for Construction Contracts.

CONCLUSION

Sayers Foods reinforces that judicial review of adjudication determinations is narrow in scope, that fresh evidence will be admitted only in exceptional circumstances, and that parties must present their best case during the adjudication and not hope for a re-hearing on judicial review. The case underscores the importance of thorough preparation, strict adherence to contractual procedures, and realistic expectations about the limited grounds on which adjudication determinations may be challenged.

Liquidated Damages After Termination: Clarifying the Accrual End Point in *Kuipers v NEP Limited GP Inc*

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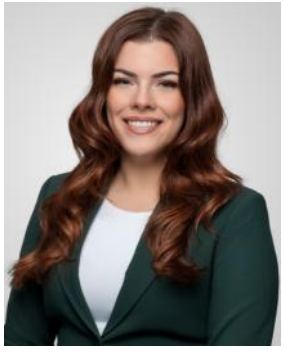
Corbin Devlin



Sarra Kerbic

The Alberta Court of King's Bench in *Kuipers v NEP Limited GP Inc*, offers clear guidance on when liquidated damages ("**LDs**") stop accruing under a milestone-based clause.[1] The case turns on a simple proposition: where the contract links LDs to Temporary Acceptance ("**TA**"), the clock runs until TA is actually achieved. This occurs even if the owner terminates the contract earlier and completes the project with a replacement contractor, provided the owner is not responsible for the delay.[2]

1) End Date for Accrual

In *Kuipers*, the Engineering, Procurement and Construction defined TA with reference operational and performance criteria. The contract guaranteed TA by May 31, 2015 and provided for LDs at $2,877/day beginning March 1, 2015 if TA was not achieved by the deadline. The owner terminated the contract on February 24, 2016 for failure to reach TA within six months of the guaranteed date. Nevertheless, the Court held that LDs continued to accrue post-termination and ended only when TA was in fact achieved on November 21, 2016. The result was an LD award of $1,818,264, based on delay from March 1, 2015 to November 21, 2016 at $2,877/day.[3]

The Court aligned this outcome with contemporary authorities awarding LDs through completion by a replacement contractor, distinguishing older cases that cut off LDs at termination.[4] It emphasized the clause's clear and deliberate language regarding the LD accrual trigger and endpoint. The Court rejected arguments that LDs stop at termination, at a board-ordered work stoppage, or at an informal notion of "commercial viability."[5]

This approach supports two risk-allocation premises. First, it avoids rewarding abandonment; a contractor who cannot meet the schedule does not cap LD exposure by precipitating termination. Second, it discourages owner opportunism by implicitly conditioning post-termination accrual on the owner acting reasonably and not causing delay.[6]

2) Alternative Delay Damages

While the owner also claimed lost profits and interest as alternatives, the Court treated those as contractually excluded by a clause excluding liability for consequential loss.[7]

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[1] 2025 ABKB 278.
[2] *Ibid* at 329-338.
[3] *Ibid* at 324, 327, and 338-339.
[4] *Ibid* at 330-334.
[5] *Ibid* at 325-327.
[6] *Ibid* at 339.
[7] The clause captured loss of profits, revenue, and cost of capital.

Liquidated Damages After Termination: Clarifying the Accrual End Point in *Kuipers v NEP Limited GP Inc*

Kuipers v NEP Limited GP Inc
LU #174 [2026]

Primary Topic:
III. Building Contract
Jurisdiction:
Alberta
Authors:
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CanLII Reference:
2025 ABKB 278

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Accordingly, LDs operated as the agreed substitute for time-related economic loss; separate delay damages were unavailable not as a matter of doctrine but by contract.[8]

3) Consequential Loss vs. Remediation

The Court drew a firm line between excluded consequential loss and recoverable direct costs to remediate and complete the defective work. Reading "Consequential Loss" to bar rectification would eviscerate the core promise of a turnkey EPC contract. On that basis, the Court awarded $11,364,490.08 for remediation/completion, while maintaining the bar on loss of profit/revenue/financing claims.[9]

4) Intent and Enforceability

Arguments that the LD clause existed only to satisfy financing requirements, while having some basis in fact, did not persuade the Court. Interpretation is objective.[10] The clause's plain language and commercial context, and not subjective motives, prevail. Evidence that project lenders required the clause, if anything, supported that it was meant to operate as written.

