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Case Comment: *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company*

It is common in building contracts to include a term whereby the contractor agrees to add the project owner as an additional insured under its general liability insurance policy. Often the endorsement insures the added owner for any liability "arising out of the operations" of the contractor.

The appeal in this case concerns the interpretation of this insurance language and clarifies the requisite connection between the contractor's operations and the owner's liability as a "but for" test. However, unlike the "but for" test in negligence, the degree of connection in the insurance context requires an unbroken chain of causation between the liability event and the operations of the named insured.

In this case, the degree of connection between the contractor's installation of the equipment and the equipment's malfunctioning was insufficient.

Background

The Appellant, Sky Clean Energy Ltd. ("**Sky**") is a developer of solar energy projects and the project owner. Sky entered into CCDC2 contracts with Marnoch Electrical Services Inc. ("**Marnoch**"), an electrical contractor, to install two rooftop solar power systems that Sky designed, using equipment selected and sourced by Sky. Marnoch's responsibility was limited to installing the solar system's components.

Incorrect transformers were delivered to one of the project sites; a mistake that threatened to delay the construction schedules for both systems. Faced with a significant delay, Sky enlisted Marnoch's help to source replacement transformers. Although not contractually obligated to do so, Marnoch helped Sky locate a replacement supplier. It was Sky's decision whether or not to accept the supplier; Sky never asked Marnoch for its opinion on the suitability of the transformer, nor did Marnoch have the expertise to opine on such matters.

Upon completion of the construction of the solar systems, Sky transferred ownership of the systems to a solar energy partnership ("**Firelight**"). As part of the sale agreement, Sky provided Firelight with warranties and indemnities.

During the installation phase (connecting the solar systems to the power grid), the replacement transformers caught fire and burned. As a result, Sky incurred liabilities for remediation and loss of revenue to Firelight. Sky settled these liabilities with Firelight and then sought to recover those damages, first against Marnoch, then against Marnoch's general liability insurer, Economical Mutual Insurance Company ("**Economical Insurance**").

The Contract

Under the contracts with Sky, Marnoch agreed to indemnify Sky for Marnoch's failure to perform its contractual obligations and for its negligent acts. Marnoch also agreed to name Sky as an insured under its commercial general liability insurance policy, but "only with respect to liability, other than legal liability arising out of [Sky's] sole negligence, arising out of the operations of [Marnoch] with regard to the Work."

The insurance certificates issued to Sky by Marnoch's insurance broker confirmed Sky's entitlement to coverage under an endorsement "but only with respect to liability arising out of the operations of [Marnoch]."

Legal Proceedings

Sky commenced various proceedings against Marnoch, Economical Insurance, Marnoch's insurance broker and the manufacturer of the replacement transformers.

In the proceeding against Economical Insurance, the trial judge found that the design of the solar systems, including the wiring and the choice of equipment, were Sky's responsibility. Marnoch played no role in the decisions to purchase or install the transformers, therefore Sky's liability did not "arise out of the operations" of Marnoch. Sky appealed.

Appeal

Strathy C.J.O., for a panel of the Court of Appeal, upheld the trial judge's holding and dismissed Sky's appeal.

"Arising Out of"

The Court dismissed Sky's argument that the trial judge adopted an unduly narrow interpretation of the words "arising out of the operations."

The Court agreed with the trial judge's adoption of the British Columbia Court of Appeal's reasoning in *Vernon Vipers Hockey Club v. Canadian Recreation Excellence (Vernon) Corporation*, 2012 BCCA 291 ("***Vernon***"). In particular, the Court confirmed that the correct interpretation of "arising out of" or "arising from" requires more than a "but for" connection between the liability of the additional insured and the operations of the named insured. In the insurance context, there must be an "unbroken chain of causation" to satisfy the requisite connection and the connection must be more than "merely incidental or fortuitous."

"Operations"

The court in *Vernon* went on to define "operations" to include the "creation of a situation, or circumstance, that is connected in some way to the alleged liability." The court in Vernon qualified this interpretation as not requiring an "active" role by the named insured in creating the liability event.

