SPRING 2026
ISSUE 32

GLAHOLT BOWLES
CONSTRUCTION LAWYERS

BUILDING INSIGHT

GLAHOLT BOWLES LLP

IN THIS ISSUE

Practical Lessons for Construction Lawyers from *Sayers Foods Ltd v Gay Company Ltd*, 2026 ONSC 918

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: (i) it was retaining notice holdback, (ii) it believed Gay had delivered false statutory declarations, and (iii) 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]

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 facts as established by an adjudicator requires palpable, overriding error.

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 that 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 its case 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.

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

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.

Sayers also raised an argument regarding its failure to advance its claim for a 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 that 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 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. It should be noted, however, that Sayers has sought leave to appeal to the Ontario Court of Appeal.

GLAHOLT BOWLES
CONSTRUCTION LAWYERS

Noting Contractors in Default: What Pro-Demnity's Latest Guidance Means for Consultants in Ontario

INTRODUCTION

On February 5, 2026, Pro-Demnity Insurance Company (the mandatory professional liability insurer for Ontario architects) published an article titled "Who Decides that a Contractor is in Default? A Guide for Architects".[1] The message to architects administering construction contracts is unequivocal: under no circumstances should an architect make a determination that a contractor is in default or issue a Notice of Default. This is because a finding of default is, in substance, a legal opinion as to whether a contractor is in breach of contract—and architects are not in the business of giving legal opinions.

Pro-Demnity's guidance is directed at architects insured under its mandatory program, but the implications reach much further. Engineers, contract administrators, and other design professionals working in Ontario should all take note.

PRO-DEMNITY'S POSITION

Pro-Demnity says it has "received a number of calls where the architect was instructed by the owner to issue the Notice of Default". In Pro-Demnity's view, that determination should be made by the owner. The reason for this is that the owner, unlike the architect, is actually a party to the construction contract.

The architect's role in a potential default situation is more limited. It consists of providing the owner with "sufficient factual information and supporting documentation regarding any possible breaches of contract" and then stepping back to let the owner and its lawyer decide whether those breaches warrant a Notice of Default. From a risk management and insurance standpoint, the architect's documentation should steer clear of language that implies legal judgment (words like "default" or "breach"). Rather, the architect's documentation should stick to objective observations, use factual descriptors such as "the deficiencies remain unresolved as of [date]", and be consistent and contemporaneous.

In an earlier article, "Is Your Site Review as Good as You Think?", Pro-Demnity warned architects in similar terms: "Do not confuse your role as a contract administrator with that of a lawyer. For example, when asked whether a delinquent contractor is in 'default' of its contract, this may constitute legal advice, which you are not qualified to provide".[2]

The recommended approach was to "restrict your advice to supplying your client with factual information on the performance (or lack of) of the contractor and request that it consult with its legal counsel to make a determination of whether the level of performance or non-performance of a contract, as indicated by you, constitutes sufficient basis to determine whether a contractor has defaulted on its contract".[3]

1 Salvador Knafo, "Who Decides that a Contractor is in Default? A Guide for Architects" (February 5, 2026), online at <https://prodemnity.com/who-decides-that-a-contractor-is-in-default-a-guide-for-architects>.

2 Salvador Knafo, "Is your site review as good as you think?" (November 2, 2023), online at: <https://prodemnity.com/is-your-site-review-as-good-as-you-think>.

3 Salvador Knafo, "Is your site review as good as you think?" (November 2, 2023), online at: <https://prodemnity.com/is-your-site-review-as-good-as-you-think>.

THE TENSION WITH CCDC 2–2020

Pro-Demnity's guidance does not exist in a vacuum. It has to be read alongside the CCDC 2–2020 standard form construction contract, which is widely used in Ontario and across Canada. The relevant provision is GC 7.1.2:

> If the Contractor neglects to perform the Work properly or otherwise fails to comply with the requirements of the Contract to a substantial degree and if the Consultant has given a written statement to the Owner and Contractor which provides the detail of such neglect to perform the Work properly or such failure to comply with the requirements of the Contract to a substantial degree, the Owner may, without prejudice to any other right or remedy the Owner may have, give the Contractor Notice in Writing, containing particulars of the default including references to applicable provisions of the Contract, that the Contractor is in default of the Contractor's contractual obligations and instruct the Contractor to correct the default in the 5 Working Days immediately following the receipt of such Notice in Writing.

Read on its face, GC 7.1.2 does not expressly require the consultant, who may be an architect, to make a formal finding of "default". What it does require is a "written statement" to the owner and contractor setting out "the detail of such neglect to perform the Work properly or such failure to comply with the requirements of the Contract to a substantial degree". The formal Notice of Default itself is issued by the owner, not the consultant.

However, when considering the language of GC 7.1.2, it is reasonable for a consultant to have concerns about how to practically carry out its obligations. The consultant's written statement must describe the contractor's "neglect" and characterize the contractor's failures as being "to a substantial degree". Those are not purely neutral, factual terms. "Neglect" suggests fault. Further, "to a substantial degree" requires a qualitative judgment about the seriousness of the contractor's failures. Taken together, a statement that a contractor has "neglect[ed] to perform the Work properly" or has failed "to a substantial degree" reads like a finding of default—even if the formal Notice of Default is left to the owner. On a construction project, this tension often translates into uncomfortable conversations about how far the consultant is expected to go in characterizing performance issues.

The practical difficulty is obvious. Pro-Demnity says consultants should confine themselves to objective, factual observations. But the CCDC 2 language asks for something more than that—it asks the consultant to characterize facts using evaluative terms that inherently involve professional judgment bordering on legal characterization. Whether a consultant can thread this needle and satisfy GC 7.1.2 while staying within the bounds of Pro-Demnity's guidance is an open question.

