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Summary Judgment in Construction Cases - Has the Culture Shifted?

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Editor's Note

As all experienced construction law practitioners are aware, litigation of construction disputes can be very expensive and time-consuming, even more so than other commercial litigation. That is due in part to the document-intensive nature of construction litigation, and may also be due in part to the messy nature of fact-finding inherent in delay claims and other construction disputes. All of this leads to a problem which is the subject of ongoing judicial reform and inquiry into access to justice.

The paper is very timely. There is ongoing interest in the subject of access to justice. For example, Thompson Rivers University recently (February 8-9, 2018) sponsored a conference on access to justice (the current acronym for this subject is "A2J"), at which there was spirited discussion of different ways in which the civil litigation system might be changed to make it more accessible to the large segment of Canadian society that cannot afford to use it.

One of the important tools available to the courts and construction lawyers in trying to mitigate the cost and time of construction litigation is the use of summary judgment procedures. In the seminal case of *Hryniak v. Mauldin*, which is discussed at length in the paper, the Supreme Court of Canada recognized the growing support for alternatives to the conventional trial process. There is a tension between a full trial process to carry out the fact-finding process, which results in denial of access to justice to many parties who simply cannot afford the cost and time required to use that process, and a more rough form of justice that costs less, takes less time, and in many cases produces a fair result. It is a delicate balancing act.

This excellent paper by Mr. Bowles and Mr. Rotterdam examines judicial trends in the post-*Hryniak* world. It identifies the types of cases that are more suitable for summary judgment, and those for which summary judgment can be more troublesome.

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***2** A functioning summary judgment mechanism is crucial to the administration of justice. In the words of Karakatsanis J. in *Hryniak v. Mauldin*: [2]

> [23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
>
> [24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, [1] ordinary Canadians cannot afford to access the adjudication of civil disputes. [2] The cost and delay associated with the traditional process means that [...] the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has

> long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.
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> ....
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> [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
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> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible-- proportionate, timely and affordable. The proportionality principle means ***3** that the best forum for resolving a dispute is not always that with the most painstaking procedure.
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> [29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

As the Ontario Superior Court of Justice recently pointed out in *Zeppa v. Woodbridge Heating & Air Conditioning Ltd.*,[3] the fundamental teaching of *Hryniak* is that access to justice is a judicial imperative which must shape and inform how courts interpret all manner of procedural rules. In the context of summary judgment, this means that summary procedures must be interpreted broadly, so as to reduce the cost and time involved in civil litigation.

Reduction in cost and time is particularly important in construction litigation, which is notoriously document intensive and time consuming.[4] The disproportionate cost and time taken with construction cases puts a merits-based finding out of reach for most industry participants and this creates its own access to justice issue.

This article canvases post-*Hryniak* construction law summary judgment cases to determine whether the courts' approach has changed in light of the Supreme Court's guidance. In reviewing the case law, four issues stand out as most frequently put to the test of summary judgment. We have categorized post-*Hryniak* construction case law by issue: payment; limitations; statutory breach of trust; and discharge of liens.

Moreover, we have reviewed the case law nationally, and note where certain jurisdictions differ materially from Ontario's summary judgment rules. *Hryniak* is an Ontario case and should be read with that caution; nevertheless, it will be seen that the challenges posed by *Hryniak* are of national concern. Our research reinforces that even with enhanced judicial powers, many construction cases are not suitable for summary judgment.

***4** On the topic of enhanced powers, we will also address the power of a master on summary judgment motions. While the Osborne Report recommended that Rule 20 be amended to expressly confer on a motion judge *or master* the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed, the Rule as enacted did not extend that power to masters. The case law is currently not clear on whether masters hearing cases on a *Construction Lien Act*[5] reference have the enhanced powers or not.

There are already decisions which restrict the reach of *Hryniak*. The 2017 Ontario Court of Appeal decision in *Butera v. Chown, Cairns LLP*,[6] for example, made clear that the pre-*Hryniak* caution against partial summary judgment equally

applies in the post-*Hryniak* world and that, in fact, partial summary judgment raises problems that are anathema to the stated objectives underlying *Hryniak*. That decision is already being followed in lower courts denying partial summary judgment in construction cases.

For those who believe that the culture has not yet shifted enough, a recent legislative response to the access to justice problem in Ontario for construction cases warrants close scrutiny. This article will consider the possible impact of statutory adjudication which the Ontario government has introduced through Bill 142, the *Construction Lien Amendment Act*. As of October 1, 2019, Ontario will be the first jurisdiction in Canada to introduce statutory adjudication as a "real-time" disputes resolution procedure for construction projects. This is a rational legislative response to the barriers to justice we discuss in this paper. Experience in other jurisdictions has taught that adjudication is ineffective without recourse to summary enforcement procedures in courts. [7] The new Ontario Act goes one step further in providing for summary enforcement; an adjudicator's determination, once filed, is enforceable as if it were an order of the court, [8] thus doing away with the need for enforcement by way of summary judgment. However, we can safely predict that many cases will still go to court. Not all of them should.

It is important to remember that any adjudicator's determination is binding on an interim basis only and subject to the underlying matter being determined by a court. Our review of the post-*Hryniak* cases to ***5** date would indicate that summary judgment may well play a crucial supporting role in the adjudication process when it comes to dealing with attempts to attack the adjudicator's determination in court.

1. SUMMARY JUDGMENT REFORMS IN ONTARIO CULMINATE IN HRYNIAK

The excessive cost and time of litigation as a barrier to access to justice is not a new concern, and there is a legislative history in Ontario of broadening the rules on summary judgment to address this problem. Notably, the 1985 rules represented a change to a broader regime, and motions courts throughout the province embraced their enhanced powers. [9] Appeal courts, however, applied the rules restrictively:

> Over time, the Ontario Court of Appeal weighed in with its own interpretation of the rule, taking what was understood as a firm stance against the making of determinations of credibility and findings of fact on summary judgment motions. In deciding motions for summary judgment, courts were never to assess credibility, weigh evidence or make findings of fact, but merely to make the threshold determination of whether there was a genuine issue of material fact requiring a trial. Although this interpretation remained in place for some time, by 2006 it had become clear that it was not serving the civil justice system well. The reconsideration of summary judgment became an important focal point of a review commissioned by the Ontario government (and conducted by former Associate Chief Justice Coulter Osborne) with a view to making civil justice more accessible and affordable. [10]

In a construction law context, the Ontario Court of Appeal's approach to the previous rules are perfectly summarized in *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd. / Groupe d'assurance canadienne generale Ltée*: [11]

> [16] The leading case in this jurisdiction on summary judgments is *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.). Morden A.C.J.O., giving the judgment for the court, noted (at p. 549) that Rule 20 "substantially expanded the potential for summary judgment beyond that ***6** provided in the former Rules of Practice". He pointed out that the key provision in the new practice was Rule 20.04(2), *supra*, which introduces the concept of a "genuine issue for trial". Later he discussed the meaning of the phrase (at p. 551):
>
> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the

> rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. [Emphasis in the original.]
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> [17] *Ungerman* and a number of other summary judgment cases were recently reviewed by this court in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 111 O.A.C. 201 (Ont. C.A.). While I do not believe the court changed the law from that set out in *Ungerman*, the extensive analysis by Borins J.A. as to the difficulties motions court judges encounter in determining whether the record before them discloses a genuine issue for trial, emphasized the restricted scope of the judicial process created by Rule 20. The crux of Borins J.A.'s analysis was summarized by him at para. 18:
>
> In my view, the difficulty encountered by motions judges arises not so much because of any real problem in appreciating that the inquiry must focus on a genuine issue of material fact, but because of uncertainty concerning the role of a motions judge and that of a trial judge. Not infrequently, it is apparent from their reasons for judgment that some motions judges have come to regard a motion for summary judgment as an adequate substitute for a trial. In my view, this is incorrect and does not reflect the true purpose of Rule 20. This confusion of roles usually arises in the more difficult cases in which the parties have presented conflicting evidence relevant to a material fact. [Emphasis added.]

***7** The Ontario summary judgment rules were amended in 2010, following the recommendations of the Osborne Report, [12] to reform summary judgment into a legitimate alternative means for adjudicating and resolving legal disputes. [13] The prior wording of Rule 20, whether there was a "genuine issue for trial", was replaced by "genuine issue requiring a trial". As the Ontario Court of Appeal pointed out in *Combined Air Mechanical Services Inc. v. Flesch*, [14] this change in language was more than semantics: while the prior wording served mainly to winnow out plainly unmeritorious litigation, the amended wording, coupled with the enhanced powers under rules 20.04(2.1) and (2.2), now permitted the motion judge to dispose of cases on the merits where the trial process was not required in the "interest of justice".

The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed. It recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented. [15] In following some of the Report's recommendations, the Legislature adopted the following rule in 2010:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the ***8** following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.

> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> (3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.
>
> (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.
>
> (5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

As noted by Justice Karakatsanis in *Hryniak*, that wording represented a significant change in the court's power:

> [43] The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.
>
> [44] The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.
>
> [45] These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in ***9** the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

Therefore, on a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring a trial based only on the evidence before her, without using the new fact-finding powers. If the summary judgment process provides the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, there is no genuine issue requiring a trial. If, after that enquiry, there is a genuine issue requiring a trial, the court should determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). The use of those powers is discretionary, provided that their use is not against the interest of justice, which it will not be if it will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.[16] These powers may be employed unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules. On the latter point, Karakatsanis J. offered the following clarification:

> [59] In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

> [60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important ***10** claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

What can be seen, then, is that the Supreme Court of Canada has articulated a new approach to summary judgment by mandating that summary judgment rules must be interpreted broadly, and thus expanding the use of summary judgment as an alternative model for adjudication that should be more widely available to provide litigants with less expensive and more timely access to justice. [17]

2. APPLICATION OF HRYNIAK OUTSIDE ONTARIO

At the outset, it is important to again stress that *Hryniak* was decided in the context of the changes made to the Ontario *Rules of Civil Procedure*. The new regime is tied to the wording of those Rules, and may therefore not be entirely transferable to other jurisdictions.

Rule 20 of the Prince Edward Island *Rules of Civil Procedure* was amended as of September 1, 2015, to reflect the *Hryniak* decision. [18] The Saskatchewan summary judgment rules are essentially identical to the Ontario rules, so that *Hryniak* is equally applicable there. [19] Similarly, New Brunswick's new Rule 22, which came into force on January 1, 2017, is modelled closely on the Ontario rule. [20] It has been held in Newfoundland and Labrador that Rule 20 of the Ontario Civil Rules of Procedure "has a similar intent to our Rule 17A". [21]

The Alberta Rules provide for both summary judgment in Rule 7.3 and summary trial in Rule 7.5. In *Stoney Tribal Council v. Imperial Oil Resources Ltd.*, [22] the court held that *Hryniak*'s two-step approach is nonetheless compatible with the Alberta Rules, the first stage being similar to Rule 7.3, and the second step, *i.e.* the enhanced fact-finding powers, being broadly comparable to an application by way of summary trial under Alberta Rule 7.5. The Alberta Court of Appeal has therefore held that the principles stated in *Hryniak* are consistent with modern Alberta summary judgment practice as set out in Alberta Rule 7.3. [23] ***11** Courts in the Territories appear to have no hesitation in applying *Hryniak* to their jurisdictions, even though their rules also contain provisions for both summary trial and summary judgment. [24]

Other provinces have a fundamentally different approach. British Columbia, for example, has an entirely different set of rules, the significance of which was pointed out in *J. (N.) v. Aitken Estate*: [25]

> It must be remembered that *Hyrniak v. Mauldin* was dealing with the Ontario rules, which are different from our rules in British Columbia. In particular, at para. 68, the Court stressed the fact that under Ontario Rule 20.04(2) "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ..." In contrast, our Rule 9-7(15) uses the word "may" rather than "shall". I therefore do not take *Hyrniak v. Mauldin* to derogate from the proposition that in British Columbia, the question of whether a matter is suitable for summary determination is within the discretion of the trial judge, provided, of course, that that discretion must be exercised judicially.

