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Construction Lien Primer and Update

Appeals under the *Construction Lien Act*

Brendan D. Bowles
and
Markus Rotterdam
Glaholt LLP

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Brendan D. Bowles
Markus Rotterdam
Glaholt LLP

1. Introduction

A mere two sections of the *Construction Lien Act* constitute Part X of the Act, which governs appeals. Neither section 70 nor section 71 are particularly complex. And yet, a surprising number of appeals in actions governed by the Act end up in the wrong court.

Section 71 provides as follows:

- (1) Subject to subsection (3), an appeal lies to the Divisional Court from a judgment or an order on a motion to oppose confirmation of a report under this Act.
- (2) A party wishing to appeal shall file and serve a notice of appeal within fifteen days of the date of the judgment or order, but the time for filing or serving the notice of appeal may be extended by the written consent of all parties, or by a single judge of the Divisional Court where an appropriate case is made out for doing so.
- (3) No appeal lies from,
 - a) a judgment or an order on a motion to oppose confirmation of a report under this Act, where the amount claimed is \$1,000 or less; or
 - b) an interlocutory order made by the court.

This statutory code displaces the provisions of the *Courts of Justice Act*, wherever there may be an inconsistency.¹ Under the Rules, for example, leave to appeal interlocutory orders may be granted where an interlocutory order involves “matters of such importance that leave to appeal

¹ *Teperman & Sons Inc. v. Alros Products Ltd.*, (1994), 18 C.L.R. (2d) 228 (Ont. Gen. Div.).

should be granted". There is no corresponding test in the *Construction Lien Act*. Consequently, in *Celebrity Flooring Systems v. One Shaftesbury Community Assn.*,² Master Sandler indicates that even if a matter raises an important question of jurisdiction, the *Construction Lien Act* still forbids a review of interlocutory orders by appellate courts:

An order flowing from a motion to appoint a trustee in a construction lien action, whether granted or refused, has been held to be an interlocutory order. Under s. 71(3) of the Act, no appeal lies from an interlocutory order made by the court. This section was first introduced as s. 73(3)(b) of the *Construction Lien Act*, S.O. 1983, c. 6, but merely codified the established case law to this effect: see *Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd.*, [1972] 3 O.R. 189. The objection to my jurisdiction is just one part of the s. 68 motion so whichever way I decide, there is at least a very high likelihood, if not a certainty, that such decision cannot be reviewed on appeal if any party wishes to take the matter further. The point is a novel one and is of some importance to construction lien practice, at least in Toronto, where masters, and now, case management masters, handle almost all construction lien actions acting under judgments of reference under s. 58(1). Since interlocutory orders cannot be reviewed by appellate courts, there are many areas of construction lien procedure where there are reported cases going in opposite directions but the conflict cannot be resolved because the cases can never reach an appellate court. This is a somewhat undesirable by-product of the otherwise commendable policy underlying s. 71(3)(b) that prohibits appeals of interlocutory orders.

So, in this case, my decision on this novel and important question of jurisdiction would not, in my view, be able to be reviewed on appeal. Also, some other master or case management master could, in another case, reach the opposite result, and this would create procedural confusion, at least in Toronto.

² (2003), 25 C.L.R. (3d) 279 (Ont. Master).

2. Judgments

The word “judgment” has been held to apply to any decision by a judge or master by which the rights of a party to the lien proceedings are finally disposed of. The substance of the disposition sought to be appealed is what governs.³ Thus, a final order constitutes a judgment under the Act, notwithstanding the fact that it is referred to as an order, and notwithstanding the fact that it was made without a trial having taken place.⁴

In a recent decision, an attempt was made to appeal a decision of a master. The master’s report had not yet been confirmed. A motion to oppose confirmation had been brought but not yet heard. The Divisional Court held that the report had no effect until it was confirmed,⁵ and therefore could not finally determine the rights of the parties. Thus, the unconfirmed report of the master was not a “judgment” within the meaning of s. 71(1) of the Act and an appeal did not lie to the Divisional Court.⁶ Once a report of a master is confirmed, however, it is a final judgment from which appeals may be taken.⁷

³ *Durall Construction Ltd. v. W.A. McDougall Ltd.* (1979), 25 O.R. (2d) 371 (C.A.); *Bird Construction Co. v. C.S. Yachts Ltd.* (1990), 37 C.L.R. 225 (Ont. C.A.); *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.).

⁴ *Bird Construction Co. v. C.S. Yachts Ltd.* (1990), 37 C.L.R. 225 (Ont. C.A.).