[8] *Ibid* at 274, 279, 283, 337, 371.

[9] *Ibid* at 287-290, 344-347, 360-374.

[10] Ibid at 316-323.

No Time for Delay in Lien Claims...Usually: A Comment on 1951789 Alberta Ltd v Britannia Block General Partnership Inc

1951789 Alberta Ltd v Britannia Block General Partnership Inc,
2026 ABKB 283

LU #174 [2026]

Primary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Alberta
Authors:
Catriona Otto-Johnston, Partner and Elisa Stewart, Associate -- Rose LLP
CanLii Reference:
https://canlii.ca/t/kkc2f

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Catriona Otto-Johnston

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Introduction

The *Prompt Payment and Construction Lien Act*[1] is intended to provide a practical and efficient process for adjudicating lien claims. One particular way the *PPCLA* meets these objectives is by permitting a court to discharge a certificate of *lis pendens* and its related lien if a trial has not occurred within 2 years from the date the certificate of *lis pendens* was registered, pursuant to section 46(2). However, until the decision in *1951789 Alberta Ltd v Britannia Block General Partnership Inc* was issued in May 2025 (which was commented on in Legal Update #171), the Courts had historically been hesitant to grant such relief.

The lien claimant successfully appealed the Application Judge's decision to a Justice: *1951789 Alberta Ltd v Britannia Block General Partnership Inc*.[2] The *Britannia* decision confirms the *PPCLA* is to be interpreted strictly, and relief that is not specifically sought in an application should not be extended so as to wholly remove statutory protections to lien claimants without sufficient grounds or factual support to do so. Further, although parties to lien claims are strongly urged to proceed as expeditiously as possible in a lien dispute, issues as to the existence or quantum of security are usually better adjudicated with an appropriate evidentiary record before the Court. Such relief should not be granted lightly, particularly on the basis of delay alone.

The following discussion sets out the specific circumstances at issue in *Britannia* before turning to the Court's approach to section 46(2) of the *PPCLA,* the issue of delay under the *PPCLA* in general, and finally the appropriateness of reducing the quantum of lien security without a sufficient evidentiary record before the Court.

Background

In February 2020, the appellant ("UIG") registered a lien, followed by a certificate of *lis pendens* in July 2020, in relation to work performed on a residential housing project owned by the respondent ("Britannia"). In order to facilitate the sale of the project, Britannia deposited a lien bond in the amount of $1,595,842.50 into court (the "Security") and the certificate of *lis pendens* and lien were discharged from title.

Delays quickly arose in the litigation, including in part because of the COVID-19 pandemic. The parties filed multiple pleadings, affidavits, and applications relating to various issues such as the validity of the lien, questioning, and document production. By the time of the application at issue in this decision (the "Application"), there were three related actions (the UIG Action, the Britannia Action, and the Subtrades Action) as well as two applications

[1] RSA 2000, c P-26.4 (the "*PPCLA*").
[2] 2026 ABKB 283 [*Britannia*].

No Time for Delay in Lien Claims...Usually: A Comment on 1951789 Alberta Ltd v Britannia Block General Partnership Inc

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for summary relief, one brought by each party, which were adjourned *sine die* pending the outcome of the Application.

On May 28, 2025, the Applications Judge granted Britannia's application to vacate the Security. In his decision, the Applications Judge first declined to merely reduce the Security. He concluded the Application was not the appropriate forum to determine such a fact-specific issue and, in any event, UIG's lien claim was at least arguable. Nonetheless, he found it was appropriate to vacate the Security pursuant to section 46(2) of the *PPCLA,* or based on his general discretion, because of the significant amount of time that had passed since the certificate of *lis pendens* was registered. UIG appealed that decision.

Section 46(2) of the *PPCLA*

On appeal, the Court in *Britannia* began its discussion by noting the *PPCLA* provides an exceptional statutory remedy to protect subcontractors and suppliers on a building project and allow for the cost-effective, practical, and timely resolution of construction debt claims. Permitting security to be paid into court transfers lien rights to that security so as to balance owners' interests with the interests of those who supply labour and materials on a project.[3]

One example of a provision that balances the right of lien claimants and owners, while promoting the timely resolution of lien claims, is section 46 of the *PPCLA,* which 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.