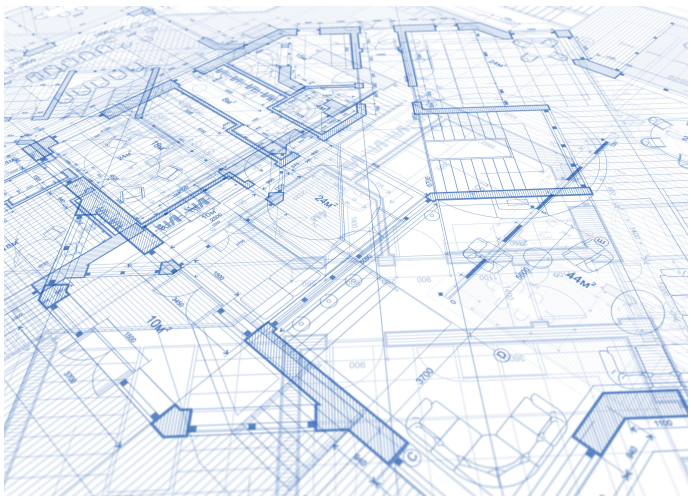
IMPLICATIONS FOR CONTRACT DRAFTING AND NEGOTIATION

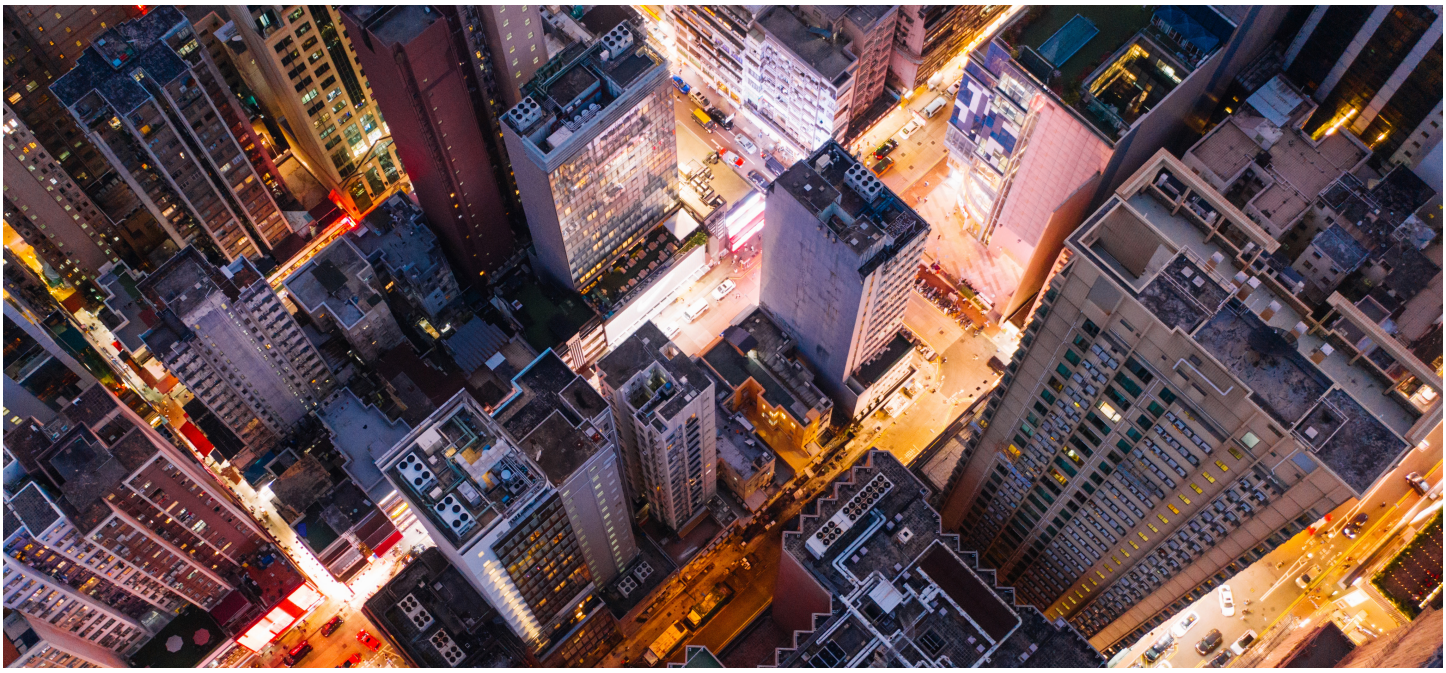
For those who assist with contract drafting and negotiation, Pro-Demnity's published position is a welcome development. Consultants negotiating engagement terms with owners can now point to this guidance when seeking to carve out or limit their obligations around default determinations. If an owner's contract or RFP requires a consultant to make findings related to contractor default, the consultant now has a credible, insurer-backed reason to push back.

This fits within a broader pattern that Pro-Demnity has flagged before: client-authored contracts that try to impose obligations on architects beyond the scope of their professional competence. As Pro-Demnity has cautioned, "[m]any client authored indemnity or warranty provisions expose the architect to obligations and liabilities that will exceed what are already the architect's at law"—and such provisions may fall outside the scope of professional liability insurance coverage.[4] The same logic applies to default-determination obligations: a consultant who agrees to make legal characterizations about whether a contractor is in breach may be taking on a risk that is simply uninsurable.

Pro-Demnity has also stressed the importance of making sure the client-architect agreement properly reflects the consultant's role under the construction contract, recommending standard form agreements like OAA Document 600, OAA Document 800, or OAA Document 900. These forms are designed to keep the consultant's obligations aligned with the construction contract and to guard against uninsured liabilities.[5]

4 "Client-Authored Contracts for Architectural Services" (March 22, 2018), online <https://prodemnity.com/client-authored-contracts-for-architectural-services>.
5 "Engineer's Standard Terms of Engagement" (April 1, 2025), online <https://prodemnity.com/engineers-standard-terms-of-engagement>.





PRACTICAL GUIDANCE FOR CONSULTANTS

With all of this in mind, here are some practical takeaways for consultants working in Ontario.

When negotiating engagement agreements, make sure your scope of services does not include making determinations of default. Under a CCDC 2, the consultant's obligation under GC 7.1.2 is to provide a factual written statement—not to issue a Notice of Default. Your engagement agreement should make that distinction explicit.

When administering construction contracts, document contractor performance issues in objective, factual language. Avoid terms like "default", "breach", or "neglect" in your own correspondence. If the owner requests a written statement under GC 7.1.2, confine yourself to describing what was observed and documented—for example, "the deficiencies identified in the site review of [date] remain unresolved as of [date]"—and leave any characterization of fault or materiality to the owner's legal counsel.