⁵ Rule 54.07(1).

⁶ *Gryphon Building Solutions Inc. v. Danforth Estates Management Inc.*, 2009 CanLII 38495 (Ont. Div. Ct.).

⁷ *Baker v. Dumaresq*, [1934] S.C.R. 665.

3. Final v. Interlocutory Orders

No appeal lies from an interlocutory order made by the court, or a judgment or order on a motion to oppose confirmation of a report if the amount in issue is \$1,000 or less.⁸ There are no strict guidelines as to what constitutes a final as opposed to interlocutory order. In each case, the court analyzes exactly what it is that the decision achieves. If the result is final, even in the context of an otherwise interlocutory motion provided for by the Act, it is a final order and appealable to that extent.

(a) Examples of Interlocutory Orders

- An order vacating a lien for full security;⁹
- An order denying a party leave to bring a motion for security for costs;¹⁰
- An order setting aside a default judgment under the Act;¹¹
- An order refusing to hold that a lien had expired and refusing to order delivery of security posted;¹²
- An order flowing from a motion to appoint a trustee;¹³
- An order setting a timetable for trial.¹⁴

⁸ s. 71(3).

⁹ *Albern Mechanical Ltd. v. Newcon Construction Ltd.*, [1971] 1 O.R. 350 (H.C.).

¹⁰ *I.C.I. Construction Ltd. v. Altavista Properties Inc.*, 2008 CarswellOnt 613 (Div. Ct.).

¹¹ *McGowan Construction of Ravenna Ltd. v. Cedar Highland Ski Club*, [2004] O.J. No. 5480 (Div. Ct.).

¹² *Teperman & Sons Inc. v. Alros Products Ltd.*, (1994), 18 C.L.R. (2d) 228 (Ont. Gen. Div.).

¹³ *Celebrity Flooring Systems v. One Shaftesbury Community Assn.* (2003), 25 C.L.R. (3d) 279 (Ont. Master).

¹⁴ *Tabrco Management Ltd. (Trustee of) v. Sundial Homes (Bronte) Ltd.* (2009), 79 C.L.R. (3d) 81 (Ont. Div. Ct.).

(b) Examples of Final Orders

- An order cancelling security paid into court to vacate a lien takes;¹⁵
- An order validating a claim for lien where the wrong lands are named;¹⁶
- An order setting a trial date;¹⁷
- An order denying a defendants request for leave to amend its statement of defence and to add a counterclaim;¹⁸
- An order striking the defence and counterclaim;¹⁹
- An order discharging a claim for lien and vacating a certificate of action.²⁰

4. Divisional Court Jurisdiction

Appeals from judgments and final orders under the Act (as opposed to motions to oppose confirmation of reports) are to the Divisional Court in all cases.²¹

Traditionally, appeals concerning lien claims under Part III have gone to the Divisional Court while appeals concerning trust claims under Part II have gone to the Court of Appeal. The reason appeals concerning trust claims have traditionally gone to the Court of Appeal may have been that they are often joined with non-statutory causes of actions, so that the Court of Appeal

¹⁵ *Interhaven Development Corp. v. Slovak Village Non-Profit Housing Inc.*, [1998] O.J. No. 2378 (Div. Ct.).

¹⁶ *Bravo Cement v. University of Toronto* (1991), 46 C.L.R. 207 (Ont. Div. Ct.).

¹⁷ *John Bianchi Grading Ltd. v. Belrock Design Build Inc.* (2005), 44 C.L.R. (3d) 198 (Ont. S.C.J.).

¹⁸ *Atlas Construction Inc. v. Brownstones Ltd.* (1996), 46 C.P.C. (3d) 67 (Ont. Gen. Div.).

¹⁹ *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, [2009] O.J. No. 2480 (Div. Ct.).

²⁰ *Wood Lumber Co. (Ontario) Ltd. v. Eng* (1999), 50 C.L.R. (2d) 139 (Ont. C.A.).

²¹ *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.).

could have taken jurisdiction under s. 6(2) of the *Courts of Justice Act*, which provides the Court of Appeal with jurisdiction to hear and determine an appeal that lies to the Divisional Court "if an appeal in the same proceeding lies to and is taken to the Court of Appeal".²²

However, where the judgment appealed concerns only claims under the *Construction Lien Act*, it is now clear that both lien claims and trust claims are properly appealed to the Divisional Court.²³ In *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*,²⁴ the Ontario Court of Appeal held as follows:

In my view, s. 71(1) of the Act applies to appeals concerning lien claims under Part III as well as appeals concerning trust claims under Part II of the Act. I can see no basis for giving the word "judgment" a restrictive meaning so that it relates only to a judgment on a lien claim. There is nothing in the Construction Lien Act that suggests such an unusual interpretation.