[3] *Britannia* at para 31.

1951789 Alberta Ltd v Britannia Block General Partnership Inc,
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No Time for Delay in Lien Claims...Usually: A Comment on 1951789 Alberta Ltd v Britannia Block General Partnership Inc

In allowing UIG's appeal and declining to apply section 46(2) of the *PPCLA*, the Court gave three reasons.

First, the Justice found that granting relief under section 46(2) was not appropriate because Britannia had not sought this relief in its Application. Rather, the Applications Judge applied the provision on his own motion. Citing two decisions of the Alberta Court of Appeal[4], the Justice cautioned against importing a distinct statutory remedy without notice to the parties, particularly where there is no consent to the relief being ordered.[5]

Second, the Court held that section 46(2) was not applicable in the circumstances because there was no lien or certificate of *lis pendens* on title to the lands, as they were discharged and replaced by the Security in 2021. The Court noted that although a lien bond stands in place of the land pursuant to section 48 of the *PPCLA,* section 46 is specifically focused on circumstances where a certificate of *lis pendens* has yet to be discharged, which was not the case in this matter. The Court said it would be more appropriate to address the issue of delay in lien proceedings where a certificate of *lis pendens* no longer exists under rules 4.31 or 4.33 of the Alberta *Rules of Court,*[6] which permit the court to dismiss an action for delay.[7]

Third, the Justice found it was not appropriate for the Applications Judge to exercise his discretion in the circumstances. Although section 46(2) is a discretionary provision, the parties should have been permitted to submit evidence as to the reason why trial had not yet occurred.[8] In fact, the Court noted that jurisprudence cited in the Applications Judge's decision confirms the onus in a section 46(2) application is on the lien claimant to provide "some explanation" as to why there has been a delay.[9] Yet UIG was not given notice of the issue or a fair opportunity to respond to the issue with evidence or submissions, and the evidentiary record before the Applications Judge was insufficient to address the issue of delay.

On these bases, the Court found the Applications Judge erred in applying section 46(2), or the Court's general discretion, to vacate the security on the basis of delay.

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[4] *Mazepa v Embree*, 2014 ABCA 438 and *Emkay Canada Fleet Services Corp. v Gemini Corporation*, 2020 ABCA 245.

[5] *Britannia* at paras 34-36, 38.

[6] Alta Reg 124/2010.

[7] *Britannia* at para 40-42.

[8] *Britannia* at paras 44-45.

[9] *Britannia* at para 45, citing *1361556 Alberta Ltd v Ristorante Cosa Nostra Inc,* 2021 ABQB 157 at paras 34-37.

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Vacating or Reinstating the Security

Although section 46(2) did not apply in the circumstances, Britannia's Application to vacate or reduce the Security remained at issue. The Court determined the Security should be reinstated pursuant to the original order permitting the Security to be paid into court and on the basis of section 48(1)(c) of the *PPCLA,* which gives the Court broad discretion to make such an order as it considers proper.[10]

In particular, the Court noted the parties had filed additional affidavit evidence since the initial hearing before the Applications Judge. That evidence provided further details of the various related actions, applications, adjournments, and settlement efforts between the parties, which was sufficient to show why a trial had not yet been held.

In the course of declining to vacate the Security, the Court noted that the *PPCLA* does not require the Court to determine blameworthiness for any delay.[11] In fact, section 46(2) does not mention delay at all. Rather, it emphasizes that the *PPCLA* seeks to have lien matters move forward in a practical and expeditious manner, by permitting a party to have a certificate of *lis pendens* vacated if a trial has not been held within two years of its registration.[12]

In this case, although it was uncontroverted that matters had not proceeded in a practical or efficient manner, the record showed ongoing procedural activity in respect of a contentious and complicated dispute. Even so, the Court emphasized that, while it was not an appropriate case to vacate the Security, the parties were expected to pursue the actions with the expediency the *PPCLA* requires, such as by advancing other avenues for relief including the extant summary judgment and summary dismissal applications.[13]

Quantum of Security

In determining what amount of the Security should be reinstated, the Court agreed with the Applications Judge that this Application was not the appropriate avenue to decide such relief, which would be tantamount to summary judgment. Since security stands in place of a lien registration, caution must be taken in determining whether any reduction would be appropriate.[14]

Without a sufficient evidentiary record before the Court, including with

[10] *Britannia* at para 48.
[11] *Britannia* at para 51.
[12] *Britannia at para 51.*
[13] *Britannia* at paras 50-53.
[14] *Britannia* at para 55.