Be mindful, however, that the CCDC 2 language itself, with its references to "neglect" and failure "to a substantial degree", pushes you toward evaluative judgments. Get legal advice on how to comply with GC 7.1.2 while staying within the boundaries of factual reporting.

Finally, if you are a lawyer advising an owner, anticipate that consultants may be reluctant or unwilling to provide statements couched in the evaluative language of GC 7.1.2. Be prepared to work with the consultant to separate out the factual component of the written statement from the legal characterization that the owner must ultimately make. Get involved early—do not wait until the default situation is fully developed to bring legal counsel into the process.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Building a Winning Evidentiary Record for Delay Claims

INTRODUCTION

Comprehensive, contemporaneous documentary evidence can make or break a delay claim. To be reliable, project schedules must be verifiable, requiring supplementary documents like logs, reports, and other project information to corroborate what schedules show. While forensic schedule analysis is effective at demonstrating the impact of changes to sequence, logic, or activity duration, proving the cause behind such impacts requires considering the facts behind the schedule.

In delay claims, experts examine all project documents to conduct schedule delay analysis, opining on when delays occurred, the reasons behind them, and the responsible parties. Various project documents serve as critical evidence in delay and disruption claims. Photographs and videos documenting actual progress can be particularly valuable in illustrating project conditions at specific points in time. These visual records demonstrate the state of work to the trier of fact and clarify complex technical aspects of construction that may not be intuitively understood by non-specialist adjudicators. Project correspondence, including letters, emails, and text messages, provides essential contemporaneous evidence of notice, directions, instructions, and decisions that influenced the project's progression.

Maintaining complete, detailed project documents throughout a project is time-consuming and resource-intensive. Contractors and some owners will have entire project controls teams dedicated to creating and maintaining proper documentation for large, complex projects. While smaller projects cannot sustain this level of activity, maintaining basic project documentation remains critical and should be viewed as an insurance policy for underwriting potential claims. Complete records are also key to dispute avoidance, as a well-documented project provides a more compelling basis for contemporaneous extension of time claims.

The value ascribed to otherwise contemporaneous, accurate records will be influenced by the document's objectivity. Project participants should strive to ensure neutrality in reports, correspondence, and daily communications. When recording observations for minutes and reports, they should be restricted to what is said, heard, and witnessed only. Electronic records should be maintained in native format-schedule files in Microsoft Project or Primavera P6, images as unaltered JPGs, PNGs, or TIFFs, and emails in their original format. Native formats preserve valuable metadata like dates created and modified, demonstrating contemporaneity, and allow forensic experts to assess logic, relationships, and constraints used in developing project schedules.

CONTRACT DOCUMENTS

Delay claims start with the contract documents. Every project is different, and delay claimants must understand how different delay risks have been allocated between the parties. Contracts establish the interim and final milestones from which extensions of time are calculated, may stipulate agreed-upon rates for standby time, and identify recoverable cost categories in the event of delay. Claimants must also be aware of contractual requirements for notice and minimum requirements for claim substantiation.

Assessing delay requires understanding a project's scope and how it has changed over time, making an up-to-date record of change orders critical. Notwithstanding contractual terms requiring executed change orders for amendments, parties may agree to changes informally through emails, text messages, or verbally. Maintaining access to such electronic information during a project is important, and verbal agreements should be confirmed in writing as soon as possible.

PROJECT SCHEDULES, SCHEDULE UPDATES, SCHEDULE NARRATIVES

A quality baseline schedule is one of the most important pieces of documentary evidence in any delay claim. An unreliable baseline schedule will undermine even the strongest claims for delay. Taking time to create a robust, achievable, and credible baseline schedule at project start is vital to any future delay claims. Likewise, maintaining regular, accurate schedule updates based on validated as-built information will bolster forward-looking time impact analyses and retrospective forensic delay analyses.

Ideally, schedule updates should be accompanied by narratives providing reasons or explanations for delays or deviations. When preparing narratives, remember that what may seem obvious to the scheduler at the time may not be obvious years later during forensic analysis. Other project schedules can be equally important, including look-ahead schedules (typically limited to shorter time horizons), which tend to be more detailed at the activity level, and sequencing schedules, which can support lost productivity claims.

NOTICES

Notices of delay, notices of default, and potentially a notice of termination may be issued over the course of contract work. Where contracts stipulate the form and content of notice, contractors should strive to meet those requirements in every case. Failure to provide timely and proper notice can be fatal to a contractor's delay claim.

Contractors may be reluctant to give notice early for fear of upsetting an owner, but this concern is often misplaced. Owners want transparency and the ability to make informed decisions. While contracts may stipulate formal notice requirements, formalities can be complemented by informal notice, like a simple heads-up email or phone call. When done right, proper, timely claims should build credibility rather than sour relationships. Records of notice should include the paper trail, referenced documents, subsequent responses, and proof of delivery.

REPORTS AND LOGS

Daily, weekly, and/or monthly progress reports serve as some of the best contemporaneous records of day-to-day activities on site, making them critical for validating the as-built schedule and supporting delay and disruption events. Site reports should be detailed enough for an independent third party to understand what was occurring on site in any given period and should include: weather conditions; workforce count and hours; equipment usage; work planned vs work progressed; and site constraints and disruptions.

When delays occur, site reports should record the cause and resulting impact (e.g., steel erection delayed eight hours due to high winds). The quality and credibility of a site report depends on its level of detail and, above all, its contemporaneousness. Consistency and completeness in logs and reports bolster credibility and make it easier to document cause-effect relationships. Keeping records factual while avoiding subjective language enhances reliability.

Project logs include time logs; design/drawing logs; RFI logs; material receiving logs; field change logs; equipment logs; non-conformance report logs; quality inspection logs; and milestone logs. Third-party inspection reports can also provide valuable insight, such as an engineer's report showing deficient work that explains contractor delays.