5. Single Judge or Panel?

Although there is precedent for the full panel of the Divisional Court to hear an appeal from a final decision of a master in a construction lien matter,²⁵ the Divisional Court has recently held that the cases in which a full panel heard the appeal did not specifically consider the issue whether a matter such as this should be heard by a single judge or a full panel, and that any

²² See the discussion in *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.).

²³ *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.* (2001), 54 O.R. (3d) 76 (C.A.).

²⁴ (2001), 54 O.R. (3d) 76 (C.A.).

²⁵ *Benjamin Schultz & Associates Ltd. v. Samet* (1991), 4 O.R. (3d) 771; *Wood Lumber Co. (Ontario) Ltd. v. Eng* (1999), 45 O.R. (3d) 795; *G.C. Rentals v. Falco Steel Fabricators Inc.*, [2000] O.J. No. 1055; *R. Meo & Associates v. Gottenu Developments Ltd.*, [2000] O.J. No. 782; *Furlan v. Structform International Ltd.*, [2006] O.J. No. 2925; *Select Acoustic Supply Inc. v. College of Physicians and Surgeons of Ontario*, [2008] O.J. No. 2163.

appeal of a master's final order should be heard by a single judge of that Court.²⁶ The court held that this approach was consistent both with the practice of the Divisional Court regarding appeals from the master and with the objective of 67(1) of the *Construction Lien Act* to promote prompt resolution in construction lien matters.

6. Timeliness of Appeal

The appellant must file and serve a notice of appeal within fifteen days of the date of the judgment or order, which time may be extended by the written consent of all parties or by a single judge of the Divisional Court where an appropriate case is made out for doing so. It is to be noted that the period for serving the notice of appeal is fifteen days in a lien matter, and not the thirty days provided for in civil actions by rule 61.04(1). Once the notice of appeal is served and filed in accordance with s. 71(2), the procedures for perfecting an appeal to the Divisional Court are the procedures set out in Rule 61.

Courts have been relatively lenient with regard to extending the time limit. In *Cornell Pump Co. v. York (Regional Municipality)*,²⁷ the court extended the time where it was satisfied that the moving party had a firm intention to appeal and that the potential settlement discussions are a reasonable explanation for the delay. In a case of plain inadvertence, the period may be extended in the absence of prejudice.²⁸ In *Deman Construction Corp. v. 1429036 Ontario Inc.*,²⁹ the Divisional Court dismissed an appeal which was initially brought to the wrong court (the Court

²⁶ *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, [2009] O.J. No. 2480 (Div. Ct.).

²⁷ [2003] O.J. No. 3655 (Div. Ct.).

²⁸ *Verly Construction Group Inc. v. Gregmen Construction Inc.*, [1998] O.J. No. 2376 (Gen. Div.).

²⁹ (2004), 41 C.L.R. (3d) 235 (Div. Ct.).

of Appeal) 29 days after the judgment of the motions judge. On further appeal to the Court of Appeal, however, the appeal was allowed to proceed without a discussion of s. 71(2), based on the fact that the appellant had initially taken some steps to oppose the judgment.³⁰ Where, however, absolutely no intention to appeal was indicated during the 15-day period, and where the land in question had been sold after the expiration of the time limit, the court refused to allow the appeal to proceed.³¹

7. Standard of Review

On appeal, the decision of a master is entitled to the same level of deference with respect to findings of fact and the exercise of discretion as would be accorded to the decision of a judge. The standard of review of an order, whether final or interlocutory, is correctness with respect to questions of law. Where the master exercises discretion, the court on appeal must determine whether the correct principles were applied and whether the master misapprehended the evidence such that there is a palpable and overriding error.³²

8. Motions to Oppose Confirmation of a Masters Report

If issues were decided on reference, the “appeal” is from a report or interim report of the master and is brought in the form of a motion to oppose confirmation of the master’s report. While not strictly speaking an appeal, the motion to oppose confirmation of a master’s report is in the

³⁰ [2005] O.J. No. 4214 (C.A.).

³¹ *Plaza Electric II Ltd. v. CMGC Management Inc.*, [1997] O.J. No. 2708 (Master).