In other words, pinning liability on a party in this context requires a clear and uninterrupted sequence of events from the party's action(s) to the liability event. Further, the party's action(s) need not directly cause the event, rather causing or contributing to the occurrence of the event can be sufficient.

Application to the Facts

The Court agreed with the trial judge and found that Marnoch's connection to the failure of the replacement transformer and the resulting fire was "merely incidental."

Although the fire would not have occurred "but for" Marnoch's ordering

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and installing the transformers as part of Marnoch's operations under its CCDC2 contracts with Sky, *Vernon* requires a stronger connection. In this case, there was a broken chain of causation. Marnoch's "operations" under the contract were limited to installing the transformers, and did not require Marnoch to select the transformers. This was Sky's decision.

The Court held that Sky's attempts to hold Marnoch liable for the consequences of its own decisions were not justified. The Court dismissed Sky's appeal with costs.

Conclusion and Takeaways

Sky argued that the language of the construction contract should inform the Court's interpretation of the insurance policy. The Court noted that insurers are often not privy to the agreements entered into by its insureds and although insurers can (in theory) create custom language to underwrite the risks assumed into by its insureds, there was no evidence that Sky demanded Marnoch request its insurer to do so in this case. This is an important takeaway. When negotiating building contracts, be wary of executing agreements that contain indemnity language that does not track the language in the insurance policy. Not only will this create uncertainties over what risks are insurable, but it will devolve into unnecessarily costly disputes when an eventual claim does arise.

During the contract negotiation phase, specifically, when drafting indemnity language that covers a party's liability arising out of the operations of another party, it is prudent to consider including "operations" as a defined term under the contract. Further, ensure the definition of "operations" is sufficiently broad and specific to cover most (if not all) liability events. Conversely, if representing the party whose operations are being defined, ensure that the language covers operations that are 1) insurable, 2) reasonable and 3) in line with the skill and expertise of the party.

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Court of Appeal Considers SCC's *Wellman* Decision and Upholds its Prior Decision on s. 7(6) of the *Arbitration Act*

The Ontario Court of Appeal has clarified the law on the courts' powers to stay proceedings where an arbitration agreement covers only part of the dispute, and on the availability of an appeal from a court's findings on such stay motions.

In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612, the applicant brought a motion to quash an appeal from the order of the motion judge refusing to stay a court action in favor of arbitration on the grounds that, following the Supreme Court of Canada's decision in *TELUS Communications Inc. v. Wellman* ("***Wellman***") in 2019, the court lacked jurisdiction as the appeal is barred by s. 7(6) of the *Arbitration Act, 1991*. A five judge panel of the Court of Appeal dismissed the motion to quash the appeal.

Subject to specific exceptions, s. 7(1) of the *Arbitration Act, 1991* provides that if a party to an arbitration agreement commences a court proceeding on a matter subject to arbitration, the court shall, on the motion of another party to the arbitration agreement, stay the court proceeding. Where arbitrable and non-arbitrable matters are raised in a single court proceeding, the court may stay the proceeding with respect to the arbitrable matters and allow it to continue with respect to the other matters. Section 7(6) provides that there is no appeal from the court's decision.

For the last twenty years, the leading case in Ontario on s. 7(6) of the *Arbitration Act, 1991* was *Huras v. Primerica Financial Services Ltd.* ("***Huras***"). The applicant invited the Court of Appeal to overrule *Huras* following the SCC's decision in *Wellman*, which overturned the Ontario Court of Appeal's decision in *Griffin v. Dell Canada Inc.* ("***Griffin***") on the interpretation of s. 7(5). The Court held that although *Wellman* overturned *Griffin* on the interpretation of s. 7(5), it did not disturb *Huras* on the interpretation of s. 7(6) and dismissed the motion to quash the appeal.

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The court held that *Wellman* was mainly concerned with whether s. 7(5) granted a motion judge the discretion to refuse to stay arbitrable claims in a court proceeding that combined arbitrable claims with non-arbitrable claims. This discretion had previously been recognized in *Griffin* and in the Court of Appeal's decision in *Wellman*. The court found although *Wellman* overturned *Griffin* on s. 7(5), the *Wellman* court expressly avoided ruling on s. 7(6) and left its interpretation for future consideration.