Similarly, in *Strata Plan BCS 1348 v. Travelers Guarantee Co. of Canada*, [26] the court held that:

> First, as Griffin J. noted in *Century Services Inc. v. LeRoy*, 2014 BCSC 702 (B.C. S.C.) at paras. 82-91, Ontario and BC have markedly different rules pertaining to summary judgment and summary trial. In sum:
>
> a) B.C. has a summary trial rule; Ontario does not.
>
> b) Because Ontario does not have a summary trial rule, the Ontario summary judgment rule gives more power to motion's [sic] judges than the BC summary judgment rule does: Ontario permits assessing and weighing conflicting evidence, even *viva voce* evidence, while BC does not permit any weighing of the facts on summary judgment. In BC, a court's role on summary judgment is to decide the ultimate question of whether there is a *bona fide* triable issue.
>
> ***12** c) Ontario does not have a summary trial process, thus the Ontario summary judgment rule is essentially a blend of BC's summary judgment and summary trial rules.

Even in British Columbia, though, courts have held that the comments in *Hryniak* "clearly apply to summary procedures in general, beyond the specific one at issue in that case; in particular, they may guide the determination of a matter's suitability for resolution by summary trial". [27]

The summary judgment provisions in Manitoba also differ significantly from Ontario's Rule 20. While the Manitoba Court of Appeal, in *Lenko v. Manitoba*, [28] held that *Hryniak* had not changed the test to be applied on a motion for summary judgment in that province, that position was subsequently qualified. In *Virden Mainline Motor Products Limited v. Murray et al.*, [29] the court held as follows:

> In this regard, I agree with the comments of Dewar J. in the recent decision of *3746292 Manitoba Ltd. v. Intact Insurance Co.*, 2016 MBQB 210 (Man. Q.B.):
>
> 17 I do not interpret the *Lenko* decision as saying that the *Hryniak* case has changed nothing in motions for summary judgment. In my opinion, *Hryniak* has changed the application of the test for summary judgment. It is a question of degree. What the *Hryniak* case emphasizes is that courts should look more closely at the materials before them in order to assess whether a conventional trial is required. If the case can fairly be decided on the materials laid before the judge on a summary judgment motion, the judge should not be constrained from doing so. All that the Court of Appeal in the *Lenko* case did was illustrate that oftentimes, it is difficult when faced with a real credibility issue, to decide the case on affidavits.
>
> [Emphasis in the original.]

The Nova Scotia Court of Appeal recently cautioned its province's courts against relying on Ontario summary judgment cases in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*: [30]

> ***13** [34] Judges, in this province, should be careful in relying on case law from Ontario when considering summary judgment motions. *Kiden* and the Ontario Rule 20.04 under which it was decided is clearly distinguishable from Nova Scotia Rule 13.04.

....

> [35] The Ontario Rule gives the Court the power to weigh the evidence, evaluate credibility and draw inferences from the evidence. That is not the case in Nova Scotia.

> [36] Justice Fichaud addressed the distinction between the Ontario Rule and the Nova Scotia Rule in *Shannex*:
>
> [38] Two reasons are often cited to support the request that an action be determined by a chambers judge upon affidavits. First is that the responding party's pleading has no merit. Second is that the disputed issues may be determined more efficiently by an abbreviated procedure without a full trial.
>
> [39] Some jurisdictions address both factors with one Civil Procedure Rule: *e.g.* Ontario's amended Rule 20, that was discussed in *Hryniak*. Ontario's Rules do not have a general mechanism to convert actions into hybrid applications. Nova Scotia separates the functions with two Rules. Rule 13 addresses the first scenario with summary judgment. Rule 6 permits a chambers judge to convert an action to an application that will more proportionately allocate resources. Rule 6.02 lists the governing criteria, and a body of jurisprudence under Rule 6 has developed the principles for conversion. These include factors like those discussed in *Hryniak*.

In British Columbia, Manitoba and Nova Scotia, therefore, one must use caution when attempting to import any of the findings in *Hryniak*.

As Karakatsanis J. noted in *Hryniak*, Quebec is the only province that currently does not include a summary judgment mechanism in its rules of civil procedure. For this reason we have not included Quebec in our national review of case law on summary judgment. It has been suggested, however, that Quebec courts may nonetheless incorporate *Hryniak*'s guiding principles in applying other, similar rules aimed at ***14** disposing of abusive or groundless claims, such as s. 51 of the new *Code of Civil Procedure*. [31]

It is clear that *Hryniak* is of greater application in some parts of Canada moreso than others. Nevertheless, the problems of barriers to justice and the illusory full trial, to use Karakatsanis' J. phrase, are of national concern and are of particular concern in respect of document heavy and factually complex construction claims. The ongoing development of the law of summary judgment post-*Hryniak* as a means to address these issues merits particular attention across Canada.

3. FINDINGS

We identified 131 summary judgment motions in Canadian construction cases between 2014 and 2017. Courts granted summary judgment in 62 of those cases (47%), partial summary judgment in 17 cases (13%), and denied summary judgment in 49 cases (37%). This is set out in chart form in Appendix "A" to this paper.

3.1 Payment

Claims for payment pursuant to the terms of a settlement agreement lend themselves to summary judgment, [32] as do claims for payment against a defaulting mortgagor [33] and claims for repayment of construction loans. [34] Where a contract stipulated that amounts invoiced were immediately due and payable, subject to later audits, judgment was granted on the amounts as invoiced. The Alberta Court of Appeal affirmed a summary judgment which had dismissed the defence that the plaintiff was not entitled to withhold payment pending completion of the audit in *SemCAMS ULC v. Blaze Energy Ltd.* [35]

Not surprisingly, summary judgement will likely also be granted to the extent an amount claimed for extras is admitted to be owing by the defendant. [36] Similarly, judgment will be granted where a claim for ***15** payment on the contract and extras is fully proven and supported by invoices that were not disputed, [37] or in light of uncontradicted documentary evidence that work was performed on a property and not paid for. [38]

To the contrary, the court in *1904601 Ontario Ltd. v. 58 Cardill Inc.* [39] provided a number of examples of payment issues that, based on conflicting evidence, could not be determined by way of summary judgment:

> In my view, in the present case, there are many factual issues requiring a trial for resolution. Whether the parties amended the contract to relieve compliance with Part 6 with respect to extras to the Contract is one such issue. The timing of the submission of the invoices for the bulk of the extras is an issue which, in my view, requires *viva voce* evidence to resolve. Both parties retained experts and both parties submit that the opinions of their expert should be preferred to the opinions of the other side's expert. This is an issue which cannot be decided on a motion for summary judgment.
>
> Other factual issues which I do not feel can be resolved on a motion include the following:
>
> a) Hi-Tek claims that extras totaling more than $1,100,000 were verbally authorized by Prica's project manager who also encouraged Hi-Tek to complete the extra work before submitting written pricing for approval ...
>
> b) Hi-Tek claims that when the Contract was signed Prica knew but did not tell Hi-Tek that there would be a significant amount of extra drywall work over and above what was contemplated by the Contract ...
>
> c) Hi-Tek claims that there were numerous design changes to the drawings which were initiated by Prica, there was poor coordination on the part of Prica and there was a compressed construction schedule, all of which combined to necessitate a ***16** massive increase in the amount of drywall work and material needed to complete the building ...
>
> d) Hi-Tek claims that the changes to the Contract were so numerous, frequent and last-minute that there was no time to submit anything in writing until after the project was complete ...
>
> e) Hi-Tek claims that each and every extra was approved verbally by either the project manager or Zeljko Prica ...
>
> f) Hi-Tek claims is that it provided Prica with costing for extras on July 17, 2014 and that 90 percent of the costing for the extras had been received before the project manager left approximately two weeks prior to substantial completion of the building ...
>
> g) Hi-Tek claims that its work was completed on time and in a workmanlike manner.

Similarly, judgment was granted on a claim for extras where the evidence was clear that the extras were authorized by the owner, but not on those portions of the claim for which no evidence was adduced to show why the work would have been extra. [40]

Summary judgment will also be granted defensively with regard to payment issues where it is clear that there is no entitlement to payment. Where a contract prohibits extra work without written permission and such permission is not given, a defendant successfully moved for summary judgment in *Jessco Structural Ltd. v. Gottardo Construction Ltd.* [41]

We conclude that cases revolving around pure payment issues are ideally suited for summary judgment. This is reflected in our research; 24 out of 26 motions for summary judgment were granted in the reported cases we reviewed across Canada.

3.2 Limitations Defences

Another area of law which seems to lend itself to determination by way of summary judgment is limitation of actions. In *Guarantee Co. of North America v. Gordon Capital Corp.*, [42] a case which arose from a claim on a ***17** fidelity bond that provided coverage for dishonest and fraudulent acts of employees, the Supreme Court of Canada determined that a limitation issue can be determined by way of summary judgment.

Where a defendant denies payment on an invoice, for example, and the plaintiff commences an action almost four years later in respect of such payment, the claim will obviously be out of time and summary judgment will be granted absent some evidence of a tolling agreement. [43] Similarly, where the evidence is clear that an owner is aware of problems with the construction, but does not commence an action within the two years stipulated by the *Limitations Act, 2002*, the claim will be barred. [44]

However, the determination of when a plaintiff knew or ought to have known of a claim will often require extensive weighing of evidence. As the court stated in *Séguin Racine Architectes et Associés Inc. v. C.H. Clement Construction*: [45]

> There was evidence before the trial judge from which he could conclude that there was a genuine issue concerning when the respondent knew or ought to have known that the act or omission which caused the water penetration was an act or omission of the appellants. It appears to us that the resolution of this issue will involve consideration of virtually all of the evidence that would likely be called at the trial, and accordingly we cannot conclude that resorting to the fact-finding powers would have made any appreciable difference in the resources or length of time that it would take to resolve this matter. As a result, we find no error in the fact that the trial judge did not consider whether he should resort to his fact-finding powers under Rule 20.04(2.1) and (2.2).

In *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, [46] a mechanical subcontractor was retained to perform work on a project owned by the Toronto Transit Commission. When it was not being paid in full by the general contractor, it obtained default judgment, obtained a notice of garnishment and served it on the owner, who responded with a copy of a labour and material bond posted by the general contractor, of which the subcontractor had not previously been aware. The subcontractor then brought an action against the surety, the ***18** general contractor and the owner, seeking $122,010 under bond from surety, or declaratory relief and damages. This occurred more than two years after the subcontractor's action against the general was commenced. The owner brought a motion for summary judgment dismissing action against it because the latter action was not commenced in time. The owner argued that with the exercise of appropriate diligence, the subcontractor could and should have discovered the existence of the bond and its claim against the owner and the surety earlier.

The court disagreed:

> [68] The question, therefore, is when a reasonable person with the abilities and in the circumstances of Dolvin first ought to have known of the claim against TTC.
>
> [69] After being rebuffed by TTC in March and April 2010, Dolvin focused its attention on Samson. Samson initially defended the first action brought by Dolvin. Dolvin would have reasonably expected to get disclosure of information about the Bond through the discovery process in that action.
>
> [70] While it would clearly have been better if Dolvin had simultaneously pursued TTC for the same information (which TTC would presumably have yielded if a request had been made), I would not characterise Dolvin's efforts to discover the existence of a Bond (or any other possible source of payment) as obviously unreasonable, at least until it became apparent that the information would not be forthcoming from Samson. That would have been no later than March 2012 when Samson and Brasseur's defence and counterclaim in Dolvin's first action was struck out.

> [71] Appreciating that the result of my decision on the other issues submitted for summary judgment means that there may be little, if anything, that Dolvin can recover from TTC, I would not dismiss Dolvin's claim on the basis of TTC's limitation defence on this summary judgment motion.

In *Walsh Construction/Bondfield Partnership v. Chartis Insurance Company of Canada*,[47] another case involving a surety, a contractor engaged a subcontractor to work on a hospital reconstruction project. The subcontractor obtained a performance bond. The contractor ***19** provided the subcontractor with formal notice of default on July 31, 2012 and advised the surety of its intended claim the very next day. The surety investigated and concluded that the subcontractor was not in default. The contractor commenced an action against the surety on April 22, 2015 for payment under the performance bond. The surety brought a motion for summary judgment dismissing the action as statute-barred. The motion was dismissed for the following reasons:

> [25] The Bond provides at section 1 that Chartis' obligations are of no force and effect if Yuanda is "promptly and faithfully" performing the subcontract. Chartis' obligations do not arise until Yuanda is in actual default. It is insufficient for WB to simply declare Yuanda in default.
>
> [26] Whether WB commenced its claim within two years of the cause of action requires the court to investigate and determine when the cause of action was discovered or discoverable. The court would be required to determine if and when Yuanda went into actual default under the subcontract.
>
> [27] Whether and when Yuanda breached the subcontract and ceased to "promptly and faithfully perform" its obligations under the subcontract requires a detailed and complex investigation of all of the facts surrounding WB's notices of default, Yuanda's and Chartis' responses to the notices, the activities on site that caused or contributed to delays experienced on site, whether WB or other contractors caused or contributed to the delay that WB accused Yuanda of causing, and other related factual issues. The issue is whether summary judgment is appropriate for such an investigation or whether the factual issues in dispute require a trial.
>
> [28] The court must make findings of fact about whether WB's allegations of default by Yuanda in the various notices of default can be proven as actual defaults. Yuanda and WB engaged in meetings and the evidence suggests that Yuanda's performance improved. The date on which Yuanda was in fact in actual default, if it was in default at all, raises a genuine issue that must be decided before the limitations issue can be decided.