PHOTOS AND VIDEOS

Photos and videos provide objective evidence of exactly what is happening on site at a point in time, including progress of different work aspects, site conditions, and causes of interference. Scheduling time for daily or weekly photos of the same site areas or work fronts creates a record of regular progress that can be correlated with delay events in retrospective analysis. For photos and videos to be most useful, they must be maintained in an organised way so reviewers can easily identify what they are looking at and from when.

Increasingly, larger projects utilise drone footage to capture project progress periodically. Fixed cameras positioned throughout a project site can track progress on a 24-hour basis. While the volume of such evidence could previously have overwhelmed project teams, new artificial intelligence applications are making powerful use of this data.

MEETING MINUTES

Meeting minutes should be kept during or prepared immediately after meetings to ensure all relevant information is captured. Typically, minutes are circulated amongst and signed off by attendees to confirm their accuracy. Parties must take seriously the contemporaneous review of meeting minutes and respond when information is recorded incorrectly.

Standardized templates make review easier and more efficient. Equally important is updating templates appropriately rather than allowing relics from past meetings

to carry forward, thereby tainting record quality. Progress meeting minutes should record current schedule status and critical-path updates. It is also helpful to document specific events causing delay, anticipated impact, responsibility, and any mitigation measures proposed or implemented.

CORRESPONDENCE

Correspondence often comprises a significant portion of evidence in delay disputes, particularly on larger projects. Emails are the most prevalent form of project communication and represent valuable evidence due to their inherent timestamps, detailed conversation threads, and attachments. Emails should be preserved in native format to retain metadata and maintain attachment integrity. Where impractical, saving them as PDFs is acceptable, but attachments should be retained and clearly labelled separately.

Phone calls and voicemails require prompt documentation. Contemporaneous notes should be made immediately following calls, and voicemails should be downloaded and stored as audio files. Increasingly, important communications are shifting to messaging platforms like Teams, WhatsApp, and iMessage. While generally informal, these can contain vital project information about changes, progress, and disruptions. Text logs or screenshots are acceptable means of preservation, though collection can be onerous and may only be justified for high-value claims.

Formal letters exchanged among project participants, particularly notices related to delay or default, constitute crucial documentation. Transmittal emails demonstrating that a party received notice of specific project issues or delays at a point in time should be carefully preserved.

COST AND FINANCIAL RECORDS

Proving delay impacts is only part one of a successful compensable delay claim; the second challenge requires proof of damages. Effective cost tracking and maintaining accurate financial records is essential for substantiating delay damage claims. Most contractors maintain cost control systems tracking project costs to specific cost codes, which should at least track overtime costs, acceleration costs, standby costs, and overhead costs. More sophisticated systems organise costs in accordance with a project's work breakdown structure, allowing more granular tracking and deeper analysis.

Parties can create unique cost codes to track delay and impact costs but often fail to do so when the delay is incurred, whether because of disconnect between project management and project controls teams or simple lack of foresight. Project teams must balance granularity with usability. Cost codes are only meaningful if used by site crews to properly track labour time and equipment and material usage. Training teams to respond to potential delays by fastidiously tracking impact costs can pay dividends.

BIM DATA

BIM is a computer-based tool for designing physical assets, a virtual, 3D representation of all physical and functional characteristics of a facility intended as both a design and maintenance tool. It is also a collaboration tool allowing different project participants to contribute design and constructability feedback directly into the model.

BIM allows designers to model scheduling information and construction sequences (often termed 4D modelling). At its best, BIM links construction specifications, drawings, material procurement information, submittal information, and other data in one place. As a scheduling tool, BIM can be highly valuable in asserting project delay claims, as a properly updated model allows contractors and owners to see a 3D virtual representation of progress status at any point in time. It also allows the impact of different causes to be modelled virtually. This is particularly helpful during the project, as the contractor can visually demonstrate how a change in sequence or late delivery will impact the overall schedule. For these reasons, maintaining BIM data after project completion can be a valuable tool for forensic delay analysis in disputes.

CONCLUSION

Schedules alone, without comprehensive evidentiary foundation, will not win delay claims. Likewise, not all documentary evidence is created equal: contemporaneity, organization, and objectivity are critical to building a credible delay case. Projects that invest in disciplined documentation are better positioned not only to succeed in disputes, but to avoid them altogether.

Jurisdiction Where the Liability of a Non-Party to Arbitration Remains Unresolved

INTRODUCTION

In *Sociedad Concesionaria Metropolitana de Salud SA v Webuild SpA*, 2026 ONCA 28, the Court of Appeal for Ontario considered the issue of jurisdiction for determining issues of liability when trying to enforce a foreign arbitral award against a non-party to the arbitration.

In this case, the Court confirmed that enforcement proceedings for a foreign arbitral award may be stayed where the party against whom enforcement is sought was not a party to the arbitration and disputes liability for the award. The Court held that in such circumstances, determining the threshold issue of liability may require adjudication in a more appropriate foreign forum before enforcement can proceed in Ontario.

BACKGROUND

The dispute originally arose from a construction contract relating to the construction of a hospital in Chile.

In 2015, Sociedad Concesionaria Metropolitana de Salud S.A. ("**Sociedad**") contracted with the Chilean branch of Astaldi S.p.A. ("**Astaldi**"), an Italian construction company, to build the hospital. The project experienced delays and payment issues after Astaldi entered restructuring proceedings in Italy in 2018.

Following termination of the contract, the parties commenced arbitration in Chile. In December 2021, a Chilean arbitrator awarded Sociedad approximately CAD $188 million in damages against Astaldi.

Meanwhile, Astaldi continued with its restructuring proceedings in Italy, and ultimately, its business was divided into two parts. Certain assets were transferred to a third-party, Webuild S.p.A. ("**Webuild**"), through a partial spin-off agreement governed by Italian law, while other assets remained with Astaldi. As a result, Sociedad took the position that Webuild had assumed Astaldi's liabilities related to the Chilean project through this transaction.

Webuild disputed that interpretation.

Rather than pursue liability proceedings in Italy, Sociedad brought an application in Ontario seeking recognition and enforcement of the Chilean arbitral award against Webuild, even though Webuild was not a party to the arbitration.