The court then went on to consider the applicant's arguments that the *Huras* line of cases should be overturned on the following grounds:

1. That *Huras* was not in accordance with the modern approach to statutory interpretation. Section 7 should be read as granting a one-time opportunity to challenge a proceeding in the courts, with no further recourse allowed, as s. 7(6) provides for "no appeal".

2. That s. 7(6) should be read as precluding any appeal from a motion brought under s. 7.

3. That *Huras* was wrongly decided because it read words into s. 7(6) by allowing an appeal if the motion judge refused to stay the court proceeding.

The court rejected these submissions and found that *Huras* was correctly decided. The court held that *Huras* found that s. 7(6) of the *Arbitration Act*, *1991* barred an appeal only when the motion judge made a "decision" under s. 7, and this was consistent with the SCC's finding in *Wellman*. A party may bring a motion based on statutory provision, but the court's decision may be made on a different basis. In addition, the court found that the bar in s. 7(6) applied whether that decision grants or refuses a stay.

Having found that *Huras* remains intact, the court found in this case the motion judge did not make a decision under s. 7 and therefore s. 7(6) does not bar this appeal. The court reasoned that as a result of *Wellman*, the motion judge had no statutory authority under s. 7(5) to refuse to stay the claims subject to arbitration and therefore his decision was not made under s. 7. The motion to quash the appeal was dismissed. The court found that the motion judge's decision was a final order and therefore an appeal lay to the Court of Appeal under s. 6(1) of the *Courts of Justice Act*.

It was interesting that even though the motion judge did not have the benefit of *Wellman* when he made his decision, the court held the motion judge to the corrected interpretation in *Wellman*, as it explained what s. 7(5) always meant, from the day of its enactment, not with prospective effect only. In reaching its decision, the court also noted that *Huras* respects the principles underlying the *Arbitration Act, 1991*: parties' autonomy to arbitrate disputes and limited court intervention in the arbitration process.

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No Cruel Treatment of Corporations - *Quebec (Attorney General) v. 9147-0732 Quebec inc.*

Under s. 12 of the *Canadian Charter of Rights and Freedoms*, everyone has the right not to be subjected to any cruel and unusual treatment or punishment. In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 202 SCC 32, the Supreme Court of Canada held that "everyone" does not include corporations.

In Québec, like other provinces, it is an offense to carry out construction work as a contractor without holding a current license for that purpose. The defendant in this case, 9147-0732 Québec inc., was found guilty of doing just that.

Under the Québec *Building Act,* the penalty for the offence is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation. Applying the *Act*, the Court of Québec imposed the then minimum fine for corporations of $30,843. The corporation challenged the constitutionality of the mandatory minimum fine, arguing that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the *Charter*.

The case went through three instances of the Québec court system before ending up in the Supreme Court of Canada. The Court of Québec concluded that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12 of the *Charter*, and that in any event, the minimum fine was far from being cruel and unusual. The Quebec Superior Court agreed that corporations were not covered by s. 12, the purpose of which was the protection of human dignity, a notion clearly meant exclusively for natural persons. A further appeal was successful, and the majority at the Quebec Court of Appeal held that s. 12 could apply to corporations. The majority held that the fact that s. 12 was linked to human dignity did not prevent its application to corporations, since other *Charter* rights which also protect human dignity, such as ss. 8 and 11(b), have also been held to apply to corporations.

The Supreme Court agreed with the dissenting judge in the Court of Appeal. The court held that the inclusion of "cruel" strongly suggested that the provision was limited to human beings:

Justice Chamberland quite rightly emphasized that the ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] "[o]ne would not say, it seems to me, that a group of workers who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business's products, creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business"... We therefore agree [. . .] that the words "cruel and unusual treatment or punishment" refer to human pain and suffering, both physical and mental.

The court looked to its earlier decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 92, in which it held that s. 7 of the *Charter* , which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", could not apply to a corporation, since it would be hard to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". To say that bankruptcy and winding up proceedings could engage s. 7 would stretch the meaning of the rigt to life beyond recognition.