As with all summary judgment motions, the affidavit evidence should be reasonably clear. As the Saskatchewan Court of Queen's Bench held in dismissing an application:

> ***20** [23] I am not satisfied the factual record established by the affidavit materials filed by the parties permits the necessary factual findings required here to effect a fair and just determination on the merits. Accordingly, I dismiss the summary judgment application and grant the application for further or better disclosure. I come to these conclusions for the following reasons.

....

> [31] With respect to her application to declare Cheyne's claim as statute barred, Michelle relies on the evidential burden established by s. 18 of *The Limitations Act*. She argues the onus is on Cheyne's to prove either the limitation period has not expired or there is no limitation period applicable to the claim. Absent such evidence, she submits the Court must grant summary judgment dismissing Cheyne's claim on the basis that the claim is statute barred.

> [32] The affidavit evidence filed by the parties is controverted on the issue of the existence of a debt owing by the defendants to Cheyne's, including when the debt, if any, is said to have arisen. Further, the affidavit evidence of the parties does not satisfactorily, or at all, address a number of issues arising out of the factual matrix presented by the pleadings, including, identifying the terms of the contract for services and materials between Cheyne's and the co-defendants; whether the contract for services and materials was extended by the additional services and materials provided by Cheyne's in July 2014 or whether the services and materials provided by Cheyne's in July 2014 were pursuant to a new contract; whether there has been a continuing acknowledgement of the debt by either of the defendants; whether the exchange of correspondence between the parties' respective solicitors in August 2013 constitutes an acknowledgement of the existence of the claim for payment of the debt; and whether the funds paid into Cheyne's solicitor's trust account constitute security for the debt or are charged as security for the lien registered by Cheyne's.

Where the affidavit evidence is sufficiently clear and complete and is unlikely to be improved at trial, however, courts will use their expanded powers and grant summary judgment, as can be seen in *Heerkens v. Lindsay Agricultural Society*: [48]

> ***21** [22] I find that whether the action is statute-barred by reason of the expiration of the applicable limitation period is a genuine issue that requires a trial. However, I find that a trial of that issue can be avoided by the exercise of the expanded fact-finding powers available pursuant to Rule 20.
>
> [23] I choose to exercise my discretion and apply the expanded fact-finding powers to determine the limitation period issue. I do so for the following reasons.
>
> [24] In determining the limitation period issue, the only expanded fact-finding power that I have applied is the ability to draw an inference. The inferences I am required to draw are few in number and are based exclusively on Heerkens' evidence. His evidence is presented by way of affidavit and as available from the transcripts of his examination for discovery and cross-examination on his affidavit. The Record includes extensive evidence upon which there would be little, if any, improvement at trial.

The issue of limitations is not always clear cut. Discoverability of a claim is the sort of issue that involves conflicting evidence, and despite enhanced fact finding powers on a motion will nonetheless often require a trial. This is borne out by our research: of the summary judgment cases reviewed, the majority of those based on limitations arguments still proceeded to trial.

3.3 Claims for Breach of Statutory Trust

Claims for breach of trust under the trust provisions of the *Construction Lien Act* have proven to be susceptible to summary determination. That makes sense, because the elements necessary to prove a breach of the contractor's trust, for example, are straightforward. They were summarized in *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* [49] as follows:

> 1. The claimed trustee was a contractor or subcontractor.
>
> 2. The claimed beneficiary of the trust supplied materials to the projects on which the trustee was a contractor or subcontractor.
>
> ***22** 3. The trustee received or was owed monies on account of its contract price for those projects.
>
> 4. The trustee owed the beneficiary for those materials.

These elements are easily established in or can be inferred from affidavit evidence, as was done in *620369 Ontario Inc. v. Alumpro Building Products Plus Inc.*: [50]

> [15] The first element of the test is satisfied, I am entitled to draw a reasonable inference from the evidence. It is a reasonable inference that Alumpro acted as a contractor or sub-contractor. No contrary evidence is offered.
>
> [16] Elements three and four are satisfied. Alumpro at para. 8 of its statement of defence admits that it owes the plaintiff the sum of $30,896.41 as of September 30, 2011. Alumpro at least owes the sum of the invoices of those persons surveyed by Mr. Sinclair. There is no issue that Alumpro at September 30, 2011, owed the plaintiff $57,145.18 plus interest.
>
> [17] With respect to the second element of the test for the imposition of a trust, it is the case that none of Herman's invoices in relation to the materials supplied identified the project or location of the improvement. This is the point of Alumpro's defence of this motion. It is "not necessary, however, for a trust beneficiary to prove an intention to supply materials or services to a specific improvement". As well, see the dictum of Justice Weiler in *Sunview Doors, supra,* at para. 82:
>
> [82] In light of this comment, the decision in *St Mary's Cement* and the applicable principles of statutory construction, I would hold that the supplier need not intend that the material be incorporated into a known and specific improvement at the time of supply. Moreover, where the contractor or subcontractor does not allocate the supplier's material to a particular piece of land or improvement within a project, but it is clear that the contractor or subcontractor has received money on account of the contract price for the project and the contractor or subcontractor owes money to the supplier, a link to the contractor's or subcontractor's ***23** contract for the project will be sufficient to establish a s. 8 statutory trust.
>
> [18] In this case, Herman's delivered a request under s. 39 of the Act for the names of parties to contracts between Alumpro and its customers, the contract prices and the state of their accounts with Alumpro. The response was incomplete but what was disclosed pointed to a breach of trust.
>
> [19] Although it is not possible to link the supply of Herman's roofing materials to a particular improvement, it is not suggested that Alumpro had a second or other suppliers and from the material referred to above, there is a clear link between the materials supplied and the projects it completed and received payment for. On this, I see no distinction between this case and the facts in the *Sunview Doors* case. The second element of the test is satisfied.
>
> [20] In the result, I find the existence of a s. 8 statutory trust in favour of the plaintiff. There is an obligation on Alumpro "to put its best foot forward" I may assume therefore, that there is nothing more. I am satisfied that there is no genuine issue for trial with respect to the claim and the defence between Alumpro and its customers, the contract prices and the state of the accounts with Alumpro. There was an attempt by Alumpro to comply but it was incomplete.

The recent Ontario Court of Appeal decision in *Airex Inc. v. Ben Air System Inc.* [51] is to the same effect:

> [15] We acknowledge that it was Airex's role to demonstrate no genuine issue requiring a trial.
>
> [16] However, once Airex demonstrated the following matters (which were never really in dispute), Airex had established that it was the beneficiary of trust monies under s. 8(1) of the Act:
>
> • it was a sub-contractor on the project;

> • it supplied materials to Ben Air, a contractor on the project, for which it (Airex) had not been paid; and
>
> • Ben Air had received payments on account of the project from Omico, another contractor on the project.
>
> ***24** [17] It was then for Ben Air to show that the trust monies had been properly applied. [...] Moreover, the appellants were required to put their best foot forward on the summary judgment motion. [...] Viewed as a whole, the evidence the appellants filed was contradictory and lacked documentary support. It certainly did not carry sufficient weight to support their assertions that they had paid out more money than they received in relation to the contract--or even that payments they had made on the contract left them without sufficient trust funds to pay Airex.

The clear statutory regime establishing the trust and the equally clear case law establishing the corresponding burden of proof have proven to make breach of trust claims one of the few areas in which motions for summary judgment have largely been successful. It is submitted that the forthcoming changes to the Act, which will mandate the manner in which trust funds must be maintained by a contractor, [52] will make such cases even more amenable to summary judgments.

3.4 Motions under s. 47 of the *Construction Lien Act*

Section 47 of the Ontario *Construction Lien Act* provides that the court may discharge a construction lien on any proper ground:

> 47. Upon motion, the court may,
>
> (a) order the discharge of a lien;
>
> (b) order that the registration of,

(i) a claim for lien, or

(ii) a certificate of action, or both, be vacated;

> (c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or
>
> (d) dismiss an action,
>
> ***25** upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances

Since it is well settled law that a motion brought pursuant to s. 47 of the Act is akin to a motion for summary judgment, [53] s. 47 cases decided since *Hryniak* will be discussed here as well.

Some early post-*Hryniak* decisions were reluctant to fully endorse the decision in a s. 47 context. In *G.C. Rentals & Enterprises Ltd. v. Advanced Precast Inc.*, [54] the court held as follows:

> [24] The question of whether, on a motion under s. 47 of the *Construction Lien Act*, the court by analogy may use the new discretionary powers under rules 20.04(2.1) and (2.2) given to a judge hearing a summary judgment motion was not addressed on the motion before me, other than by observation that there have been no reported cases under s. 47 since the release of *Hryrniak*. Although the case law prior to *Hryrniak* indicates that a s. 47 motion is analogous to a motion for summary

> judgment, I am not prepared, without submissions on the issue, to assume that on a s. 47 motion under the *Construction Lien Act* the court has the new, expanded powers expressly given to a summary judgment motions judge under rules 20.04(2.1) and (2.2), to weigh the evidence, evaluate credibility of a deponent, draw any reasonable inference from the evidence and order that oral evidence be presented by one or more parties. To exercise those powers would go well beyond what the case law to date has indicated should be the procedure on a s. 47 motion.

Similarly, in *Northridge Homes Ltd. v. Travellers Motel (Owen Sound) Ltd.*,[55] the court held that:

> [13] All counsel agree that the Motion brought by the Motel and the Grewals to discharge the liens is akin to a motion for summary judgment (albeit under the old regime, before Rule 20 of the *Rules of Civil Procedure* was amended to provide expanded powers and pre-*Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.)).
>
> ***26** [14] I agree.

In a contemporaneous decision, a master had no compunctions about applying *Hryniak* on a s. 47 motion. In *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*,[56] the master held that:

> As determined in *Combined Air Mechanical Services Inc. v. Flesch*, the court on a motion such as this is entitled to weigh evidence, evaluate credibility, and draw reasonable inferences in order to make all necessary findings of fact and apply the law to the facts.

A year later, in *Butko v. Ratayeva*,[57] the master again relied on *Hryniak* in discharging the claimant's lien:

> [32] In the present case there is a relatively simple issue: did Mr. Butko supply services and materials to improve 10 Elderwood Drive from May 8, 2014 to June 16, 2014 for which he was not paid? The evidence, while contradictory, is not voluminous. Affidavits were filed by the main parties: Mr. Butko for the plaintiff and Mr. Radayev for the defendant. The defendant also filed a short affidavit from a real estate appraiser and a report from a handwriting expert. In my view a summary judgment motion is an adequate substitute for the trial process.
>
> [33] The Supreme Court of Canada opined on the revised summary judgment test in *Hryniak v. Mauldin*, noting that the rules changed the test for summary judgment from whether the case presents a genuine issue *for* trial to whether there is a genuine issue that *requires* a trial. The court found that:
>
> 43. The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure ...
>
> 44. The new powers in rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.
>
> ***27** 45. ... the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.
>
> [34] I have already discussed the evidence filed on this motion. The preponderance of evidence supports a finding that Mr. Butko did not supply services and materials to improve 10 Elderwood Drive between May 8, 2014 and June 16, 2014. There is not a shred of evidence filed in response by Mr. Butko that persuades me that there is a genuine issue that requires a trial.

> [35] The moving parties are entitled to their order dismissing the action, discharging the lien claim of Mr. Butko and vacating the certificate of action.