MOTION JUDGE'S DECISION

Webuild moved to stay the Ontario enforcement proceeding, claiming that a key issue to be resolved was whether Webuild had assumed Astaldi's liability; answering that question required interpretation of Italian restructuring law and the spin-off agreement between Astaldi and Webuild.

The motion judge agreed, holding that liability and enforcement were distinct issues, and that Italy was clearly the more appropriate forum to determine whether Webuild assumed Astaldi's obligations. The motion judge temporarily stayed the Ontario application, pending the outcome of Italian proceedings addressing the liability issue.

COURT OF APPEAL FOR ONTARIO DECISION

Sociedad appealed, but the Court of Appeal dismissed the appeal and upheld the temporary stay of the Ontario proceedings pending the determination of the issue of liability, which was to be determined in Italy.

First, the Court made it clear that this was not a "typical" recognition and enforcement proceeding. It rejected Sociedad's argument that *forum non conveniens* should not apply to recognition and enforcement actions.

The Court stated that unlike a standard enforcement case, there was no adjudicated obligation binding Webuild; Webuild was not a party to the original Chilean adjudication, and in fact, disputed liability for Astaldi's debt.

Accordingly, the Court determined that this proceeding

required adjudication of liability before enforcement could occur, making *forum non conveniens* relevant.

Second, the Court confirmed that the issue of liability may be severed from enforcement, and that it was appropriate to do so in this case.

The Court stated plainly that if Webuild was not liable for the award, there would be nothing to enforce against it. Conversely, if liability were established, enforcement proceedings could proceed afterwards.

Finally, the Court held that because liability was still to be determined, Italy clearly was the more appropriate forum to decide that issue. Applying the *forum non conveniens* analysis from the Supreme Court of Canada's decision in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, the Court held that Italy was the more appropriate forum because of the following facts:

- the spin-off agreement was made in Italy and governed by Italian law;
- the restructuring proceedings occurred in Italian bankruptcy courts;
- resolving the dispute required expert evidence on Italian law;
- most witnesses and documents were located in Italy; and
- parallel proceedings elsewhere created a risk of conflicting judgments.

KEY TAKEAWAYS

This decision underscores the reality that enforcement of foreign arbitral awards in Ontario is not always a purely procedural exercise, particularly where enforcement is sought against a non-party to the original arbitration. In such cases, courts may need to first determine whether that party is legally liable for the award, which can transform the proceeding into a substantive dispute.

Parties seeking to commence enforcement proceedings of foreign awards in Ontario need to carefully consider whether all substantive issues have been resolved, otherwise they face the possibility of being "sent back" to adjudicate those issues in the jurisdiction most closely connected to the dispute, before continuing with their enforcement proceedings in Ontario.

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Procedural Fairness and Materiality in Arbitral Review: *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*

INTRODUCTION

In *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*, 2026 ONSC 768 ("**Aroma Franchise Company**"), the Ontario Superior Court of Justice (Commercial List) addressed the grounds on which a court may set aside an international commercial arbitral award under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"), as adopted in Ontario through the *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5.

In its ruling, the Court considered a number of issues relevant to Canadian practitioners, including the consequences of a procedural fairness breach where the impugned finding was immaterial to the outcome, the scope of an arbitrator's jurisdiction to interpret a contract, the sufficiency of reasons in an arbitral award, and the discretion available to a court to decline to set aside an award even where a ground under Article 34 is technically established.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The dispute in Aroma Franchise Company arises from a long-standing commercial relationship governing the operation of the "Aroma Espresso Bar" franchise system in Canada.

In 2007, Aroma USA entered into a master franchise agreement ("**MFA**") with Aroma Espresso Bar Canada Inc. ("**Aroma Canada**"), granting Aroma Canada the right to operate as the master franchisee in Canada. The rights under the MFA were subsequently assigned within the applicant group to Aroma Franchise Company, Inc.

The business was unprofitable and incurred ongoing operating losses. The respondents took the position that this lack of profitability was attributable, in part, to the financial structure of the franchise system, including royalties, franchise fees, and the cost of goods supplied by the applicants, particularly coffee products sourced from Aroma Espresso Bar Ltd. ("**Aroma Israel**").

Against this backdrop, Aroma Canada sought to use an alternative coffee supplier that it estimated would result in significant cost savings. The applicants did not approve this proposal, and the parties were unable to reach agreement on revised supply arrangements.

In March 2019, Aroma Canada cancelled its coffee supply orders from Aroma Israel, effectively implementing a unilateral change to its sourcing practices. The applicants responded by issuing a notice of pending termination of the MFA in April 2019, asserting that Aroma Canada had breached the agreement by sourcing coffee without approval. Aroma Canada disputed the termination and commenced arbitration in May 2019. The business ceased operations shortly thereafter, in June 2019, bringing the parties' commercial relationship to an end.

The central issues before the arbitrator concerned whether the parties breached the MFA, whether the MFA was wrongfully terminated, and whether the parties had complied with their statutory obligations of fair dealing. In the Final Award, the arbitrator concluded that the applicants had wrongfully terminated the MFA, finding that the termination right had been exercised in a manner that was arbitrary and inconsistent with the duty of good faith. The applicants subsequently applied to the Ontario Superior Court of Justice to set aside the arbitral awards under Article 34 of the UNCITRAL Model Law, advancing multiple grounds including allegations of bias, excess of jurisdiction, procedural unfairness, and inadequate reasons.

In an earlier decision, Justice Steele set aside the awards on the basis of a reasonable apprehension of bias, while also expressing views on certain additional grounds raised by the applicants. A formal order was issued directing that the awards be set aside and that a new arbitration be conducted before a different arbitrator.

The respondents appealed that decision, and the Ontario Court of Appeal allowed the appeal, overturning the finding of bias and reinstating the arbitral awards.[1] However, the Court of Appeal declined to finally determine several additional issues that had been raised but not fully adjudicated, including the consequences of an alleged procedural fairness breach and the adequacy of the arbitrator's reasons.

Instead, the Court of Appeal remitted those issues to the Ontario Superior Court of Justice for determination, directing that the Court consider, among other matters, the consequences of the arbitrator's finding that Earl Gorman, the interim managing partner of Aroma Canada and an individual respondent in the arbitration, was not a proper party to the arbitration, as well as

1 See *Aroma Franchise Company, Inc v Aroma Espresso Bar Canada Inc*, 2024 ONCA 839.

any other issues not previously decided. The present decision arises from that remittal and addresses those issues within the framework of Article 34 of the Model Law.