While all justices of the Supreme Court concurred in finding that s. 12 had no application to corporations, there was disagreement on the role of international and comparative law in interpreting the *Charter*. The majority (Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ.) held that it held a limited role of providing support or confirmation for the result reached by way of

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purposive interpretation of *Charter* rights. Justices Abella, Karakatsanis and Martin would have looked abroad in support of interpreting s. 12. As stated by Justice Abella, "since Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada's prohibition against cruel and unusual treatment or punishment with how courts around the world have interpreted the numerous international human rights instruments containing provisions that closely mirror the language of s. 12."

In the result, however, all justices were in agreement that just like demolishing a building by blowing it up does not constitute cruelty toward the building, fining a construction company does not constitute cruelty toward the corporation.

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Lien Claimants, Mortgagees and Appeal Routes: *Dal Bianco v. Deem Management Services Limited*

On September 18, 2020, the Ontario Court of Appeal released its decision in *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585. In brief, the lower court held that construction lien claimants had priority over a mortgagee in the sale proceeds of an insolvent debtor's property under section 78 of the *Construction Act* (the "***Act***"). The mortgagee appealed. On appeal, the parties moved for directions from the Court of Appeal on which appellate court had jurisdiction. Jurisdictional issues were present in this appeal because of the overlap between the priority dispute under the *Act* and a receivership process under the *Bankruptcy and Insolvency Act* ("***BIA***"). Both statutes set out different appeal routes.

The court ruled that because the impugned order was made in part reliance on the *BIA*, federal paramountcy rules in favour of federal legislation. As a result, under the *BIA*, the Court of Appeal had appellate jurisdiction.

In addition to confirming appellate routes, this decision further reinforces the protection of lien claimants as the overall purpose of Ontario's construction law regime. Also, this decision showcases the courts' propensity to underpin the protection of lien claimants as a guiding principle when disposing of construction-related matters. In other words, unless an exception dictates otherwise, a court will defer to favouring lien claimants.

Background and Facts

Deem Management Services Limited ("**Deem**") was the registered owner of a parcel of land in Waterloo, Ontario (the "**Real Property**"). Mr. Dal Bianco, the owner and sole director of Deem, incorporated Uptown Inc. to plan and develop the vacant portion of the Real Property into a senior's residence (the "**Project**").

Shortly into construction, the Project became insolvent and the trades were notified by Mr. Dal Bianco to cease construction activities. The trades liened. In addition to construction liens, various mortgages were registered against title to the Real Property, three of which were registered by Mr. Dal Bianco personally.

Pursuant to section 293(1) of the *BIA*, the Ontario Superior Court appointed a Receiver over the property in connection with the Project (the "**Property**"). The Receiver liquidated the Property and from the proceeds of sale, payments were made to the first and second ranking mortgages. However, $5M remained in trust and was to be disbursed to the remaining secured parties. A dispute arose as to whether the lien claimants or Mr. Dal Bianco, as third ranking mortgagee, held priority to the remaining funds.

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Priority Motion in the Ontario Superior Court of Justice

The motion judge relied on section 78 of the *Act* to grant priority in favour of the construction lien claimants.

In granting the motion, C. Gilmore J. noted that the intention of the *Act*, and thus the intention of section 78, is to protect lien claimants by granting them priority status over mortgages that are registered on title after construction liens have been registered. However, the *Act* carves out certain exceptions that, if proven, would shift the *Act*'s priority regime in favour of mortgagees. Therefore, the issue on this motion, as is the issue in most priority disputes, is whether the facts demonstrate that a section 78 exception exists.

C. Gilmore J. relied on the principle set out in the Ontario Court of Appeal's decision in *Boehmers v. 794561 Ontario Inc.*[1] to confirm that the onus to persuade the court that a section 78 exception is triggered rests on the mortgagee, not the lien claimant.

To satisfy their burden of proof, Mr. Dal Bianco relied on sections 78(6) and 78(2) of the *Act*, respectively, to argue that:

1. The third mortgage was a "subsequent mortgage" under the *Act* and because funds were advanced under the subsequent mortgage, Mr. Dal Bianco as the third ranking mortgagee, therefore had priority over those funds; and,

2. The third mortgage was a "building mortgage" under the *Act* and therefore held priority over the lien claimants to the extent of any deficiency in the holdbacks.