On another motion to discharge a number of liens, a 2017 decision held that "the Supreme Court of Canada directed judges hearing motions like this to take a proactive approach and assess whether the new, enhanced forensic tools of summary judgment can be applied to determine the case at this stage or in a summary trial". [58]

4. MASTER'S POWER ON SUMMARY JUDGMENT MOTIONS

4.1 Rule 20 Motions

The expanded powers granted to judges in hearing summary judgment motions were generally not extended to masters. [59]

There is, however, conflicting law in Ontario on the extent of a master's powers on a motion for summary judgment where the matter is before the master on a reference pursuant to s. 58 of the *Construction Lien Act*. In *Exteriors By Design v. Traversy*, [60] the master held that:

> ... a master hearing a summary judgment motion applies the same test as a judge and is entitled to weigh the sufficiency of the evidence under Rule 20.02 (1) & (2) but unlike a judge, the master does not have access to the new powers to assess credibility or weigh competing evidence that are set out in Rule 20.04 (2.1) and (2.2). Consequently, if there are genuine ***28** questions of fact that hinge on determinations of credibility it is extremely unlikely that summary judgment will be available.

The master's findings in the case were made in the context of a construction lien reference.

That decision was based, in part, on the decision in *Mehdi-Pour v. Minto Developments Inc.*, [61] a non-reference decision, where the same master held as follows:

> [16] The amendments to the summary judgment rule which came into effect in January effect two changes to the rule. The first of these applies to masters or judges and the second applies only to judges. The first change is that the test for granting summary judgment has been amended from "genuine issue for trial" to "genuine issue requiring a trial." This means that it is no longer sufficient that there be a triable issue. The court must also consider whether a trial is the most appropriate forum to decide the issue or whether it is more appropriate that it be decided without a trial.
>
> [17] The second change is the provision that a judge may "weigh evidence, draw inferences or make findings of credibility" and the new provision that to do so, the judge may hear oral evidence and conduct a mini trial. These new powers in rule 20.04 (2.1) are clearly intended to allow judges to grant summary judgment in circumstances where they might not have been able to do so before the amendments.

That decision was affirmed on the exercise of jurisdiction issue in the Divisional Court. [62]

Another master, however, concluded that the enhanced fact-finding powers introduced into Rule 20.04(2.1) after *Hyrniak* apply to a reference master by reason of s. 58(4) of the Act: [63]

> [18] The court on this motion must first determine whether the limitations issue can be decided on the motion materials before the court or, if the motion materials are insufficient whether the evidentiary record would be sufficiently enhanced to allow the court to decide the limitations issue by way of summary ***29** judgment using the expanded fact-finding powers introduced into rule 20.04(2.1) after

> *Hyrniak*. These expanded powers apply to a reference master under the *Construction Lien Act*, R.S.O. 1990, c.C.30 by reason of section 58(4) of that Act.

It should be noted that in a different context, the Divisional Court has held that the reference provisions of the Act do not elevate a master to a judge. In *RSG Mechanical Inc. v. 1398796 Ontario Inc.*, [64] the court held as follows:

> Counsel submitted that having the "... jurisdiction, powers and authority of the court ..." has the effect of making the referee, in this case the Master, a judge of the Superior Court of Ontario. Thus, the Master would not be bound to follow the decision of judges of the Superior Court or its predecessors. He would have been bound only by courts at a higher level: the Divisional Court or the Court of Appeal. As I see it, this is incorrect. The section does nothing other than provide for the conduct of the reference. It does not change the position of the referee within our judicial structure. The Master continues to have the status and place that comes from being a Master. He does not, for the purposes of the reference, obtain the standing of or become a judge. On this basis, he would be bound to follow the decision of a single judge of the Superior Court.

Based on that Divisional Court finding, it is at least arguable that a master does not have the enhanced powers given to a judge. On the other hand, s. 51(b) of the Act provides that the court, whether the action is being tried by a judge or on a reference by a master, "shall take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action". It is therefore quite possible that s. 51(b) itself contemplates a master on a reference exercising the enhanced fact finding powers. Of particular note are the words "arising therein or at the trial", which support a broad interpretation of a master's powers on a reference, and not just at trial. Interestingly, s. 51(b) is not analyzed in any of the reported decisions on this issue. We therefore believe that the most that can be said at this point is that the final outcome of this debate as to a master's ability to ***30** use enhanced fact finding powers remains unclear until an appellate court directly addresses the issue.

4.2 Section 47 Motions

It has also been held that a master hearing a s. 47 motion has the new enhanced powers: In *Diamond Drywall Contracting Inc. v. Ikram*, [65] the master held as follows:

> [6] After the *Hyrniak* decision Rule 20, the summary judgment rule, was amended to grant expended powers to judges on summary judgment motions. Those expanded powers were not extended to masters hearing rule 20 motions. Diamond argues that as a master I do not have the expanded powers prescribed by rule 20 because those powers do not extend to masters hearing summary judgment motions.
>
> [7] I disagree. A motion brought pursuant to rule 47 is not an actual motion for summary judgment. At most, it is a motion "akin" to a motion for summary judgment, quoting Justice Ferrier in *Dominion Bridge*. A motion under section 47 is made to "the court". The Act does not require such motions to be heard by a judge. Moreover, section 67 of the Act requires the court to adopt procedures in an action that are "as far as possible of a summary character, having regard to the amount and nature of the liens in question".
>
> [8] Reading section 47 and 67 together, I find that as a master hearing a motion under section 47 of the Act I am entitled to import all of the powers available on a motion for summary judgment, the motion being akin to a motion for summary judgment. This is particularly important in Toronto Region where the Superior Court of Justice has delegated much of the construction lien work of the court to two masters whose work is devoted in one case exclusively and in the other case partially to construction lien matters.

> [9] Consequently, to the extent necessary, I conclude that on a motion pursuant to section 47 of the Act I have the jurisdiction to weigh evidence, make findings of fact and apply the law to the facts.

***31** The same master, in *Butko v. Ratayeva*,[66] concluded that these powers were available to a master whether under a reference or otherwise:

> [27] "Court" is defined in the Act as the Superior Court of Justice. Section 67 of the Act provides that except where inconsistent with the Act the rules of court apply. Rule 1 defines "court" to include a case management master.
>
> [28] It is well established that a motion brought under section 47 of the Act is akin to a summary judgment motion. The test that has been applied and that continues to apply is the test that applies to summary judgment motions brought in civil actions under rule 20.04. Prior to the rule amendment the test was whether there is a genuine issue for trial. Since the rule amendment the test is whether there is a genuine issue that requires a trial. The responding party is required to but his best foot forward and lead his best evidence in an effort to keep the lien claim (and in this case the action) alive. In effect the summary judgment test under rule 24.04 applies to motions brought pursuant to section 47 of the Act.
>
> [29] The issue is whether the restrictions on the powers available to a judge under rule 20.04(2.1) are available to the court (i.e. a master) exercising jurisdiction under section 47 of the Act. In my view they do. The Act does not incorporate rule 20.04 by reference. Rather the case law developed to provide that the test that is used to decide motions under rule 20.04 is the same test that should be applied on motions under rule 47 of the Act. Had the legislature sought to limit the discretion of the court under section 47 such that the powers used to exercise discretion are restricted to motions under section 47 of the Act heard by a judge but not by a master, then the Act would have so stated. Section 67 is clear: where the Act and the rules conflict, the Act prevails. I conclude that the powers available to the court to determine a motion under section 47 of the Act are not limited in their application to motions heard by a judge. A master may exercise the same powers on a motion under section 47 of the Act whether or not the master is presiding over a reference or a motion in an action that has not been referred.
>
> ***32** [30] Since the body of law in that regard developed the rule was amended in furtherance of the recent trend towards judicial efficiency, proportionality and the alternative and more expeditious resolution of disputes where appropriate.

Finally, in *Govan Brown & Associates Ltd. v. Equinox 199 Bay Street Co.*,[67] another s. 47 motion, the master held that:

> As determined in *Combined Air Mechanical Services Inc. v. Flesch*, the court on a motion such as this is entitled to weigh evidence, evaluate credibility, and draw reasonable inferences in order to make all necessary findings of fact and apply the law to the facts ... In the case of the motions before me as reference master I have all of the powers of a judge: see section 58(4) of the *Construction Lien Act*.

As a practical matter, these decisions are understandable in that lien masters are experts in the *Construction Lien Act*, and conduct trials on a reference with full fact finding powers. In that light, why should a master not use the enhanced fact finding powers on a motion for summary judgment, particularly where a trial is not required and the resolution of the issues on the motion will advance the goals of access to justice as outlined in *Hryniak*? The answer, it is respectfully submitted, may well be that the master simply lacks constitutional jurisdiction given the express language of Rule 20 confining the powers to a judge. The Divisional Court decision in *RSG Mechanical Inc. v. 1398796 Ontario Inc.*[68] suggests that it does not matter whether the case has been referred or not; a master remains a master. This may be less of an issue for motions brought under s. 47, where the master does have express jurisdiction to hear the motion without limitation in the *Construction Lien Act*. An appellate court may be persuaded by the reasoning reflected in the cases we

have reviewed in this section. If so, that appellate court may conclude that a master should conduct a broad inquiry in disposing of a s. 47 motion, which is akin to a motion for summary judgment, but is not literally a Rule 20 motion. Moreover, this may be a particularly attractive argument if the master is conducting a reference, based on the broad language under s. 51(b). We believe a broader interpretation is consistent with the Supreme Court of Canada's stated objectives in *Hryniak*, on either a summary judgment or a s. 47 motion. Nevertheless, this issue has not been finally settled.

*33 5. SUMMARY JUDGMENT IN CONSTRUCTION ADJUDICATION

On September 26, 2016, the Ontario Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure published an expert review, recommending wholesale reform of construction credit legislation in Ontario, including the adoption of statutory adjudication based on the model in place in the United Kingdom. [69]

Throughout the Commonwealth, summary judgment plays a crucial role in the success of adjudication. While the courts' use of summary judgment in those jurisdictions occurs at a different stage of adjudication than it would in Ontario, as we explain in detail below, we believe that here, too, summary judgment may play an important role towards the success of the model.

In the United Kingdom, by far the most common way of enforcing the determination of an adjudicator is to commence a claim in the Technology and Construction Court ("TCC") and at the same time make an application for summary judgment. [70] A major factor towards the success of adjudication is likely the fact that the TCC came up with a procedure to rapidly enforce adjudicators' decisions. As noted in s. 9.1.3 of the *Technology and Construction Court Guide*: [71]

> The HGCRA provides for a mandatory 28-day period within which the entire adjudication process must be completed, unless a) the referring party agrees to an additional 14 days, or b) both parties agree to a longer period. In consequence, the TCC has moulded a rapid procedure for enforcing an adjudication decision that has not been honoured. Other adjudication proceedings are ordinarily subject to similar rapidity.

That procedure works remarkably well, usually resulting in a court decision no more than eight weeks from the commencement of the claim. [72] The procedure is not prescribed by statute or regulation; it is entirely judge-made. [73]

> ***34** 9.2.1 Unlike arbitration business, there is neither a practice direction nor a claim form concerned with adjudication business. The enforcement proceedings normally seek a monetary judgment so that CPR Part 7 proceedings are usually appropriate. However, if the enforcement proceedings are known to raise a question which is unlikely to involve a substantial dispute of fact and no monetary judgment is sought, CPR Part 8 proceedings may be used instead.
>
> 9.2.2 The TCC has fashioned a procedure whereby enforcement applications are dealt with promptly. The details of this procedure are set out below.
>
> 9.2.3 The claim form should identify the construction contract, the jurisdiction of the adjudicator, the procedural rules under which the adjudication was conducted, the adjudicator's decision, the relief sought and the grounds for seeking that relief.
>
> 9.2.4 The claim form should be accompanied by an application notice that sets out the procedural directions that are sought. Commonly, the claimant's application will seek an abridgement of time for the various procedural steps, and summary judgment under CPR Part 24. The claim form and the application should be accompanied by a witness statement or statements setting out the evidence relied on in support of both the adjudication enforcement claim and the associated procedural

> application. This evidence should ordinarily include a copy of the Notice of Intention to Refer and the adjudicator's decision. Further pleadings in the adjudication may be required where questions of the adjudicator's jurisdiction are being raised.
>
> ....