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respect to separate but related actions such as the Subtrades Action, reducing the Security would be inappropriate.[15]

Conclusion

Ultimately, UIG's appeal was allowed and the Security was reinstated in the amount of $1,408,697.84.[16] The Court also exercised its discretion to set several specific procedural terms and directions for the parties to follow so as to advance the action in an expeditious manner in accordance with the purpose of the *PPCLA*.[17]

Takeaway

Although the Security was ultimately reinstated in *Britannia,* this decision is a reminder to lienholders of the risks involved when a lien action is delayed. There is generally nothing to be gained from failing to diligently prosecute a lien action, and while the Chambers Justice found that the facts of this particular case were not sufficient to justify vacating or reducing security on the basis of delay alone, the appeal decision in *Britannia* is a clear reminder that one of the core purposes of lien legislation is to advance and resolve construction payment disputes in a timely and efficient manner. While this decision addresses the provisions of Alberta's *PPCLA* in particular, the same principles may inform lien matters in other jurisdictions, many of which have similar provisions to Alberta's "two-year rule".

[15] *Britannia* at paras 56-57.
[16] This amount reflects a clarification provided by UIG as to the total amount of the lien claim: *AJ Decision* at para 6.
[17] *Britannia* at paras 58-59.

Rule 49.14: Partial Settlement Disclosure

Rule 49.14: Partial Settlement Disclosure

LU #174 [2026]

Primary Topic:
I General
Jurisdiction:
Ontario
Authors:
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On June 16, 2025, new Rule 49.14 of Ontario's *Rules of Civil Procedure* came into force. The rule codifies and expands a line of case law beginning with *Aecon Buildings v Stephenson Engineering Limited*[1], which imposed a bright line obligation on parties to immediately disclose partial settlements, with a stay of the action being the *only* remedy for failure to immediately disclose. However, while seemingly harsh, this judge-made rule was not of universal application, it only applied if the partial settlement changed entirely the "landscape of the litigation" as the Ontario Court of Appeal formulated the test. Often on an "Aecon motion" as they came to be known, the issue was not the timing of the disclosure, but whether the partial settlement had sufficiently changed the litigation landscape such that a stay was appropriate.[2] Other times the fate of the action turned on whether the disclosure of the partial settlement was soon enough to qualify as "immediate".[3]

The new Rule 49.14 is a significant step towards clarifying and reforming the law surrounding partial settlements. In fact, the new Rule purports to do away with the Aecon test by clarifying that *any* partial settlement should be disclosed, not just those that change entirely the litigation landscape. It also seeks to provide clear guidance as to the timing of disclosure. Significantly, where the disclosure requirement is breached, the new Rule affords discretion to the courts to determine an appropriate remedy as opposed to always requiring a stay. In the authors' view, these are welcome developments which promote resolution of cases based on their substantive merits and not on tactics or technicalities, and which, as a practical matter, should make it easier for counsel to advise their clients and to ensure compliance with their disclosure obligations.

However, it would be an overstatement to say all controversies are settled. We are in a period of transition where cases remain before the courts where the partial settlement at issue pre-dates the new Rule, and there are certain unresolved questions that in the authors' view will need to be answered by future cases. This article reviews the requirements of the new Rule and provides practical guidance for practitioners navigating the transition.

Rule 49.14 Requirements

According to Subrule 49.14(1), a "partial settlement agreement" is a binding written or unwritten agreement between at least one plaintiff and at least one defendant in an action, where at least one defendant is not party to the agreement, and the agreement does not settle the action in its entirety.

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[1] 2010 ONCA 898, leave to appeal dismissed 2011 CanLII 38818 (SCC).

[2] See Bennington Financial Corp, v Medcap Real Estate Holding Inc, 2023 ONSC 2742, and McLaughlin v 2495048 Ontario Inc, 2023 ONSC 4866.