A) The S. 78(6) Subsequent Mortgage Argument

Section 78(6) of the *Act* outlines an exception that covers a mortgage registered after construction has commenced on a project and thus after lien rights have arisen. For a mortgagee to gain priority over lien claimants under this exception, the *Act* sets out that the funds lent must satisfy the following three conditions:

1. The funds must be advanced "in respect of that mortgage";

2. There must not be any preserved or perfected liens at the time of the advance; and

3. At the time of the advance, the mortgagee must not have received written notice of a claim for lien.

Conditions two and three were satisfied in this case.

With respect to the first condition, Mr. Dal Bianco took the position that the entirety of funds advanced under the Project "benefitted the project" and therefore were advanced "in respect of" the third mortgage. The court disagreed. The court referred to the case of *XDG Ltd. v. 1099606 Ontario Ltd.*[2] to highlight the distinction between "amounts secured" and "amounts advanced". In *XDG*, the financial arrangement in question involved advances made under a credit agreement, whose amounts were later secured by registration of a mortgage. The court in *XDG* held that because the mortgage was registered on title to secure a prior indebtedness and was not registered to secure advances made under that mortgage, the lien claimants' priority was not affected. The court also referred to the decision in *Jade-Kennedy Development Corp., Re* to confirm the absence of case law supporting the notion that section 78(6) required the proceeds of an advance to create a "benefit" to the borrower.

Ultimately, the motion court held that Mr. Dal Bianco's third mortgage was not a "subsequent mortgage" under the *Act* and therefore did not trigger an exception that would disturb the *Act*'s priority regime. Importantly, Mr. Dal Bianco had already made the advances to finance the Project at the time when the construction liens arose, and then subsequently registered the mortgages on title. The court held that nowhere in the *Act* does it contain an exception that allows for lenders to lend funds for an improvement and then gain priority over lien claimants by subsequently securing their loans with registered mortgages. The court noted that allowing mortgagees to maneuver in this manner to gain priority runs counter to the *Act*'s overall purpose, which (again) is to protect lien claimants.

1. 1995 CarswellOnt 244 aff'g *Jade-Kennedy Development Corp., Re*, 2016 ONSC 7125.

2. 2002 CarswellOnt 4535, [2002] O.J. No. 5307 ["***XDG***"]

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B) The S. 78(2) Building Mortgage Argument

Mr. Dal Bianco further argued that the third mortgage is a "building mortgage" in accordance with section 78(2) of the *Act*. The court disagreed. Noting that "building mortgage" is not a defined term under the *Act*, the court undertook a closer inspection of the initial wording of section 78(2): "…intention to secure the financing of an improvement …". The court characterized this language as a future intention on the part of the mortgagee to secure the financing of an improvement. Thus, for a charge to qualify as a "building mortgage" under the *Act*, a lender must first register a mortgage and then advance the funds under that mortgage. Mr. Dal Bianco did the reverse: he advanced funds and thereafter registered the mortgage on title – a sequence of events that proved fatal.

Mr. Dal Bianco appealed.

First Motion in the Ontario Court of Appeal

On appeal, a dispute arose over the correct appeal route. Mr. Dal Bianco filed a motion to a single judge of the Court of Appeal seeking directions on whether the Court of Appeal or the Divisional Court had appellate jurisdiction over the lower court's order.

The *BIA* and the *Act* both set out different appeal routes: Under section 71(1) of the *Act*, an appeal lies to the Divisional Court; and under section 193 of the *BIA*, an appeal lies to the Court of Appeal.

M. Jamal J.A. held that, as a single judge, he lacked jurisdiction to decide the motion. In support of his disposition, he relied on the Ontario Court of Appeal case of *Ontario (Provincial Police) v. Assessment Direct Inc.*[3] where the Court of Appeal in that case held that "a single judge has no power to decide whether an appeal is within the jurisdiction of this court." The motion was adjourned to be heard by a panel.