THE DECISION

The central issue before the Court was whether the arbitral awards should be set aside pursuant to Article 34 of the UNCITRAL Model Law. The applicants relied on three principal grounds, namely: (1) they were unable to present their case, (2) the arbitrator exceeded his jurisdiction, and (3) the awards failed to provide sufficient reasons.

At the outset of its analysis, the Court emphasized that the grounds for setting aside an arbitral award under Article 34 are narrow and must be applied with a high degree of deference to the arbitral tribunal, noting that courts are not permitted to intervene merely because they would have reached a different conclusion on the facts or the law. This framing informed the Court's treatment of each of the applicants' arguments.

Procedural Fairness

With respect to procedural fairness, the applicants argued that they had been denied the opportunity to present their case when the arbitrator determined, without submissions from the parties, that Mr. Gorman was not a proper party to the arbitration. The Court accepted that this finding engaged Article 34(2)(a)(ii), as neither party had been afforded the opportunity to address the issue prior to the arbitrator making the determination.

However, the Court proceeded to consider the significance of that breach in the context of the arbitral award as a whole, emphasizing that not every procedural defect warrants setting aside an award. The arbitrator had already made substantive findings rejecting any basis for personal liability on the part of Mr. Gorman, including findings that there was no oppression and no justification for piercing the corporate veil. In those circumstances, the additional statement that Mr. Gorman was not a proper party to the arbitration did not affect the outcome and was characterized as "superfluous".

Accordingly, while a breach of procedural fairness was established, the Court concluded that it was not material to the issues in dispute and did not justify setting aside the awards.

Jurisdiction

The applicants further argued that the arbitrator exceeded his jurisdiction by modifying, rather than interpreting, the MFA, contrary to the contractual requirement that the agreement be strictly enforced. In particular, they contended that the arbitrator's conclusion that the termination was wrongful was inconsistent with the express termination provisions of the agreement. The Court rejected this argument, emphasizing that jurisdictional review under Article 34(2)(a)(iii) must be approached with caution and confined to true questions of jurisdiction, rather than disagreements with the arbitrator's interpretation of the contract. On a holistic reading of the award, the Court was satisfied that the arbitrator had engaged in an exercise of contractual interpretation, informed by the factual matrix and the statutory duty of good faith. Thus, the applicants' disagreement with that interpretation did not establish a jurisdictional error.

Adequacy of Reasons

With respect to the adequacy of reasons, the applicants advanced a broad range of criticisms, alleging that the arbitrator failed to address key arguments, omitted references to significant evidence, and provided insufficient analysis on central issues. The Court reiterated that arbitral tribunals are not required to address every argument or piece of evidence, nor to produce reasons of the same depth or form as a judicial decision.

Instead, the Court applied a functional approach, asking whether the reasons, viewed in the context of the record and the issues, were sufficiently intelligible to demonstrate that the arbitrator understood and addressed the substance of the dispute. In this regard, the Court noted that the arbitrator had identified the central issues, summarized the applicable legal principles, made detailed factual findings, and explained the basis for the conclusions reached, including with respect to wrongful termination and damages. The Court concluded that the awards satisfied the requirement to provide reasons under Article 31 of the Model Law and that no ground for intervention under Article 34(2)(a)(iv) had been established.

Remedy

Having found only a limited procedural fairness breach, the Court then considered the appropriate remedy, noting that Article 34 is permissive and that even where a ground is established, the Court retains discretion as to whether to set aside the award. In assessing whether to exercise that discretion, the Court emphasized the importance of considering the seriousness and materiality of the defect in the context of the arbitration as a whole.

Given that the breach related to a non-material issue and did not affect the outcome, the Court declined to set aside the awards or order a new arbitration, concluding that such a remedy would not be appropriate in the circumstances.

The application was therefore dismissed.

COMMENTARY

The decision in *Aroma Franchise Company* illustrates the limited scope of judicial intervention under Article 34 of the Model Law. While the Court's analysis is with respect to the Model Law, the underlying principles engaged, including procedural fairness and jurisdiction, are reflected in different forms, across a wide range of arbitral rules and regimes.[2] In that regard, the decision may provide guidance on how courts may approach similar issues, even though the scope of judicial intervention will depend on the governing framework.

The Court's treatment of procedural fairness is particularly informative. The Court accepted that a breach of procedural fairness occurred when the arbitrator made a finding regarding Mr. Gorman's status without hearing submissions from the parties but, nonetheless, declined to set aside the award because the breach was not material to the outcome.

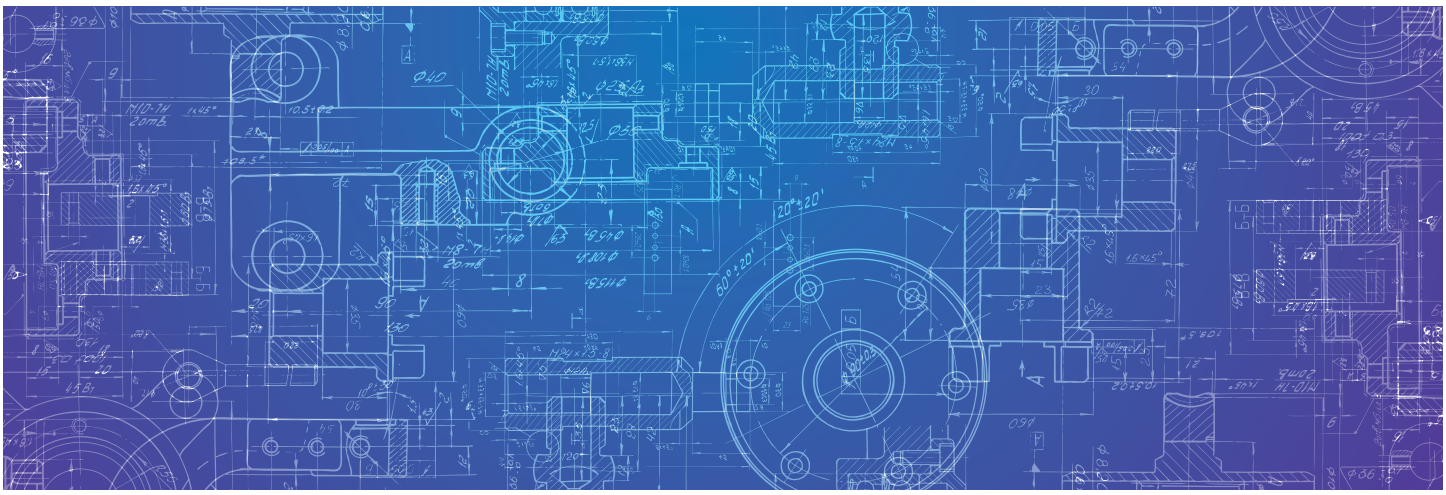
The Court's reasoning suggests that a key question is not necessarily whether a procedural irregularity occurred, but whether it had a meaningful impact on the issues actually decided.