[3] Peninsula Employment v Castillo, 2025 ONSC 1121.

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The crux of the new Rule is found in Subrules 49.14(4) and (5): the obligation to promptly disclose. This obligation belongs to the plaintiff, who must disclose the terms of the settlement agreement, excluding monetary value, to every other party to the proceeding who is not party to the settlement agreement. Disclosure must be made immediately if the hearing has commenced, or otherwise within 7 days or earlier if another step occurs in the proceedings. A new form, Form 49E, must be served and filed with the court.

Importantly, parties cannot contract out of the disclosure obligation, pursuant to Subrule 49.14(6).

Subrule 49.14(7) allows the court to impose a range of consequences for non-compliance, including but not limited to: order for costs, further examinations for discovery, striking out evidence, stay of proceedings, and "such other order as is just". This marks a departure from previous jurisprudence which required the courts to stay the proceedings if a party failed to disclose.[4]

Although beyond the scope of this article, counsel should be aware of the additional requirements relating to settlement agreements involving parties under disability, found in Subrules 49.14(8) and (10).

What Are the Limits of Disclosure?

The new Rule appears straightforward: if you are a plaintiff and involved in a partial settlement, you must disclose the terms of that agreement within the prescribed timeline. *Smialek et al. v. Status Construction Ltd. et al.* confirmed Rule 49.14 now applies more broadly to all partial settlement agreements regardless of their impact on the adversarial landscape.[5] Previously, the courts focused on whether the partial settlement entirely changed the landscape of the litigation; a test grounded in the abuse of process doctrine.[6]

The new Rule is less clear, however, regarding the timing of the obligation to disclose relative to documenting the partial settlement. For example, does the obligation arise where the parties have reached an agreement in principle but have not yet prepared or executed formal Minutes of Settlement? There is no bright line established by the new Rule as to how formal the terms need to be before the disclosure obligations arise. On one hand, the new Rule seems to state that it does not arise until the terms are certain, since the terms themselves must be disclosed in Form 49E. On the other

[4] *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324.

[5] 2025 ONSC 5229.

[6] See in addition to *Aecon and Handley Estate*: *Gowing Contractors Ltd. v. Walsh Construction Co Canada*, 2025 ONSC 2671; and *Poirier v. Logan*, 2022 ONCA 350.

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hand, the new Rule requires disclosure of "unwritten" partial settlement agreements, perhaps reflecting a concern by the legislature that parties should not be permitted to drag their feet in reducing precise terms to writing in order to push back the disclosure obligation. The authors suggest that the distinction between the timing of disclosure and the timing of filing Form 49E indicates the latter is the intended approach, although this is yet to be clarified by the courts.

There may further be some cases where it is unclear whether the disclosure obligation has been triggered if there is no evidence of a meeting of the minds. Say, for example, the parties settle their dispute at mediation but agree to have their lawyers take the pen to the minutes another day. There is, in this scenario, a verbal settlement agreement that goes beyond an "agreement to agree" which may, for the purposes of the new Rule, trigger the requirement to disclose before filing of Form 49E and before formal execution of a written settlement agreement.

However, the risk of not having formal minutes of settlement executed at mediation is that the deal will fall apart. Given that risk, there will be parties who resist disclosure of a partial settlement in principle until a formal settlement document is agreed to and signed, even if significant time has passed since the agreement in principle was reached and the formal settlement document ends up being materially consistent with the earlier verbal agreement. Will disclosure of only the formal settlement document after it is executed be too little, too late?

The court provided a partial answer to these questions of formality and timing in *Plenary Health Milton LP v PCL Constructors*,[7] in which the existence of the partial settlement agreement was disclosed before it was executed, as it related to another negotiated agreement between the parties. The court held that this was timely disclosure of the partial settlement, akin to advance notice, in line with the decision in *Kingdom Construction Limited v Perma Pipe Inc*.[8] *Plenary Health*, however, turns on its facts and may not be applicable in all instances.

Further, is the duty owed to anyone who is not a party to the litigation? In *Gowing*, the court considered the scope of the partial disclosure rule prior to Rule 49.14's enactment. In *Gowing*, the court confirmed that parties who are not directly involved in the litigation, but who are connected to related proceedings must receive disclosure from the settling parties, following the principles set out in *Aecon*.