Second Motion in the Ontario Court of Appeal

This time around, a panel of the Ontario Court of Appeal noted that the key to identifying the correct appeal route is to focus the analysis on the order under appeal. Specifically, the court confirmed that the question to be asked when a receiver has been appointed under section 193 of the *BIA* is "whether the order under appeal is one granted in reliance on jurisdiction under the *BIA*. Where it is, the appeal provisions of that statute are applicable."[4]

In this case, the impugned order was granted in part reliance on the *BIA*. The court held that styling a motion under a receivership or other bankruptcy and insolvency proceeding is not sufficient to access the appeal route under the *BIA*. However, the impugned order in this case was more than styled under the *BIA*. Rather, the substance of the order was borne out and made pursuant to the *BIA*'s receivership process. Thus, because the *BIA* is federal legislation and the *Act* is provincial legislation, the court deferred to the principle of federal paramountcy to settle the conflict in favour of the *BIA*. Accordingly, the Court of Appeal was the correct appeal route.

Key Takeaways

The case is important to construction stakeholders for several reasons. First, the higher court's decision clarifies that the *BIA*'s appeal route takes precedence over that of the *Act*'s when the order under appeal was granted in reliance on the *BIA*. Given the financial threat COVID-19 poses to construction projects and the likelihood of projects becoming insolvent as a result thereof, knowing the appropriate appeal route in the event a bankruptcy and insolvency proceeding commences is useful for parties appealing orders.

Second, for construction financiers, the lower court's decision confirms that, as a rule, when claiming priority over lien claimants, it is prudent practice for secured lenders to register the charge *prior* to advancing the funds. Failing to adhere to this sequence and then moving to gain priority over lien claimants is a futile strategy; not only is it in blatant contradiction of the overall purpose of the *Act*, but it is unsuccessful in front of an arbiter.

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3. 2017 CarswellOnt 19624, 2017 ONCA 986.

4. *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 CarswellOnt 5177, 2019 ONCA 269.

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Case Comment: *GTA Restoration Group Inc. v. Baillie*

Facts

In August of 2020, Master Robinson released his decision in *GTA Restoration Group v. Baillie* ("***Baillie***"). The dispute concerned the decontamination of a property. Following the unfortunate passing of Baillie's sister, Baillie contracted with GTA to decontaminate her sister's house. GTA invoiced Baillie for the completed work, and Baillie agreed to pay.

The issue arose when Baillie notified GTA that Baillie was insured. In response to the notice that an insurance company was involved, GTA increased their bill by almost $40,000. Subsequently, Baillie's insurance conducted their own audit of GTA's work and informed GTA that they felt GTA exaggerated their costs and refused to pay the higher fee.

GTA, which remained unpaid, registered a lien for the unpaid invoice, and commenced proceedings against Baillie.

Baillie countered that, among other things, GTA's lien was willfully exaggerated. Baillie asked the Master to discharge the lien under sections 35 and 47 of the new *Construction Act* (the "***Act***").

Issues Raised

Master Robinson in *Baillie* was faced with several distinct issues, two of which this article draws attention to. First, Baillie is the first case to deal with the newly worded section 47 and if willful exaggeration can qualify as grounds for discharging a lien. Second, Master Robinson weighed in on the case law developing the procedural differences between a section 47 motion and a motion for summary judgment.

Can a Lien be Vacated for Willful Exaggeration?

Baillie argued that sections 35 and 47, when read together, allow the court to discharge a lien which is willfully exaggerated. Baillie's argument rested on the new addition to the wording of section 47 following the amendment of the old *Act*, in particular that willful exaggeration qualified as an abuse of process. GTA took the position that section 47 could not apply to an exaggerated lien, and that only section 35 applied. Essentially, GTA argued that section 35 was a complete code for willful exaggeration claims and, therefore, that dismissal of the lien under section 47 was not possible.

This was the first case to interpret the new wording of section 47, and what it meant for a lien to be "frivolous, vexatious, or an abuse of process." In looking at the meaning, Master Robinson relied upon the expert report prepared by Bruce Reynolds and Sharon Vogel. After doing so, Master Robinson found that willful exaggeration could ground an abuse of process claim under section 47 of the *Act*.