That has practical implications for how parties conduct themselves during the arbitration. If materiality is key, a party who remains silent in the face of a potential procedural issue may face greater difficulty establishing, after the fact, that the irregularity affected the result. For parties, including those involved in construction arbitrations where multi-party disputes and complex procedural rulings are common, this underscores the importance of addressing procedural concerns as they arise. If a tribunal appears poised to decide an issue on which submissions have not been made, counsel may wish to raise that concern contemporaneously, rather than relying on the possibility of post award review.

The decision in *Aroma Franchise Company* also serves as a reminder of the deference afforded to arbitral awards in the context of international arbitration. Parties to an international arbitration seeking to set aside an award must frame their claims within the grounds set out in Article 34 of the Model Law. Even where such grounds are engaged, the Court may, in the exercise of its discretion, decline to set aside the award where the alleged breach did not have a meaningful impact on the outcome. In that regard, the decision underscores the limited scope of judicial intervention.

Ramez Gries
Associate

2 See, for example, paragraph 46(1)(6) of the *Arbitration Act*, 1991, SO 1991, c 17.



The Oppression Remedy: Considerations for Expanding Available Remedies in *Construction Act* Breach of Trust Matters

The oppression remedy is a powerful and broad remedy available under section 248 of the *Business Corporations Act*, RSO 1990, c B.16 (the "**OBCA**"). It allows a complainant to apply to the court for relief where a corporation's conduct is oppressive, unfairly prejudicial, or unfairly disregards the interests of any security holder, creditor, director or officer of the corporation. The court is then granted broad discretion under the OBCA to make any interim or final order it thinks fit.

To be entitled to a remedy under section 248 of the *OBCA*, the complainant must show (1) a reasonable expectation that the corporation would treat it in a certain way, and (2) that reasonable expectation was violated by oppressive conduct, unfairly prejudicial conduct, or conduct that unfairly disregarded their interests.[1]

Although primarily a corporate law remedy, the oppression remedy may be used in limited circumstances for breach of trust actions under the *Construction Act*, RSO 1990, c C.30 (the "***Construction Act***"). In particular, the oppression remedy may be a complementary pleading in a Construction Act breach of trust action, and in fact, it is not uncommon for lawyers to plead the *OBCA* in their breach of trust claims.

The *Construction Act* breach of trust provisions create a cause of action which is distinct from the lien remedy. At a high level, the function of the statutory trusts created by the *Construction Act* keeps funds within the construction pyramid and dissuades parties from evading their payment obligations down the construction pyramid. Importantly, the Construction Act breach of trust remedy permits personal judgments against the officers and directors of the breaching corporation.

The point of intersection between the oppression remedy and the breach of trust provisions may reasonably be said to be as follows: the statutory trust imposed by the *Construction Act* creates a reasonable expectation that the payor will not misappropriate trust funds. If trust funds are misappropriated, then the interests of the payee may be unfairly disregarded, or the payee may be oppressed or unfairly prejudiced.

This intersection is supported by *Vicor Mechanical Ltd v Pegah Construction Ltd*, 2009 CanLII 68467 (SCJ) ("***Vicor Mechanical***"). In that case, on a motion to strike paragraphs from the plaintiff's statement of claim, the Court determined that the plaintiff's primary claim related to an alleged breach of trust under the former *Construction Lien Act*. The Court did not prevent the plaintiff from asserting the oppression remedy because "it is possible that a breach of the [*Construction Lien Act*] is the act that effects a result that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the plaintiff".

When deciding whether to plead relief under the *OBCA*, it is important to consider the remedy sought. The primary advantage of pleading the oppression remedy in conjunction with a Construction Act breach of trust claim is that the remedies available under the *OBCA* are much more flexible than those available under the Construction Act, as the court is granted the ability to make any interim or final order it thinks fit.

With that in mind, if a plaintiff is simply seeking damages for breach of trust, a claim for the oppression remedy may simply be an "in the alternative" argument. In this case, there is no particular advantage to pleading the oppression remedy because, on the authority of *Vicor Mechanical*, the basis for granting the oppression remedy is a successful breach of trust claim.

There does not appear to be any case law where the courts have actually granted relief under the *OBCA* when both breach of trust under the *Construction Act* and the oppression remedy are pleaded. In fact, the oppression remedy may be more difficult to prove than the breach of trust claim because it requires the additional element of oppressive or prejudicial conduct.[2]

1 *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 56.

2 See *S.E. Rozell & Sons Inc v Groff*, [2000] OJ No 707 (SCJ) at paras 86–87.

An additional hurdle to relief under the *OBCA* may be the requirement for a plaintiff to prove that they are a "complainant" under section 245 of the *OBCA*. Although creditors are generally accepted to be a "proper person" for the purposes of the statutory definition, they are not complainants as of right and the case law is clear that not all debt actions should be converted to oppression claims. In *Royal Trust Corp of Canada v Hordo*, [1993] OJ No 1560 (Gen Div), the Court stated that complainant status should be refused "where the creditor is not in a position analogous to that of the minority shareholder and has '… no particular legitimate interest in the manner in which the affairs of the company are managed'".