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[7] 2025 ONSC 5756.
[8] 2023 ONSC 4776, affirmed in 2024 ONCA 593.

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It is uncertain whether *Gowing* and *Aecon* remain good law as to scope of disclosure under the new Rule. In the meantime, prudent counsel should err on the side of caution and consider whether any parties in related actions may be affected by the partial settlement and whether disclosure is appropriate.

Remedies and Retrospectivity

Although the new rule broadens the range of relief available for non-disclosure, the court in *Smialek* made it clear that harsher consequences are not off the table. In that case, the court found that rule 49.14 does not overturn *Handley*, which mandated a stay of proceedings for failure to disclose a partial settlement which changes the adversarial landscape. Put another way, while the extent of the change to the litigation landscape is no longer the threshold question as to whether to disclose or not, and while a court is no longer required to impose a stay in all cases, where a partial settlement does fundamentally alter the litigation landscape and is not disclosed in a timely manner, a stay of proceedings remains a very real possibility.

Notably, the disclosure in *Smialek* was made prior to rule 49.14's enactment and the court therefore declined to decide the issue of retrospectivity. The court in *Plenary Health* did, however, provide clarity on the issue, holding that rule 49.14 is intended to apply retrospectively "to the extent possible", as per section 52 of Ontario's *Legislation Act*. But, in *Plenary Health*, the new Rule was held not to apply because the timing for disclosure in this case was 2023, and Plenary could not be "expected to foresee rules that would not come into effect until two years later." The court proceeded to conduct a "change in the litigation landscape" analysis.

Therefore, the test of whether the settlement changes the adversarial landscape is not rendered entirely moot by the enactment of rule 49.14. *Smialek* and *Plenary Health* clearly carve out an exception to the application of the new rule for partial settlements entered into well before the new Rule's coming into force.

As for remedies, *Smialek* held that *Handley* continues to apply where a party fails to disclose a partial settlement that changes the adversarial landscape if rule 49.14 does not apply. However, *Plenary Health* introduces nuance to this rule through the application of section 52(5) of the *Legislation Act*: "if a new or amended regulation provides for a lesser penalty, the lesser penalty applies when a sanction is imposed after the new or amended regelation enters into force."

On this basis, the court in *Plenary Health* held that, if it were wrong in its determination that disclosure was timely, a lesser sanction of the ability to

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request a case conference to set an expedited timetable was the most responsive and proportionate remedy. Therefore, it is possible that less draconian remedies are available even where rule 49.14(4) and (5) do not apply to the disclosure, or lack thereof, itself. Parties should proceed with caution if relying on this point made in *obiter*.

There remains a gap in the case law as to whether the automatic stay of proceedings continues to be a default remedy if a partial settlement that entirely changes the adversarial landscape is not disclosed in a timely manner. The issue of whether the *Handley* remedy is mandatory in such circumstances was heard by a five-judge panel at the Ontario Court of Appeal in *1086289 Ontario Inc., operating as Urban Electrical Contractors v. The Corporation of the City of Welland* on October 24, 2025. As of the date of this article, the decision remains under reserve.

Trust or bust: Safeguarding adjudication proceeds from bankruptcy

Re Earth Boring Co. Limited et al.,
2026 ONSC 1242

LU #174 [2026]

Primary Topic:
XV Adjudication
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
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CanLii Reference:
2026 ONSC 1242

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Fraser MacKinnon Blair

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When a successful claimant under the Construction Dispute Interim Adjudication (Adjudication) provisions in the *Construction Act*[1] does seemingly everything right (obtains a favourable order and agrees to hold funds in escrow pending judicial review, which is ultimately dismissed), can insolvency law still strip those funds away? As *Re Earth Boring Co. Limited et al.* demonstrates, the answer is a sobering (and likely correct) yes.