> *I do not accept GTA's position that willful exaggeration cannot be a basis for determining that a lien is an abuse of process under s. 47. The nature, extent, and knowledge (or reasonable knowledge) of exaggeration are factors that, in my view, are properly considered by a court. Whether they are sufficient to warrant discharge will turn on the facts and circumstances of each case.*[1]

As the Master noted, this was the first case where a court acknowledged that full discharge of the lien could be a remedy for willful exaggeration. However, Master Robinson went on to conclude that there were not enough facts before the court to determine if

1. *GTA Restoration Group Inc v. Baillie*, [2020] ONSC 5190 at para 62.

the lien in question was, in fact, willfully exaggerated. Instead, the lien in question was declared exaggerated and reduced pursuant to section 35(2) of the *Act*.

It is hard to say what type of facts could lead a court to discharge a willfully exaggerated lien under section 47. Naturally, the finding that a lien is willfully exaggerated means that there is in fact an actual value underlaying the lien claim, albeit a lower value. Master Robinson himself acknowledged that it would be inconsistent with the *Act* to deny an entirely unpaid contractor the ability to prove entitlement to a lien at trial. Thus, in order to feel that discharge under section 47 is justified, a court would likely require facts that prove serious bad faith on the part of the lien claimant on clear evidence. What that evidence would look like is less clear.

Regardless, Master Robinson's conclusion that section 35 is not a self-contained regime for willful exaggeration opens up the scope for discharges under section 47 of the *Act*.

Difference Between a Motion for Summary Judgment and a Section 47 Motion

Given Master Robinson's finding that he lacked sufficient evidence to rule on willful exaggeration, the question of evidentiary onus was an important one. To determine the evidentiary onus of each party in a section 47 motion, Master Robinson needed to weigh in on the current jurisprudence differentiating a section 47 motion from a summary judgment motion.

Master Robinson followed the approached taken by the Court in *M. Fuda Contracting Inc. v. 1291609 Ontario Ltd.*, 2018 ONSC 4663, concluding that a motion for summery judgment was a type of motion that fell under the umbrella of section 47, but that there were important distinctions in procedure between the two.

This distinction between section 47 motions and a motion for summary judgment under R. 20 is important for establishing the parties' evidentiary burdens. On a motion for summary judgment there is a burden on both parties to put their "best foot forward", meaning each side must lead their best evidence. Whether that burden exists under a section 47 motion is less clear. For example, in *R&V Construction v. Baradaran*, 2020 ONSC 3111, the Court looked at the wording of section 47 and concluded that "there is no requirement for parties to 'put their best foot forward.'"

Master Robinson softened the position that there is no "best foot forward" approach, stating that in a situation like in *R&V Construction* it made sense no such evidentiary onus would apply, but that would not be true in other cases like the one before him. As Master Robinson identified, in *R&V Construction* the unrepresented defendant had moved under section 47 to discharge the lien, but had instead had summary judgment issued against him for his failure to lead appropriate evidence of triable issues. In such a situation, it seems hardly fair to fault the unrepresented defendant. Especially when the plaintiff is not the moving party.

However, the facts of *Baillie* show why a "best foot forward" requirement is necessary in many section 47 motions. In Baillie, the majority of the evidence was in the hands of GTA who refused to put its "best foot forward" on the section 47 motion.

Given the decision in *Baillie*, and the somewhat murky caselaw on this issue, it is incumbent upon the parties to determine on the facts of a case whether a "best foot forward" approach is required. Counsel may need to consider showing the best evidence of triable issue regardless, given the uncertainty. While *Baillie*'s measured approach might mean that the parties cannot be certain what the evidentiary burden in a given case will be in advance, lawyers can take some solace in Master Robinson's view that *R&V Construction* and another recent case, *Maplequest Developments Inc. v. 2603774 Ontario Ltd.*, 2020 ONSC 4308, did not alter prior caselaw.