This procedure is used in conjunction with Part 24 of the Civil Practice Rules, which provides that a court will grant summary judgment if it considers that the defendant has no real prospect of successfully defending the claim or issue. While Civil Practice Rules Part 24, due to its stringent requirements, is used rarely in conventional civil litigation, summary judgment is readily granted in adjudication enforcement proceedings. [74] Pickavance argues that this is due to the following four factors:

> ***35** 1. The nature of the subject matter;
>
> 2. the limited grounds on which a court can impugn an adjudicator's decision;
>
> 3. the ease with which the material necessary for the procedure can be identified; and
>
> 4. the early policy decision to endorse the "rough justice" aspect of adjudication. [75]

United Kingdom courts have embraced summary judgment as the proper way to enforce adjudicators' determinations. The Court of Appeal, in *Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited*, [76] held as follows:

> In the ordinary case I have little doubt that an adjudicator's determination under section 108 of the 1996 Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment. The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being re-opened) can be enforced summarily.

Similarly, Ramsay J., in the Technology and Construction Court, held that "adjudication decisions are intended to be enforced summarily and a claimant should not generally be kept out of the money". [77]

The United Kingdom system obviously benefits from a dedicated and specialized construction court. In the absence of such a court, and in the absence of clear legislative direction or practice directions by the courts, the question of enforceability will be much less certain than it is in the United Kingdom. In Ireland, for example, the situation has been summarized as follows: [78]

> A key characteristic of adjudication is that the decision of the adjudicator is intended to be binding in the interim. The decision of the adjudicator shall be enforceable by action, or by leave of the High Court, in the same manner as a judgment ***36** or order of that court with the same effect and, where leave is given, judgment may be entered in the terms of the decision. The reference to 'leave of the court' for enforcement of an adjudicator's decision as a judgment of the High Court does not make clear how this would work in practice, and what factors the court would take into account in deciding whether to grant leave. Indeed, the entire question of how an adjudicator's decision can be enforced, if not complied with, remains very uncertain, and there is a real danger that a quick decision that payment is due may be undermined by a much longer process for enforcing that decision. If the Irish courts follow the approach taken by the UK courts, the enforceability of adjudicators' decisions will be strictly upheld, subject to very limited exceptions.
>
> It is regrettable that neither the 2013 Act nor the Code of Practice divested enforcement of disputes to a single court to facilitate speedy enforcement actions. It remains to be seen if the Irish courts

> will issue a practice direction on the matter. As Ireland does not have a specialist construction court available to hear challenges to adjudicators' decisions, it is arguable that the Commercial Division of the High Court is the appropriate jurisdiction for hearing all such claims, irrespective of the amounts in dispute. In the absence of nominating a specific court or judge to deal with disputes, the floodgates may open for unnecessary and sporadic judicial challenges and it is arguable that what is needed is delegation to a single court or judge as this will ensure a smooth transition and creation of a systematic and coherent body of judicial precedent from a single source.

In Northern Ireland, which also does not have the benefit of a Technology and Construction Court, the matter has been addressed by way of practice note, which states that "applications for summary judgment on an Adjudicator's award under the Construction Contracts (NI) Order 1997 as amended shall be made to the Commercial Judge". The courts seek to hear and determine such applications within 28 days of issue. [79] Here, too, the judiciary has endorsed the summary nature of adjudication: [80]

> ***37** If the statutory scheme is to require the Adjudicator to make his decision within 28 days then the Court should attempt a timetable that permits any dispute on the Adjudicator's decision to be heard within the same period.

In Ontario, the *Construction Act*, now passed into law, but not proclaimed at the time of printing with respect to adjudication, [81] implements the vast majority of the changes recommended by the expert review, including Part II.1--"Construction Dispute Interim Adjudication".

While most of the Review's recommendations were adopted, the Act went further than the recommendation that "adjudication decisions should be enforced by way of application to the Superior Court of Justice, similar to arbitration awards" and actually provides that a party to an adjudication may file a certified copy of the determination of an adjudicator with the court and, on filing, the determination is enforceable as if it were an order of the court. [82] In other words, there is no need for an order enforcing the determination, the determination is akin to an order.

In Ontario, the following matters may be referred to adjudication by any of the parties to a contract or subcontract:

- The valuation of services or materials provided under the contract.
- Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
- Disputes that are the subject of a notice of non-payment under Part I.1.
- Amounts retained under s. 12 (set-off by trustee) or under s. 17(3) (lien set-off).
- Non-payment of holdback under s. 27.1.
- Any other matter that the parties to the adjudication agree to, or that may be prescribed. [83]

***38** The adjudicator must make a reasoned determination in writing no later than 30 days after receiving a notice of adjudication, the copy of the contract or subcontract and any documents the party intends to rely on during the adjudication. The parties may agree to an extension of up to 14 days on the adjudicator's request, or may agree to another time frame by written agreement with the adjudicator's consent. A determination made by an adjudicator after such date is of no force or effect. [84] The determination of a matter by an adjudicator is binding on the parties to the adjudication until a determination of the matter by a court or by arbitration. [85]

It is crucial to realize, however, that the determination is binding on an interim basis only; it is binding only until the determination of the matter by a court or an arbitrator.[86] While an adjudicator's determination can be set aside on judicial review only on very limited grounds, similar to those that allow a challenge to an arbitral award,[87] there is nothing in the Act that prevents a party from commencing an action, be it a lien or a non-lien action, the day after it receives an adjudicator's determination, not to set aside the determination under s. 13.18, but simply to finally determine the issue between the parties.

It is evident based on the six categories of issues that will be eligible for adjudication, that a large percentage of adjudicated construction disputes in Ontario will revolve around payment issues. We believe, therefore, that it is in dealing with court challenges to determinations regarding payment issues that summary judgment may play a crucial role in ensuring the success of the new regime. The fact that the determination and reasons of the adjudicator are admissible as evidence in court[88] should assist the court. Experience elsewhere has shown that the courts' robust approach in upholding determinations is crucial to the success of the regime. While that experience relates to a different stage of adjudication, it is submitted that summary judgment can serve an equally crucial function in Ontario to weed out spurious challenges to valid determinations. As we have demonstrated, our courts already have the tools post-*Hryniak* and are inclined to deal with pure payment disputes in a summary fashion. If anything, statutory adjudication should enhance that role. No doubt the success of adjudication in shifting the culture of construction disputes will be of national interest.

*39 6. CONCLUSION

The question we have attempted to answer here, or at least shed light onto, is to what extent the 2010 changes to the Rules of Civil Procedure and the Supreme Court of Canada decision in *Hryniak* could reasonably be expected to shift the culture in document-intensive, multiple-party and issue construction cases. We conclude that for these cases the Rule changes and *Hryniak* are not a complete answer to the problems surrounding access to justice and excessive costs of litigation raised a decade ago in the Osborne Report. Nevertheless, the paper has highlighted a few types of construction disputes that seem to be particularly well suited to summary determination.

The Osborne Report concluded that it was, to a great extent, appellate jurisprudence that had narrowed the scope and utility of the rule. That appears to have changed, with the majority of appeals from successful summary judgment motions in the period we surveyed being dismissed. Having said that, the Ontario Court of Appeal all but closed the door to partial summary judgments in that province by finding that partial summary judgment raises problems that are anathema to the stated objectives underlying *Hryniak*.

Courts in the United Kingdom have used summary judgment as a means to establish a “culture of adjudication”. While that happens at a different stage of the adjudication process, *i.e.* at the enforcement stage, we believe that summary judgment can play an equally important role here when it comes to weeding out frivolous challenges to adjudicators' payment determinations. A large percentage of determinations by adjudicators will deal with payment issues, which, as seen, are the single most successful group of cases decided by way of summary judgment.

The United Kingdom adjudication process has been greatly assisted by a specialist court, the Technology and Construction Court. While the vast majority of Canadian jurisdictions have no such court, Toronto's construction lien masters are as specialized as the TCC and are uniquely positioned to play a similar role towards the success of Ontario's adjudication regime. However, as seen, they may be hampered by limits to their jurisdiction in doing so. From a policy point of view, there is much to be said for extending the enhanced powers discussed here to masters. Until that issue is directly addressed by an appellate court, the extent of the masters' powers in assisting the adjudication process remains unclear. Nevertheless, we believe that summary judgment may ***40** well emerge as a support pillar to the upcoming adjudication regime in Ontario.

One of the benefits of adjudication will be the extent to which it serves as a faster, more cost effective means of dispute resolution than traditional litigation. By contrast, if adjudication becomes a “dress rehearsal” to be engaged in before the

parties resort to inevitable litigation, these gains will be undermined. Summary judgment will be particularly important if adjudication is to take hold as the preferred means of resolving construction disputes, and if we are to see the significant reduction in litigation in Ontario that adjudication has brought in the United Kingdom. Parties should have the right to seek a final determination, but there will be times where the courts will be justified in disposing of matters on a summary basis. A true culture shift will likely only be seen when both a robust summary judgment regime and adjudication are well-established.

41 Appendix "A" - Summary Judgment in Construction Cases Post-*Hryniak

Year	Jurisdiction	Name & Citation	SJ/ 47	Moving Party	Partial / Full	Granted	Lien Action	Appeal	Ground
2014	AB	*Chandos Construction Ltd. v. Buildtech Framing Inc.*, 2014 ABQB 597	SJ	Plaintiff	Full	No	Yes	No	Reduction of security
2014	BC	*Stanley Paulus Architect Inc. v. Windhill Holdings Ltd.*, 2014 BCSC 1816, additional reasons 2016 CarswellBC 90 (S.C.)	SJ	Plaintiff	Partial	Yes	Yes	No	Payment
2014	BC	*Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186, additional reasons 2014 CarswellBC 2728 (S.C.)	SJ	Plaintiff	Partial	Yes	Yes	No	Payment

2014	MB	*AB Mechanical Ltd. v. Canotech Consultants Ltd.*, 2014 MBCA 80	SJ	Plaintiff	Full	Yes	Yes	Yes, dismissed	Payment
2014	NS	*Masontech Inc. v. Aaffinity Contracting and Environmental Ltd.*, 2014 NSSC 164	SJ	Plaintiff	Full	In part	No	No	Payment Quantum to trial
2014	ON	*Sioux Lookout (Municipality) v. Goodfellow*, 2014 ONSC 6051 (S.C.J.)	SJ	Plaintiff	Full	In part	No	No	Entitlement to easement yes Obstruction of drainage no
2014	ON	*Kieswetter Demolition (1992) Inc. v. Traugott Building Contractors Inc.*, 2014 ONSC 1397 (S.C.J.)	SJ	Plaintiff	Partial	Yes	Yes	No	Payment
2014	ON	*Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918 (S.C.J.)	SJ	Defendant	Full	In part	No	No	Limitations no Negligent misrep. yes
2014	ON	*Ramco Installation Ltd.*	SJ	Plaintiff	Partial	No	Yes	No	Breach of trust

		v. Mometal Structures Inc., 2014 ONSC 6807 (S.C.J.)							
2014	ON	*Ben-Air Systems Inc. v. Neilas (799 College St) Inc.*, 2014 ONSC 7205 (S.C.J.)	SJ	Defendant	Full	In part	Yes	No	Reduction of security yes Discharge of lien no
2014	ON	*G.C. Rentals Enterprises Ltd. v. Advanced Precast Inc.*, 2014 ONSC4237 (S.C.J.), additional reasons 2014 CarswellOnt 13537 (S.C.J.)	s. 47	Defendant	Full	No	Yes	No	Timeliness of lien
2014	ON	*Rexel Canada Electrical Inc. v. Tron Electric Inc.*, 2014 ONSC 2047 (S.C.J.)	SJ	Plaintiff	Full	In part	No	No	Payment yes Breach of trust no
2014	ON	*Seal Tech Basement Sealing Inc. v. Prychitko*, 2014 ONSC	SJ	Defendant	Full	In part	Yes	No	Claim & line dismissed cc damages to trial

	6058 (S.C.J.)							
2014	ON	*Boyd v. Ashgrove Lane Properties Ltd.*, 2014 ONSC 3037 (S.C.J.)	SJ	Defendant	Full	No	Yes	No	Timeliness of lien
2014	ON	*620369 Ontario Inc. v. Alumpro Building Products Plus Inc.*, 2014 ONSC 274 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Breach of trust
2014	ON	*Govan Brown Associates Ltd. v. Equinox 199 Bay Street Co.*, 2014 ONSC 3924 (S.C.J.)	s. 47	Defendant	Full	Yes	No	No	Error in naming owner
2014	ON	*21114 Ontario Inc. v. Stadia Industries Ltd.*, 2014 ONSC 3221 (S.C.J.)	s. 47	Defendant	Full	Yes	Yes	No	Non-payment of cost award
2014	ON	*Yorkwest Plumbing Supply Inc. v. Nortown Plumbing (1998) Ltd.*, 2014	SJ	Defendant	Full	Yes	Yes	Yes, dismissed	Improper general lien