Case summary

In *Re Earth Boring Co. Limited et al., 2026* ONSC 1242, the Ontario Superior Court of Justice (Commercial List) (***Re Earth Boring***) addressed competing claims to approximately CA$337,000 held in escrow. Earth Boring Co. Limited (**Earth Boring**) had originally retained Tulloch Geomatics Inc. (**Tulloch**) to provide surveying services, and a payment dispute led to an order (the **Determination**) made pursuant to the interim adjudication provisions contained in section 13 of the *Construction Act* requiring Earth Boring to pay Tulloch CA$337,390.62 (the **Payment**). Earth Boring brought an application for judicial review of Adjudication Order and the parties entered into a tolling and escrow agreement, under which the Payment was held in escrow by Earth Boring's legal counsel pending the outcome of Earth Boring's application for judicial review. Under the *Construction Act*, a party seeking leave for judicial review, must either pay the Adjudication Order or obtain a stay of the determination, otherwise payment of the determination is due **15 days** after the determination is communicated to the parties. To obtain a stay, the party seeking the stay must establish, on a balance of probabilities that:

a) There is a serious issue to be resolved on judicial review;

b) The moving party will suffer irreparable harm if a stay is refused; and

c) The balance of convenience favours granting a stay.[2]

The test is applied in a holistic fashion. The three factors are not watertight compartments or a series of independent hurdles, but are instead, "interrelated in the sense that the overriding question is whether the moving party has shown that is in the interest of justice to grant a stay." In the context of applications for judicial review of adjudication determinations under the *Construction Act*, the court has granted a stay where not all prongs of the test for a stay were met but the disputed amounts were paid into court.[3]

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[1] RSO 1990 c C30 (the *Construction Act*).

[2] *RJR -MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.

[3] *Sayers Foods Ltd. v. Gay Company Limited*, 2024 ONSC 4832, at paras 5, 15.

Trust or bust: Safeguarding adjudication proceeds from bankruptcy

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Primary Topic:
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V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Authors:
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Dragana Cerovina

In this instance, the parties agreed for the funds to be held in counsel's escrow account, pending the outcome of Earth Boring's application for judicial review. The funds were transferred to the escrow account in late 2024, however, and critically, the escrow agreement did not expressly mention or expressly create a trust over the funds.

On April 15, 2025, Earth Boring commenced proceedings under the *Bankruptcy and Insolvency Act* (***BIA***), which were converted to proceedings under the *Companies' Creditors Arrangement Act* (***CCAA***) only two days later. On that same day (April 17, 2025) the Divisional Court dismissed Earth Boring's application for leave for judicial review, effectively confirming the Adjudication Order in Tulloch's favour.

Earth Boring's shares were subsequently sold pursuant to a subscription agreement approved by the court through a reverse vesting order in the context of the *CCAA* proceedings, under which the escrow funds were classified as a retained asset of the newly constituted Earth Boring entity (**NewCo**), while Tulloch's claims were transferred to Earth Boring's ResidualCo, which was later adjudged bankrupt. Inconsequentially, on April 25, 2025, the Divisional Court issued its order confirming the decision reflected in its April 17, 2025 endorsement.

The central question before the Court was whether the escrow funds were the property of Earth Boring or constituted property held in trust for Tulloch. Tulloch relied on a line of authority from *Acepharm Inc., Re* and *Greenstreet Management Inc. (Re)*, in which Courts found that funds held in solicitors' trust accounts were impressed with a trust and therefore fell outside the bankrupt's estate. By contrast, Earth Boring relied upon s. 70(1) of the *BIA* and a line of authority stemming from *Canadian Credit Men's Trust Association Limited v. Beaver Trucking Limited*, which provided that a bankruptcy order takes precedence over all judicial attachments and executions, unless they have been completed by payment to the creditor, which was not the case as it relates to Tulloch, as the funds remained in escrow at the time of the commencement of the insolvency proceedings.

The Court, drawing from the Court of King's Bench of Alberta's decision in *Transtrue Vehicle Safety Inc. v. Werenka* (***Werenka***), found in favour of Earth Boring, holding that the escrow agreement did not establish a trust and that the absence of certainty of intention, was fatal to Tulloch's position. Drawing on *Werenka*, and cases cited therein, the Court concluded that where a bankruptcy event intervenes before a judgment is fully executed (i.e., before payment to the creditor), s. 70 of the *BIA* applies and the trustee in bankruptcy (or, in this case, Newco as the successor entity) prevails, even where the result may appear excessively "harsh" on the opposing party. Ultimately, the Court directed the escrow agent to release the funds to Newco in accordance with the scheme approved under the *CCAA* proceedings.