Conclusion

Baillie stands for the proposition that it is possible to discharge a lien for willful exaggeration under section 47 of the new *Act*. In tandem, Master Robinson affirms the "best food forward" evidentiary onus in certain section 47 motions, affording the court more evidence to assess a willful exaggeration claim. As the case law continues to develop under the amended *Act*, it remains to be seen what facts will, or would, allow a court to confidently discharge a lien for willful exaggeration. Although this uncertainty may prove difficult for lawyers to navigate in the present, over time the courts will hopefully develop concrete circumstances defining the burden for each party.

AUTHOR:

Notable Case Law

ATB Financial v. DLM Oilfield Enterprises Ltd, 2020 ABQB 562

Under s. 22 of the Alberta *Builders' Lien Act*, where a certificate of substantial performance is issued, and where the owner makes a payment after the issuance of that certificate, the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.

The court rejected an attempt to expand that trust scheme to situations in which no certificate of substantial performance was issued.

Osmi Homes Inc. v. Kumar, 2020 ONSC 5334 (Master)

The court rejected an argument that an unsuccessful defendant advancing some successful arguments at trial is entitled to its costs of the action, despite a judgment against it.

1917196 Ontario Ltd. v. Kazmi, 2020 ONSC 6166 (Master)

The plaintiff brought a motion to strike a defence based on a deficient Scott Schedule. Master Wiebe held that the deficiencies did not rise to the level of non-compliance that would allow him to strike a pleading. While not perfect, the original lawyer, who was not a construction lawyer, had attempted to follow the form requested by the Master.

When experienced construction counsel took over as the defendant's lawyer, Master Wiebe encouraged the plaintiff to resolve the motion. It didn't, nor did it accept an offer to settle. Master Wiebe ordered substantial indemnity costs against the plaintiff.

Tremblar v. 1839563 Ontario, 2020 ONSC 1316 (S.C.J.)

Part II of the Ontario *Construction Act* is privity based. A person cannot be a trust beneficiary without privity of contract with the trustee. Therefore, a subcontractor cannot be the beneficiary of the owner's trust.

Encompas v. 2503147 Ontario Inc., 2020 ONSC 6283 (S.C.J.)

One of the first decisions dealing with a s. 37 deadline missed on the basis of a misinterpretation of the COVID-related suspension of timelines regulations. The decision stands for the following propositions:

1. The fact that a lien claimant misinterprets the various COVID-related regulations governing extension or suspension of timelines does not save a lien that expired under s. 37.

2. Where it is obvious from correspondence that counsel for the lien claimant misinterpreted the suspension legislation, and where opposing counsel ignores the correspondence, that might lead to a no-costs award.

3. Failure to respond to correspondence from a lien claimant inquiring whether the other parties would consent to a judgment of reference might (the court did not decide this issue) be a violation of the *Rules of Professional Conduct*, but in any event will be considered when it comes to costs.

4. Given the strength of the s. 46 motions in this case on their merits, and further given the frequency in which the Superior Court of Justice had been hearing simple matters in writing during the COVID-19 health pandemic, the motions should have been brought in writing and without notice. Again, failure to do so led to a no-costs award.

The court held that replying in a meaningful way to the said correspondence, by at a bare minimum stating the party's position on the proposed order for a reference, would have in no way sacrificed the opposing party's rights.

This decision must be read in conjunction with the *Rules of Professional Conduct* and counsels' duties to their clients.

Prasher Steel Ltd. v. Maystar General Contractors Ltd., 2020 ONSC 6598

The Divisional Court overturned a decision in which a master granted judgment on a motion to enforce a settlement on the sole basis that it was embodied in a judgment, while it should have been embodied in a report, since the master was acting on a reference.

Even though that point was raised by neither party on appeal, but by the court itself, Justice Corbett held that the matter was important, since it materially affected review and appeal rights, and could not be ignored by the court.

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March 2020

Madalina Sontrop and Jackie van Leeuwen, associates, discuss force majeure events and clauses in the context of the global COVID-19 pandemic.

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April 2020

John Paul Ventrella and Jacob McClelland, associates, discuss the effect of Ontario's regulations under the *Emergency Management and Civil Protection Act*, the list of essential workplaces and the suspension of limitation and procedural time periods on the construction industry.

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