		ONSC 6825 (Div. Ct.)							
2014	ON	*Magine Construction Inc. v. Moro Group Builders Inc.*, 2014 ONSC 1024 (S.C.J.), affirmed 2014 CarswellOnt 12937 (C.A.)	SJ	Defendant	Full	Yes	No	Yes, dismissed	Action for breach of contract where no contract existed
2014	ON	*McNally Construction Inc. v. Hamilton Port Authority*, 2014 ONSC1180 (S.C.J.), additional reasons 2014 CarswellOnt 10268 (S.C.J.), reversed 2014 CarswellOnt 12890 (C.A.)	SJ	Third Party	Full	Yes	No	Yes, allowed	Contribution & indemnity
2014	YK	*Cobalt Construction Inc. v. Kluane First Nation*, 2014 YKSC 40	SJ	Plaintiff	Full	Yes	No	No	Acceptance of non-compliant bid
2015	AB	*S K Restoration Inc. v. 1389978 Alberta Ltd.*, 2015	SJ	Plaintiff and Defendant	Full	Granted in part	Yes	No	Payment / extras

	ABQB 73							
2015 AB	*Kramer's Technical Services Inc. v. Eco-Industrial Business Park Inc.*, 2015 ABQB 59	SJ	Defendant	Full	Yes	No	No	Payment
2015 AB	*SemCAMS ULC v. Blaze Energy Ltd.*, 2016 ABCA 113	SJ	Plaintiff	Full	In part	No	Yes, dismissed	Payment
2015 AB	*Kidco Construction Ltd. v. Griffith*, 2015 ABQB 814	SJ	Defendant	Full	No	Yes	No	Authorization of work
2015 AB	*Union Square Apartments Ltd. v. Academy Contractors Inc.*, 2015 ABQB 380, reversed 2016 CarswellAlta 1985 (Q.B.), additional reasons 2017 CarswellAlta 496 (Q.B.)	SJ	Defendants	Full	No	No	Yes, allowed	Limitations
2015 AB	*Attila Dogan Construction and*	SJ	Defendant	Full	In part	No	Yes, dismissed	Exclusions

		Installation Co. v. AMEC Americas Ltd., 2015 ABQB 120, affirmed 2015 CarswellAlta 2342 (C.A.)							
2015	AB	*Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.*, 2015 ABCA 252	SJ	Third Party	Full	No	No	Yes, dismissed	Contribution & indemnity
2015	AB	*Condominium Corp. No. 0321365 v. Prairie Communities Corp.*, 2015 ABQB 753	SJ	Third Party	Full	In part	No	No	Contribution & indemnity no Personal liability yes
2015	BC	*Alpine Gas Ltd. v. 0702687 BC Ltd.*, 2015 BCSC 1273	SJ	Plaintiff	Full	Yes	Yes	No	Payment
2015	BC	*No. 151 Cathedral Ventures Ltd. v. Titan Pacific*	SJ	Plaintiffs	Full	Yes	No	No	Enforcement of security agreement

		Contracting Inc., 2015 BCSC 1655							
2015	BC	*GLV Canada Inc. v. Deramore Constructions Services Inc.*, 2015 BCSC 2534	SJ	Plaintiff	Full	Yes	No	No	Payment
2015	Federal	*Pinder v. Canada (Minister of Environment)*, 2015 FC 1376, affirmed 2016 CarswellNat 6743 (F.C.A.)	SJ	Defendant and Plaintiff	Full	Defendant-Yes; Plaintiff--No	No	Yes, dismissed	Termination of lease
2015	MA	*Riverside Realty Construction Ltd. v. Winnipeg (City)*, 2015 MBQB 20	SJ	Plaintiffs	Full	No	No	No	Return of security
2015	NB	*Allan Windows Technologies Ltd. v. 6877869 Canada Ltd.*, 2015 NBQB 100	SJ	Plaintiff	Full	Yes	Yes	No	Payment according to settlement
2015	NB	*Wilson v. Moncton (City)*, 2015 NBQB 46	SJ	Plaintiff	Full	No	No	No	Negligence in securing site

2015NS	*Aaffinity Contracting Environmental Ltd. v. APM Construction Services Inc.*, 2015 NSSC 33	SJ	Plaintiff	Full	No	Yes	No	Pay-when-paid clause
2015NS	*Keating Construction Co. v. Ross*, 2015 NSSC 173	SJ	Plaintiff	Full	Yes	Yes	No	Payment under MOA
2015ON	*Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd.*, 2015 ONSC 4545 (S.C.J.), additional reasons 2015 CarswellOnt 13123 (S.C.J.)	SJ	Defendant	Partial	Yes	Yes	No	Quantum meruit & contract claim struck Timeliness of lien to trial
2015ON	*Séguin Racine Architectes et Associés Inc. v. C.H. Clement Construction*, 2015 ONSC 6833 (Div. Ct.)	SJ	Defendant	Full	No	No	Yes, dismissed	Limitations

2015ONSC	*Linesteel (1973) Ltd. v. APM Construction Services Inc.*, 2015 ONSC 5802 (S.C.J.)	SJ	Defendant	Full	No	No	No	Termination of contract
2015ONSC	*Butko v. Ratayeva*, 2015 ONSC 1102 (S.C.J.)	s.47	Defendant	Full	Yes	Yes	No	No services provided
2015ONSC	*Royal Oak Railing Stair Ltd. v. MyHaven Homes Ltd.*, 2015 ONSC7565 (S.C.J.), additional reasons 2016 CarswellOnt 596 (S.C.J.)	SJ	Plaintiff	Full	Yes	Yes	No	Payment
2015ONSC	*Northridge Homes Ltd. v. Travellers Motel (Owen Sound) Ltd.*, 2015 ONSC 3743 (S.C.J.), additional reasons 2015 CarswellOnt 11554 (S.C.J.)	s. 47	Defendant	Full	No	Yes	No	Type of contract Extras

2015ONSC	*Khalimov v. Hogarth*, 2015 ONSC 6244 (S.C.J.)	SJ	Defendants	Partial	Yes	Yes	No	Maximum holdback liability of owner
2015ONSC	*Beta Associates v. Toronto (City)*, 2015 ONSC 328 (S.C.J.)	SJ	Plaintiff	Partial	Yes	Yes	No	Declaration of subst. perf. and payment
2015ONSC	*Wallwin Electric Services Inc. v. Tasis Contractors Inc.*, 2015 ONSC 1612 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Pay-when-paid
2015ONSC	*Total Meter Services Inc. v. Aplus General Contractors Corp.*, 2015 ONSC3830 (S.C.J.), additional reasons 2015 CarswellOnt 10651 (S.C.J.)	SJ	Plaintiff	Partial	In part	Yes	No	Delay claim yes Holdback no
2015ONSC	*Deep Foundations Contractors Inc. v. B. Gottardo Construction Ltd.*, 2015 ONSC 4875 (S.C.J.), additional	SJ	Plaintiff	Full	Yes	Yes	No	Defendant's delay of proceedings

	reasons 2016 CarswellOnt 5964 (S.C.J.)							
2016ONSC	*Forest City Fire Protection Ltd. v. 1099516 Ontario Inc.*, 2015 ONSC 2346 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Payment
2016ONSC	*DCMS GP (Dufferin-Steeles) Inc. v. Caribbean Tower Cranes Ltd.*, 2015 ONSC 4125 (S.C.J.)	SJ	Defendant	Full	Yes	No	No	Payment under insurance policy
2016ONSC	*DCM Erectors Inc. v. Ottawa (City)*, 2015 ONSC 5171 (S.C.J.), additional reasons 2015 CarswellOnt 13408 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Tort of conversion
2016ONSC	*111 St. Clair Avenue West Investments v. Ron Boyko Group Inc.*,	SJ	Third Party	Full	Yes	No	No	Indemnity

	2015 ONSC 4576 (S.C.J.)							
2015 ON	*Finn Way General Contractor Inc. v. Red Lake (Municipality)*, 2015 ONSC 7747 (S.C.J.), additional reasons 2016 CarswellOnt 2894 (S.C.J.)	SJ	Defendant	Full	Yes	No	No	Breach of Contract A
2015 ON	*James v. Miller Group Inc.*, 2015 ONSC3138 (S.C.J.), additional reasons 2015 CarswellOnt 10897 (S.C.J.)	SJ	Defendant	Full	No	No	No	Contribution and indemnity
2015 ON	*Four Seasons Site Development v. Toronto (City)*, 2015 ONSC 2293 (S.C.J.)	SJ	Defendant	Partial	Yes	No	No	Limitations
2015 ON	*Taylor v. Great Gulf (Whitby) Ltd.*, 2015 ONSC 6891 (S.C.J.)	SJ	Defendant	Full	No	No	No	Negligent work

2015ONSC	*Empire Communities Ltd. v. Ontario*, 2015ONSC4355 (S.C.J.), additional reasons 2015 CarswellOnt 12446 (S.C.J.)	SJ	Defendants	Full	Yes	No	No	Misrepresentation
2015ONSC	*J. Jenkins Son Landscaping Contractors Ltd. v. SCS Consulting Group Ltd.*, 2015 ONSC 1921 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Disclosure of confidential information
2015ONSC	*Ontario (Attorney General) v. Blackbird Holding Ltd.*, 2015 ONSC 6058 (S.C.J.)	SJ	Plaintiff	Full	No	No	No	Delay of action
2015ONSC	*Furmanov v. Juriansz*, 2015 ONSC3137 (S.C.J.), additional reasons 2015 CarswellOnt 8835 (S.C.J.)	SJ	Defendant	Full	No	No	No	Partnership between plaintiffs
2015ONSC	*Glaspell v. Ontario (Minister of Municipal*	SJ	Plaintiff	Partial	Yes	No	No	Building Code violation

	Affairs and Housing), 2015 ONSC 3965 (S.C.J.)							
2015ONSC	*Sweet v. H. Hennink Construction Ltd.*, 2015 ONSC 2571 (Div. Ct.)	SJ	Plaintiff	Full	Yes	No	Yes, dismissed	Unnamed insured
2015ONSC	*1606533 Ontario Inc. v. Raposo*, 2015 ONSC 490 (S.C.J.)	SJ	Defendant	Full	No	No	No	City's inspection duties
2015ONSC	*Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.*, 2015 ONSC 389 (S.C.J.), affirmed 2015 CarswellOnt 16117 (Div. Ct.)	SJ	Both agreed	Partial	Yes	Yes	Yes, dismissed	Determination of ownership under CLA
2015ONSC	*A.C. Concrete Forming Ltd. v. Time Development Construction Inc.*, 2015 ONSC 7617	SJ	Plaintiff	Full	Yes	Yes	Yes, dimissed	Payment

	(S.C.J.), affirmed 2017 CarswellOnt 836 (Div. Ct.)							
2015ONSC	*Jessco Structural Ltd. v. Gottardo Construction Ltd.*, 2015 ONSC 3637 (S.C.J.), affirmed 2016 CarswellOnt 8864 (Div. Ct.)	SJ	Defendant	Full	Yes	Yes	Yes, dismissed	Payment for work done without approval
2015ONSC	*Hamilton (City) v. Thier + Curran Architects Inc.*, 2015 ONCA 64	SJ	Third parties	Full	No	Yes	Yes	Third party claim inextricably linked to issues in main action
2015ONSC	*Tanfi Ltd. v. Slade*, 2015 ONSC 778 (S.C.J.), affirmed *Slade v. Tanfi Ltd.*, 2016 CarswellOnt 6726 (C.A.), additional reasons 2017 CarswellOnt	SJ	Plaintiff	Full	Yes	No	Yes, dismissed	Payment on mortgages