Trust or bust:
Safeguarding adjudication proceeds from bankruptcy

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Securing funds for future successful adjudication claimants

1. Establishing a genuine trust over the funds

Re Earth Boring appears to present a reasonably clear roadmap as to what would, and would not, be sufficient to protect successful adjudication claimant's funds from insolvency risk. As is evident, the single most important lesson is that the funds must be impressed with a proper trust if they are to be excluded from a debtor's estate under s. 67(a) of the *BIA*; all three elements of a trust must be present (those being: certainty of intention, subject matter and object). The escrow agreement in *Re Earth Boring* did not mention the notion of a trust and the evidence supported the fact that such intention never existed (at paras 62–63), unlike in *Greenstreet* where funds deposited with a solicitor "in trust" with no unilateral right of return established the necessary trust ingredients (at para 57). A successful claimant in a *Construction Act* adjudication seeking to protect funds that have been awarded should therefore consider the following:

- Incorporating express trust language in the holding agreement: The agreement governing the funds, whether termed an escrow agreement or otherwise, should explicitly state that the funds are held "in trust" and identify the trust's purpose. The Court drew a sharp distinction between a bare escrow and a true trust, finding that the absence of any reference to a trust in the *Re Earth Boring* escrow agreement was a threshold problem as it relates to "certainty of intention" (at para 62). Such an agreement should clearly articulate: (a) that the parties intend the funds to be held in trust; (b) the specific funds constituting the trust property (certainty of subject matter); and (c) the beneficiaries and the conditions for distribution (certainty of object) (at para 50).

- Payment into (not through) a dedicated trust account: In both *Acepharm* and *Greenstreet*, funds were paid to a lawyer "in trust," as opposed to in *Re Earth Boring* where the funds had temporary passage through a law firm's "mixed use" trust account before landing in an escrow account, which was given little weight by the Court as it relates to the intention to create a trust (at para 15).

2. The limits of the "contingent interest" argument

Tulloch attempted to argue that, even without a trust, Earth Boring's interest in the escrow funds was merely "contingent" on the outcome of its motion

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for leave, and that accordingly, the funds should not form part of the estate (at para 68). Again, following the reasoning in *Werenka*, the Court rejected this notion, acknowledging that treating the posted funds as a s. 67(a) trust simply because the outcome is undetermined runs afoul of s. 70; where bankruptcy intervenes before litigation is adjudicated and judgement fully executed, the trustee in bankruptcy prevails (at para 76). Hence, parties should be aware that the mere contingent nature of a claim is insufficient to properly protect a claimant in such circumstances.

3. Alternative measures

Beyond establishing a trust, a successful adjudication claimant should also consider:

- Active participation in any insolvency proceedings: As noted by the Court, Tulloch was aware of the insolvency proceedings and in communication with the Monitor's counsel but chose not to oppose or seek clarification regarding the status of the escrow funds prior to the closing of the Subscription Agreement (at para 23).

- Prompt enforcement of the adjudication order: Rather than agreeing to defer enforcement pending judicial review, successful claimants should move to immediately enforce and collect payment, thus, removing the risk entirely; s. 70(1) of the *BIA* provides a safe haven where executions have been completely executed by payment to the creditor (at para 35).

- Seeking a security interest: Citing *Toronto-Dominion Bank v. Phillips*, the Court noted that execution creditors are not secured creditors (at para 39). Therefore, where enforcement is to be deferred, the claimant should consider whether a registrable security interest over the funds (or other assets) or a personal guarantee can be attained.

Summary

Re Earth Boring serves as a stark reminder that winning an adjudication is only part of the battle and that without the proper measures, a successful claimant's recovery can be swept away by an untimely insolvency filing. Claimants should be cognizant of the risks associated with standard escrow arrangements and insist on agreements that satisfy the three certainties of a trust if they wish to shield unpaid adjudication proceeds from the reach of a trustee in bankruptcy. Equally important, claimants should not remain

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passive bystanders in insolvency proceedings but should act swiftly to enforce orders and secure interests before restructuring transactions close. Taken together, these practical steps offer a meaningful framework for protecting adjudication claimants in an area of law where timing and drafting precision can make all the difference.

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