However, there may be circumstances where it would be appropriate to ask the court for an alternative remedy, which may only be available under the *OBCA* because the circumstances require a remedy relating to the management of the trust-breaching corporation's affairs. For example, under the *OBCA*, the court may make an order varying or setting aside a transaction or contract to which a corporation is a party, and compensating the corporation or "any other party" to the transaction or contract. Therefore, if setting aside the contract between the parties is an appropriate remedy, a claim under the *OBCA* may be favourable to the *Construction Act* breach of trust claim.

From a practical standpoint, the oppression remedy and breach of trust claims can be pleaded together with a view to maximizing the relief available to the plaintiff. However, in light of the absence of case law granting relief for oppression in a breach of trust scenario, counsel should assess whether the oppression remedy is appropriate in the circumstances before proceeding with a claim for relief under the *OBCA*. A corporate remedy alternative to damages will likely be appropriate only in rare circumstances—namely, where the plaintiff's interest in the trust-breaching corporation is akin to that of a minority shareholder.


Robyn Jeffries
Articling Student

Notable Case Law

***Catania v Jamesway Custom Homes Ltd*, 2026 ONSC 689 (SCJ)**

Owners paid a deposit of over $500,000.00 for the express purpose of procuring all materials, equipment, and trucking required to purchase the armour stone for a cottage project. The contractor did not use any of that money to buy, supply, transport or store armour stone, and did not account for how the funds were used.

While as the business owner, the contractor's principal was generally free to allocate the money paid to him under the landscaping invoice as he saw fit, that freedom was constrained by his contractual obligations to purchase, deliver, and store the armour stone. By failing to do so, a breach of a so-called "Quistclose trust" was committed. (*Barclays Bank Ltd v Quistclose Investments Ltd*, [1970] AC 567 (HL)). Where funds are advanced for a specific purpose, a trust is imposed in equity impressed to ensure that the funds are solely used for that purpose or returned to the parties who advanced the funds.

The personal defendant, as the sole officer, director, and shareholder and the person responsible for making all business decisions, was held personally liable for the breach of trust as a constructive trustee on the basis of knowing assistance.

The contractor's conduct also constituted a breach of the duty of honest performance which entitled the plaintiffs to terminate the contract and pursue their remedy of damages.

***Rosswill Pools 1995 Ltd v Mandarino*, 2025 ONSC 7212 (AJ)**

The defendant argued that rule 24.01(1), which provides that a defendant who is not in default under the rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed to serve the statement of claim on all the defendants within the prescribed time, should apply with respect to s. 1(2) of O Reg 302/18, which provides that a statement of claim shall be served within 90 days after it is issued. That argument was dismissed, since A.J. Robinson held that the entirety of rule 24.01 is inconsistent with the *Construction Act* and its regulations.

***Terra Bona Developments Ltd v Cacoeli Kennedy Steeles LP*, 2026 ONSC 585 (AJ)**

A land registrar's deletion of a construction lien without

a court order following an application under s. 75 of the *Land Titles Act* was improper. The *Construction Act* and its regulations are a complete code governing construction liens, and there is no provision in either that contemplates removal of a preserved or perfected lien from title to premises by anyone other than the lien claimant itself or by court order obtained on motion. Section 75 of the *Land Titles Act* does not permit persons or parties to delete the registration of a claim for lien absent consent of the lien claimant or a court order obtained in accordance with the procedures outlined in Part VII of the *Construction Act*. The application deleting the claim for lien as expired under the *Construction Act* was therefore invalid and ought not to have been certified by the land registrar.

***Mana Home Design Inc v Siteline Property Management Inc*, 2025 ONSC 6887**

In *2708320 Ontario Ltd. cob Viceroy Homes v Jia Development Inc*, 2023 ONSC 2301, A.J. Wiebe summarized the process to be followed in a section 47 motion:

- The moving party must prove that there is no triable issue as to the basis on which the lien is sought to be discharged;
- Both parties must "put their best foot forward" in the evidence to assist the court in making this determination, and the court is entitled to make this assumption;
- The lien claimant has this onus because it is invariably in the best position to provide the evidence.

In *Mana Home Design*, A.J. Wiebe added one comment to those considerations:

- If the moving party's own motion material reveals sufficient issues justifying a trial concerning the issue in dispute, namely the quantum of the claim for lien, the lien claimant does not have to adduce evidence in response.

***Con-sult Mechanical Inc v Anderson Webb Limited*, 2026 ONSC 1685 (Div Ct)**

Where no costs materials have been provided in accordance with case management directions and/or the Practice Direction, the Divisional Court's general practice is to award no costs. In most cases the court will make this decision without providing reasons for it.

***Element Restorations Ltd v Arruda*, 2026 BCSC 578 (SC)**

Where a renovator estimated costs of construction at $35,350 and ended up invoicing $69,184.82, the court found that that was not a reasonable margin of error in budgeting and amounted to breach of contract. Given the owner's inexperience and reliance on the contractor, the contractor's claim in *quantum meruit* for materials furnished and work performed was dismissed.

***CHU de Québec-Université Laval v Tree of Knowledge International Corp*, 2026 ONCA 209**

There are at least two different avenues for holding officers and directors personally liable for the tortious conduct of a corporation. First, in specified circumstances, the court can pierce the corporate veil to find an officer or director, who is found to be a directing mind, liable for acts attributed to the corporation. In this case, the test for piercing the corporate veil was not met. Second, in some circumstances, the court can find officers or directors of a corporation personally liable for tortious acts that might otherwise be attributed to the corporation, even when piercing the corporate veil is not available. In this case, fraud was the basis to hold officers and directors personally liable for their conduct, even where the conduct was in the course of their duties and arguably in the interests of the corporation.

***Project Freeway Inc v ABC Technologies Inc*, 2025 ONCA 855**

Despite an entire agreement clause in the contract, the trial judge used a letter of intent as an interpretive aid to identify what the agreement between the parties was, so that she could apply the entire agreement in resolving the issue before her. The letter of intent was held to be a part of the factual matrix and could therefore be considered in interpreting the contract. The Court of Appeal held that she was entitled to do so.

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