	40 (S.C.J.)							
2015ONSC	*Curoc Construction Ltd. v. Ottawa (City)*, 2015 ONCA 693	SJ	Defendant	Full	Yes	No	Yes, dismissed	Failure to prove damages
2015ONSC	*Toronto Hydro-Electric System Ltd. v. Toronto (City)*, 2015 ONSC 1406 (Div. Ct.)	SJ	Third Party	Full	No	No	Yes, denied.	Full and final release with subcontractor and city was not complete defence
2015ONSC	*Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township)*, 2015 ONSC 1501 (S.C.J.), affirmed 2015 CarswellOnt 16621 (C.A.), leave to appeal refused 2016 CarswellOnt 5412 (S.C.C.)	SJ	Defendant	Partial	Yes	No	Leave denied	Signed waiver was bar to action
2015ONSC	*Tribecca Finance Corp. v. Tabrizi*, 2015 ONCA 748	SJ	Plaintiff	Full	Yes	No	Yes, dismissed	Payment on mortgages

2016	ON	*Architectural Millwork Door Installations Inc. v. Provincial Store Fixtures Ltd.*, 2015 ONSC 4913 (S.C.J.), affirmed 2016 CarswellOnt 6796 (C.A.), additional reasons 2017 CarswellOnt 1931 (S.C.J.), affirmed 2017 CarswellOnt 19172 (C.A.)	SJ	Plaintiff	Full	In part	No	Yes, dismissed	Payment of principal sum yes Validity of credit memo to trial
2016	ON	*Fincantieri Cantieri Navali Italiani S.p.A. v. Anmar Energy Ltd.*, 2015ONSC5468 (S.C.J.), leave to appeal refused 2015 CarswellOnt 18040 (S.C.J.)	SJ	Defendant	Full	No	No	Leave denied	Identity of parties
2015	SA	*Alberici Western Constructors*	SJ	Defendant	Full	No	Yes	No	Stay of proceedings

		Ltd. *v.* *Saskatchewan Power Corp.*, 2015 SKQB 74, affirmed *Saskatchewan Power Corp.* *v.* *Alberici Western Constructors, Ltd.*, 2016 CarswellSask 186 (C.A.)							in favour of arbitration
2015	SA	*EECOL Electric Corp.* *v.* *101194203 Saskatchewan Ltd.*, 2015 SKQB 12	SJ	Plaintiff	Full	In part	Yes	No	Breach of trust (dismissed), personal liability
2015	SA	*Magna Electric Corp.* *v.* *Tesco Electric Ltd.*, 2015 SKQB 35	SJ	Plaintiff	Full	In part	No	No	Liability yes Quantum of damages to trial
2015	SA	*Cheyne's Plumbing Heating Ltd.* *v.* *Cheyne*, 2015 SKQB 318	SJ	Defendant	Full	No	No	No	Limitations
2016	AB	*Wooddworks Design Ltd.* *v.* *Forzani*, 2016	SJ	Plaintiff	Partial	Yes	No	Yes, allowed	Issue whether new contract replaced old contract

	ABCA 310							
2016	AB	*Jabneel Development Inc. v. Lamont (Town)*, 2016 ABQB 161.	SJ	Plaintiff	Partial	Yes	No	Yes, allowed	Repudiation
2016	AB	*Swanby v. Tru-Square Homes Ltd.*, 2016 ABQB 731	SJ	Defendant	Full	No	No	No	Personal liability of owner
2016	AB	*Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46	SJ	Defendants	Full	No	No	Yes, dismissed	Duty of care of lawyers and surveyors
2016	AB	*Wood Buffalo Housing Development Corp. v. Alves Construction Ltd.*, 2016 ABQB 249	SJ	Defendants	Full	Yes	No	No	Existence of contract
2016	AB	*Keyland Development Corp. v. Rocky View No. 44 (Municipal District)*, 2016 ABQB 735	SJ	Defendants	Full	Yes	No	No	Access to land / permits
2016	AB	*Skyline Concrete Services Ltd.*	SJ	Plaintiff	Full	No	No	No	Payment

		v. Flint Energy Services Ltd., 2016 ABQB 396							
2016	AB	*Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2016ABQB365, reversed 2017 CarswellAlta 2336 (C.A.)	SJ	Defendant	Full	Yes	No	Yes, dismissed.	Exlcusion clause
2016	AB	*Union Square Apartments Ltd. v. Academy Contractors Inc.*, 2016 ABQB 575, additional reasons 2017 CarswellAlta 496 (Q.B.)	SJ	Defendants	Full	No	No	Yes, allowed	Limitations
2016	MB	*Lenko v. Manitoba*, 2016MBCA 52	SJ	Plaintiff	Partial	Yes	No	Yes, allowed in part	Misrepresentation
2016	NB	*Relja v. New Maryland (Village)*, 2016 NBQB 189	SJ	Defendant	Full	No	No	No	Liability of consultant
2016	NS	*Shannex Inc. v. Dora Construction*	SJ	Defendant	Full	No	Yes	Yes, allowed in part	Scope of release

		Ltd., 2016 NSCA 89							
2016	NS	*Martin Marietta Materials Canada Ltd.* *v.* *Beaver Marine Ltd.*, 2016 NSSC 226, reversed *Hatch Ltd.* *v.* *Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 CarswellNS 466 (C.A.)	SJ	Defendant	Full	Yes	No	Yes, allowed	Causation
									Motions judge erred in weighing evidence
2016	NS	*Upham* *v.* *Dora Construction Ltd.*, 2016 NSSC 90, reversed in part Shannex Inc. v. Dora Construction Ltd., 2016 CarswellNS	SJ	Defendant	Full	No	Yes	Yes, allowed	

	1030 (C.A.)							
2016	ON	*Kappeler Masonry Corp. (Receiver of) v. Carillion Construction Inc.*, 2016 ONSC 1354 (S.C.J.)	SJ	Plaintiff	Full	In part	No	No	Payment Issue of work without change order to mini-trial
2016	ON	*One-Way Drywall Inc. v. Lomax Management Inc.*, 2016 ONSC 1462 (S.C.J.), additional reasons 2016 CarswellOnt 5589 (S.C.J.)	SJ	Defendant	Full	No	No	No	Breach of trust
2016	ON	*Cartman v. Ottawa General Contractors Ltd.*, 2016 ONSC 4047 (S.C.J.)	SJ	Plaintiff	Partial	Yes	No	No	Refund of advance
2016	ON	*Limen Group Ltd. v. Allform Group Ltd.*, 2016 ONSC 4344 (S.C.J.)	s.47	Plaintiff	Full	No	Yes	No	Lien registered against wrong premises
2016	ON	*Diamond Drywall Contracting Inc. v. Ikram*,	s. 47	Defendant	Full	Yes	Yes	No	Timeliness of lien

	2016 ONSC 5411 (S.C.J.)							
2016	ON	*Best Way Stone Ltd. v. Lansbridge Construction Inc.*, 2016 ONSC 5796 (S.C.J.)	SJ	Defendant	Full	No	Yes	No	Whether property improved
2016	ON	*Deep Foundations Contractors Inc. v. Gottardo*, 2016 ONSC 6245 (S.C.J.).	SJ	Defendant	Full	No	Yes	No	Whether interest and costs were covered by trust
2016	ON	*Avision Construction Group Inc. v. Siri Guru Singh Shaba of Cambridge (Trustees of)*, 2016 ONSC6457 (S.C.J.), additional reasons 2016 CarswellOnt 17510 (S.C.J.)	SJ	Defendant	Full	No	Yes	No	Whether contract abandoned
2016	ON	*2395446 Ontario Inc. v. King's and Queen's Custom Homes Inc.*, 2017	SJ	Plaintiff	Full	No	No	Yes, allowed	Overpayment Penalty clause

		ONCA 782							
2016	ON	*1904601 Ontario Ltd. v. 58 Cardill Inc.*, 2016 ONSC 7040 (S.C.J.), additional reasons 2016 CarswellOnt 20111 (S.C.J.)	SJ	Plaintiff	Full	In part	No	No	Payment of partial amount
2016	ON	*Conterra Restoration Ltd. v. Kirsch*, 2016 ONSC 7892 (S.C.J.)	SJ	Plaintiff, Defendant & third party	Full	No	No	No	Authorization of additional work
2016	ON	*1587855 Ontario Inc. v. Contract Glaziers Corp.*, 2016 ONSC 7934 (S.C.J.).	SJ	Plaintiff	Full	No	Yes	No	Section 12 set-off
2016	ON	*Liora Fine Arts Inc. v. Malcolm Holdings Inc.*, 2016 ONSC 8103 (S.C.J.)	SJ	Defendant	Full	Yes	No	No	Personal liability
2016	ON	*Robert Nicholson Construction Co. v. Edgecon Construction Inc.*, 2016 ONSC	SJ	Plaintiff	Full	Yes	No	Yes, allowed	Section 13 liability SJ set aside

	3107 (Div. Ct.)							
2016	ON	*Hutton v. EllisDon Corp.*, 2016 ONSC 6501 (S.C.J.)	SJ	Defendant	Full	No	No	No	Limitations
2016	ON	*Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, 2016 ONSC 5107 (S.C.J.), additional reasons 2017 CarswellOnt 17894 (S.C.J.)	SJ	Defendant	Partial	No	Yes	No	Notice of claim
2016	ON	*Korf Properties Ltd. v. Hirsch Construction Ltd.*, 2016 SKQB 318	SJ	Defendant	Full	Yes	Yes	No	Trust / priorities
2017	AB	*Single Source Asphalt Paving and Concrete Construction Inc. v. Bourque*, 2017 ABQB 479	SJ	Plaintiff	Full	No	Yes	No	Existence of contract
2017	AB	*Beal v. Valette Holdings Ltd*,	SJ	Defendants	Full	No	No	No	Improper building inspections / good faith

	2017 ABQB 437							
2017 MB	*Heritage Electric Ltd. et al v. Sterling O G International Corporation et al*, 2017 MBCA 85	SJ	Plaintiffs	Full	Yes	No	Yes, dismissed	Payment
2017 ON	*Chambers v. Prouse*, 2017 ONSC 186 (S.C.J.)	SJ	Defendant	Full	Yes	Yes	No	Son of contractor can't bring lien action
2017 ON	*Ciccocioppo Design/ Build Inc. v. Gruppuso*, 2017 ONSC 2012 (S.C.J.)	SJ	Defendant	Full	Yes	Yes	No	Unjust enrichment
2017 ON	*Filippi v. 315 Pembroke St East*, 2017 ONSC 3851 (S.C.J.), additional reasons 2018 CarswellOnt 1700 (S.C.J.)	s. 47	Plaintiff	Full	No	Yes	No	Definition of "owner" under CLA
2017 ON	*Construction Excedra Inc. v. Kingdom of Saudi Arabia*, 2017 ONSC 105	SJ	Defendant	Partial	Yes	Yes	No	Diplomatic immunity

	(S.C.J.), additional reasons 2017 CarswellOnt 1705 (S.C.J.)							
2017 ON	*AACR Inc. v. Lixo Investments Ltd.*, 2017 ONSC 1009 (S.C.J.), additional reasons 2017 CarswellOnt 11847 (S.C.J.)	SJ	Both	Full	Plaintiff--No Defendants--Yes	Yes	No	Contractor dismissed--authorization of work Defendants allowed--not party to contract
2017 ON	*2199273 Ontario Inc. v. Abramov*, 2017 ONSC 417 (S.C.J.)	SJ	Defendant	Full	No	No	No	Parties to contract
2017 ON	*Walsh Construction/ Bondfield Partnership v. Chartis Insurance Company of Canada*, 2017 ONSC3985 (S.C.J.), additional reasons 2017 CarswellOnt 15175 (S.C.J.)	SJ	Defendant	Yes	No	Yes	No	Limitations / Surety
2017 ON	*Mount Royal Painting Inc. v. Lomax Management Inc.*, 2017	SJ	Defendant	Full	No	Yes	No	Who were the contracting parties?