³² *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, [2009] O.J. No. 2480 (Div. Ct.); *Zeitoun v. The Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.), aff’d 2009 ONCA 415.

nature of an appeal and should be dealt with substantially as an appeal from the report.³³

Rule 54.09 provides as follows:

Fifteen-Day Period to Oppose Confirmation

54.09 (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,

(a) immediately on the filing of the consent of every party who appeared on the reference;

or

(b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

To Whom Motion to Oppose Confirmation Made

(2) A motion to oppose confirmation of a report shall be made to a judge other than the one who conducted the reference.

Notice of Motion to Oppose Confirmation

(3) A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;

(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion.

Motion for Immediate Confirmation

(4) A party who seeks confirmation before the expiration of the fifteen-day period prescribed in subrule (1) may make a motion to a judge for confirmation.

Disposition of Motion

(5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

³³ *Solomon Rothbart Goodman v. Davidovits* (1996), 46 C.P.C. (3d) 314 (Ont. Gen. Div.); *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C.).

(a) Timeliness of Motion

The motion to oppose confirmation of a master's report must be brought within the 15 day period for confirmation of the master's report. It is possible to move to a judge for an extension of time for the period of confirmation, if for some reason it is practically impossible to serve notice of motion to oppose confirmation within the statutory 15 day period. Unless a motion to oppose is served within that time, the report is automatically confirmed on the expiration of 15 days.

It has been held, however, that it might be possible to oppose a report even after it was automatically confirmed by expiration of time. In *Cass v. Muir*,³⁴ the Divisional Court dismissed an appeal from a motions court judge who extended the time for bringing a motion to object to a report on a reference. It was held that the motions court judge did not err in extending the time for moving to object to the report:

The decision to extend the time for bringing a motion to oppose confirmation was within the power of the learned motions judge under rule 3.02. The power is a discretionary one and his decision should not be interfered with on appeal unless he was clearly wrong. That would be the case if the judge below made an error in principle or based his decision on extraneous matters.

Despite the powerful argument of Mr. Reynolds, and with some anxious consideration, I have decided that the learned motions judge did not err in principle in granting the extension of time for opposing

³⁴ (1995), 27 O.R. (3d) 208 (Div. Ct.).

confirmation, or base his decision on extraneous matters. In my opinion the learned motions judge directed his mind to the appropriate considerations, particularly the lack of prejudice to the clients.

(b) Venue

Under rule 54.09(2)(a), the motion to oppose confirmation of a report must be made to a judge of the Superior Court of Justice other than the one who conducted the reference.

(c) Standard of Review

The standard of review on such a motion is very strict. The referee is shown considerable deference on all matters. It was held that the master's award should not be disturbed unless it appears unsatisfactory on all the evidence or is clearly wrong,³⁵ and that an error in principle, an excess or absence of jurisdiction, or some patent misapprehension of the evidence is required to be shown to successfully oppose confirmation of a master's report.³⁶ Since a motion to oppose confirmation of a master's report is in the nature of an appeal, new evidence is not admissible unless it would otherwise meet the test for new evidence on appeals.³⁷

The onus is on the party opposing confirmation to demonstrate that the decision is wrong.³⁸

³⁵ *Komorowski v. Van Weel* (1993), 12 O.R. (3d) 444 (Gen. Div.).

³⁶ *Dominion Sheet Metal & Roofing Works v. Di Orio* (1994), 17 C.L.R. (2d) 295 (Ont. Gen. Div.). See also *Jordan v. McKenzie* (1989), 26 C.P.C. (2d) 193 (Ont. H.C.), aff'd (1989), 39 C.P.C. (2d) 217 (Ont. C.A.), and *Regan v. Regan-Graham Ltd.*, [1993] O.J. No. 2877 (Gen. Div.), aff'd [1994] O.J. 2039 (C.A.).

³⁷ *Solomon Rothbart Goodman v. Davidovits* (1996), 46 C.P.C. (3d) 314 (Ont. Gen. Div.); *Komorowski v. Van Weel* (1993), 12 O.R. (3d) 44, 9 C.L.R. (2d) 39 (H.C.).

³⁸ *Komorowski v. Van Weel* (1993), 12 O.R. (3d) 444 (Gen. Div.); *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C.J.); *Lensen v. Lensen*, [1987] 2 S.C.R. 672.

Appeal

An appeal from an order on a motion to oppose confirmation of a master's report lies to the Divisional Court.³⁹

³⁹ *Construction Lien Act*, s. 71(1).