	ONSC 2499 (S.C.J.)							
2017	ON	*Heerkens v. Lindsay Agricultural Society*, 2017 ONSC 240 (S.C.J.)	SJ	Defendant	Full	Yes	No	No	Limitations
2017	ON	*2383431 Ontario Inc. v. Rose of Sharon (Ontario) Retirement Community*, 2017 ONSC 2351 (S.C.J.), additional reasons 2017 CarswellOnt 9356 (S.C.J.)	SJ	Plaintiff	Full	No	No	No	Enforcement of guarantee
2017	ON	*614128 Ontario Ltd. o/a Trisan Construction v. Epstein*, 2017 ONSC 4417 (S.C.J.)	SJ	Plaintiff	Full	Yes, in part	No	No	Lawyer's negligence established Quantum to trial
2017	ON	*MacNamara v. 2087850 Ontario Ltd.*, 2017 ONSC 499 (S.C.J.), affirmed 2017 CarswellOnt 16149 (C.A.)	SJ	Plaintiff	Full	Yes	No	No	Fraud

2017ONSC	*Ekum-Sekum Inc. v. Bel-Air Excavating Grading Ltd.*, 2017 ONSC 540 (S.C.J.)	SJ	Plaintiff	Full	Yes	No	No	Payment
2017ONSC	*Beckerman v. Paluszkiewicz*, 2017 ONSC 3675 (S.C.J.), additional reasons 2017 CarswellOnt 9585 (S.C.J.)	SJ	Third Party	Partial	No	No	No	Status of party (independent contractor v employee)
2017ONSC	*Burns v. 1681758 Ontario Inc.*, 2017 ONSC 4051 (S.C.J.)	SJ	Defendants	Full	No	No	No	Limitations
2017ONSC	*Hawkshaw v. Bachly Investments Inc.*, 2017 ONSC 1364 (S.C.J.), additional reasons 2017 CarswellOnt 6149 (S.C.J.)	SJ	Third Party	Defendant Third Party--Full Def.--Partial	Yes	No	No	Defendant--Limitations Third party - liability
2017ONSC	*Dart v. St. Jules*, 2017 ONSC 2709 (S.C.J.), additional	SJ	Defendant	Full	Yes	No	No	Claim governed by release

	reasons 2017 CarswellOnt 12050 (S.C.J.)							
2017 ON	*Eastwood Square Kitchener Inc. v. Value Village Stores, Inc.*, 2017 ONSC 832 (S.C.J.)	SJ	Defendant Plaintiff	Full	No	No	No	"plethora" of genuine issues
2017 ON	*Airex Inc. v. Ben Air System Inc.*, 2017 ONCA 390	SJ	Plaintiff	Full	Yes	Yes	Yes, dismissed	Breach of trust
2017 ON	*G P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co.*, 2017 ONCA 298	SJ	Defendant	Full	Yes	No	Yes, dismissed	Exclusions in policy
2017 ON	*625805 Ontario Ltd. v. Silverwood Flooring Inc.*, 2017ONCA 125	SJ	Defendant	Full	Yes	No	Yes, allowed	Limitations
2017 ON	*Direct Equipment Ltd. v. Sundial Homes (Sharon) Limited*, 2017	SJ	Plaintiff	Full	No	Yes	No	Payment for rental equipment

	ONSC 5133 (S.C.J.)							
2017	ON	*Zeppa v. Woodbridge Heating Air Conditioning Ltd.*, 2017 ONSC 5847 (S.C.J.)	SJ	Defendant	Full	Yes	No	No	Limitations
2017	AB	*Whissell Contracting Ltd. v. Calgary (City)*, 2017 ABQB 644	SJ	Plaintiff	Partial	No	No	No	Payment
2017	NB	*Province of N.B. v. Foulem*, 2017 NBQB 127	SJ	Defendant	Full	No	No	No	Liability
2017	SK	*Surespan Construction Ltd. v. Saskatchewan*, 2017 SKQB 55	SJ	Both	Full	Def. yes Pla. no	No	No	Tender acceptance

Footnotes

1 Brendan Bowles is a Partner and Markus Rotterdam is Director of Research at Glaholt LLP in Toronto. The authors wish to thank Emma Cosgrave, Andrew Salvador and Arielle Wasserman, all articling students at Glaholt LLP, for their valuable research assistance.

2 2014 SCC 7.

3 2017 ONSC 5847 (S.C.J.).

4 See Jane E. Sidnell, note to Justice A. Graesser, "Judicial Dispute Resolution Advocacy", 2012 J. Can. C. Construction Law. 1.

5 As of July 1, 2018, the Act will be renamed *Construction Act*.

6 2017 ONCA 783.

7 James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at p. 252 et seq.

8 *Construction Act*, s. 13.20.

9 *Hryniak*, para. 38.

10 Cited from Janet Walker, "Summary Judgment Has Its Day in Court" (2012) 37 Queen's L.J. 697.

11 (1998), 42 O.R. (3d) 618 (C.A.).

12 Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/.

13 *Hryniak*, para. 36.

14 2011 ONCA 764, additional reasons 2013 CarswellOnt 5398 (C.A.), additional reasons 2013 CarswellOnt 5399 (C.A.), leave to appeal refused 2014 CarswellOnt 744 (S.C.C.), affirmed Hryniak v. Mauldin, 2014 CarswellOnt 640 (S.C.C.), affirmed Bruno Appliance and Furniture Inc. v. Hryniak, 2014 CarswellOnt 642 (S.C.C.).

15 Cited from *Hryniak*, para. 39.

16 *Hryniak*, para 66.

17 Eisen v. Betowski et al., 2017 ONSC 6433 (S.C.J.).

18 York River Properties Inc. v. Creed's Petroleum Equipment Maintenance Ltd., 2015 PESC 35, additional reasons 2016 CarswellPEI 10 (S.C.).

19 Toth v. Deimert, 2016 SKQB 58; Sanscartier v. Harlingten, 2016 SKQB 68.

20 Volpé c. Province du N.-B., 2017 NBQB 109; Gillis v. Law Society of NB et al, 2017 NBQB 212.

21 Community Mental Health Initiative Inc. v. Summit Lounge Ltd., 2014 NLTD(G) 130.

22 2014 ABQB 408.

23 Windsor v. Canadian Pacific Railway, 2014 ABCA 108.

24 Adlair Aviation (1983) Ltd. v. Commissioner of Nunavut, Government of Nunavut and Mark McCulloch, 2017 NUCJ 19; Ross River Dena Council v. Yukon, 2015 YKSC 45.

25 2014 BCSC 419.

26 2014 BCSC 1468.

27 Marchant v. Marnow, 2017 BCSC 1138.

28 2016 MBCA 52.

29 2017 MBQB 161.

30 2017 NSCA 61.

31 Teresa Walsh and Lauren Posloski, "Establishing a Workable Test for Summary Judgment (along with a Much Needed Culture Shift)--Part II", in Todd L. Archibald, *Annual Review of Civil Litigation 2014* (Toronto: Carswell, 2014).

32 Allan Windows Technologies Ltd. v. 6877869 Canada Ltd., 2015 NBQB 100.

33 Tribecca Finance Corp. v. Tabrizi, 2015ONCA748. See also Tanfi Ltd. v. Slade, 2015 ONSC 778 (S.C.J.), affirmed Slade v. Tanfi Ltd., 2016 CarswellOnt 6726 (C.A.), additional reasons 2017 CarswellOnt 40 (S.C.J.).

34 Kramer's Technical Services Inc. v. Eco-Industrial Business Park Inc., 2015 ABQB 59.

35 2016 ABCA 113.

36 1904601 Ontario Ltd. v. 58 Cardill Inc., 2016 ONSC 7040 (S.C.J.), additional reasons 2016 CarswellOnt 20111 (S.C.J.).

37 A.C. Concrete Forming Ltd. v. Time Development Construction Inc., 2015 ONSC 7617 (S.C.J.), affirmed 2017 CarswellOnt 836 (Div. Ct.); Stanley Paulus Architect Inc. v. Windhill Holdings Ltd., 2014 BCSC 1816, additional reasons 2016 CarswellBC 90 (S.C.).

38 Royal Oak Railing Stair Ltd. v. MyHaven Homes Ltd., 2015 ONSC 7565 (S.C.J.), additional reasons 2016 CarswellOnt 596 (S.C.J.).

39 2016 ONSC 7040 (S.C.J.), additional reasons 2016 CarswellOnt 20111 (S.C.J.).

40 S K Restoration Inc. v. 1389978 Alberta Ltd., 2015 ABQB 73.

41 2015 ONSC 3637 (S.C.J.), affirmed 2016 CarswellOnt 8864 (Div. Ct.).

42 [1999] 3 S.C.R. 423.

43 Four Seasons Site Development v. Toronto (City), (2015), 2015 ONSC 2293, 2015 CarswellOnt 5187, 46 C.L.R. (4th) 331 (Ont. S.C.J.).

44 Zeppa v. Woodbridge Heating Air Conditioning Ltd., 2017 ONSC 5847 (S.C.J.).

45 2015 ONSC 6833 (Div. Ct.).

46 2014 ONSC 918 (S.C.J.).

47 2017 ONSC 3985 (S.C.J.), additional reasons 2017 CarswellOnt 15175 (S.C.J.).

48 2017 ONSC 240 (S.C.J.).

49 2010 ONCA 198.

50 2014 ONSC 274 (S.C.J.).

51 2017 ONCA 390.

52 *Construction Act*, s. 8.1. This section is not in force at the time of writing. The Attorney General has announced that this section, along with the other "modernization" sections, will come into force on July 1, 2018. The amendments related to prompt payment, adjudication and liens against municipalities will come into force on October 1, 2019. The revisions will not have retroactive effect; the new regime will not apply to contracts entered into before the changes come into force. For the detailed transition rules, see s. 87.3 of the Act.

53 Diamond Drywall Contracting Inc. v. Ikram, 2016 ONSC 5411 (S.C.J.); Beaver Materials Handling Co. v. Hejna, 2005 CarswellOnt 2803 (S.C.J.); Dominion Bridge Inc. v. Noell Stahl-Und Maschinebau GmbH, 1999 CarswellOnt 5067 (S.C.J.).

54 2014 ONSC 4237 (S.C.J.), additional reasons 2014 CarswellOnt 13537 (S.C.J.).

55 2015 ONSC 3743 (S.C.J.), additional reasons 2015 CarswellOnt 11554 (S.C.J.).

56 2014 ONSC 3924 (S.C.J.).

57 2015 ONSC 1102 (S.C.J.).

58 Filippi v. 315 Pembroke St East, 2017 ONSC 3851 (S.C.J.), additional reasons Filippi v. 315 Pembroke St. East, 2018 CarswellOnt 1700 (S.C.J.).

59 Diamond Drywall Contracting Inc. v. Ikram, 2016 ONSC 5411 (S.C.J.).

60 2012 CarswellOnt 6727 (S.C.J.).

61 2010 ONSC 5414 (S.C.J.), affirmed 2011 CarswellOnt 5478 (Div. Ct.). The same conclusion was also reached in 90 George St. v. Reliance Construction Canada Inc., 2012 ONSC 1171 (S.C.J.).

62 Mehdi-Pour v. Minto Developments Inc., 2011 ONSC 3571 (Div. Ct.).

63 Walsh Construction/Bondfield Partnership v. Chartis Insurance Company of Canada, 2017 ONSC 3985 (S.C.J.), additional reasons 2017 CarswellOnt 15175 (S.C.J.).

64 2015 ONSC 2070 (Div. Ct.).

65 2016 ONSC 5411 (S.C.J.).

66 2015 ONSC 1102 (S.C.J.).

67 2014 ONSC 3924 (S.C.J.).

68 2015 ONSC 2070 (Div. Ct.).

69 Bruce Reynolds, Sharon Vogel, *Striking the Balance: Expert Review of Ontario's* Construction Lien Act, April 30, 2016.

70 James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at p. 252.

71 https://tecbar.org/wp-content/uploads/2016/05/TCC-Guide-2nd-Ed-3rd-Rev-March-2014.pdf.

72 James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at p. 252.

73 *Ibid.*

74 James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at p. 254.

75 *Ibid.*

76 [2000] EWCA Civ 50.

77 True Fix Construction Limited v. Apollo Property Services Group Limited, [2013] EWHC 2524 (TCC).

78 Dermot McEnvoy, “Ireland”, in James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at pp. 470-1.

79 Michael Humphreys, “Northern Ireland”, in James Pickavance, *A Practical Guide to Construction Adjudication* (Oxford: Wiley Blackwell, 2016) at pp. 430-1.

80 Justice Weatherup, Address to the British & Irish Commercial Bar Association, 18 June 2014, cited ibid. at 432.

81 At the time of writing, it is expected that the adjudication provisions of the Act will come into force as of October 1, 2019. Adjudication will then apply in respect of contracts and subcontracts entered into on or after that day.

82 *Construction Act*, s. 13.20(1).

83 *Construction Act*, ss. 13.5(1) and (2).

84 *Construction Act*, s. 13.13.

85 *Construction Act*, s. 13.15.

86 *Construction Act*, s. 13.15(1).

87 *Construction Act*, s. 13.18(5).

88 *Construction Act*, s. 13.13(7).

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