

April 7, 2022

## **“Exaggerated Liens” – Abuse of the Process or Not?**

### Key Takeaway

The recent decision of *RJ Concrete v. Eco Depot LTD.*<sup>1</sup> highlights that courts will unlikely discharge a lien pursuant to section 47 by reason alone that the lien is exaggerated. Provided that the lien claimant acted in good faith, the court will likely exercise the power conferred by section 35(2) of the *Construction Act* (the “*Act*”) to reduce the value of the lien by the exaggerated amount.

However, while Justice Williams relies on section 35(2) in this decision to reduce the value of the lien, it may be the case that section 35(2) should not have applied.

### Legislative Background

The *Act* creates a powerful right to register a claim for lien against title of an owner. Given the substantial implications of this right, the *Act* contains a number of provisions intended to protect owners from claimants who wield that power inappropriately.

Those provisions include:

- a) section 35(1) of the *Act* which makes a person liable for damages resulting from the preservation of a claim for lien where the person knows or ought to know that the amount of the lien is wilfully exaggerated or that the person is not entitled to a lien;
- b) section 47 of the *Act* which allows a party to bring a motion to discharge the lien on the basis that the lien is frivolous, vexatious or an abuse of process; and
- c) section 86 of the *Act* which enables the court to make an order of costs against a person, or its lawyer, who preserved or perfected a lien that is without foundation, is frivolous, vexatious or an abuse of process, is for a wilfully exaggerated amount, or that has expired.

### The RJ Concrete Case

In June 2019, Eco Depot Ltd. (the “owner”) and RJ Concrete & Construction Ltd. (the “contractor”), entered into an agreement pursuant to which the contractor had to perform three tasks. The total contract price was \$109,400.00 plus applicable taxes.

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<sup>1</sup> [\*RJ Concrete v. Eco Depot LTD.\*](#), 2022 ONSC 1759

In January 2020, following the completion of the first task and certain extra work, which was not included within the original scope, the parties' relationship broke down. The owner paid the contractor \$60,905.50.

In May 2020, the contractor registered a lien in the amount of \$70,282.42.

The owner brought a motion under section 47 of the *Act* to have the lien discharged on the basis that the contractor's claim for lien was willfully exaggerated and was therefore an abuse of process.

Justice Williams did find that the lien was exaggerated. However, Justice Williams accepted the contractor's argument that it had mistakenly calculated the lien amount based on the total contract price, rather than the price of the work it had completed. In determining that there was no willful exaggeration, Justice Williams noted the fact that, when the owner disputed the lien amount, the contractor acknowledged that its' lien was too high and offered to reduce the lien to an amount very close to the amount that Justice Williams determined was appropriate. However, the owner refused the contractor's offer and decided to bring its motion instead.

Justice Williams therefore accepted the contractor's argument that the appropriate remedy was to reduce the value of the lien in accordance with section 35(2) of the *Act*.

This case certainly highlights the importance of properly calculating the lien amount. Justice Williams relied on *HMI Construction Inc. v. Index Energy Mills Road Corp.*<sup>2</sup>, where the Divisional Court provided the proper manner to calculate a claim for lien, for a fixed price contract, as follows:

- (1) the contract accounting (i.e. the agreed contract price and approved changes);
- (2) plus extras (with amounts claimed for each extra, including the basis on which those claims were calculated);
- (3) less credits for contract work not done;
- (4) less acknowledged deficiencies (if any);
- (5) plus any other claims.

Lien claimants and counsel should exercise diligence and caution in calculating lien amounts in order to avoid consequences associated with exaggerated liens.

#### What is the Implication of a Willfully Exaggerated Lien?

Interestingly, Justice Williams also stated that even if she had found that the lien was willfully exaggerated, it would not have resulted in a finding that the lien claim was an abuse of process and therefore there was no basis to discharge the lien under section 47 of the *Act*.

The implication of this finding is quite far-reaching as it suggests that a willfully exaggerated lien will not, on its own, result in a discharge pursuant to section 47. Perhaps this is the correct outcome. After all, the legislature could have included, but chose not to include, "willfully exaggerated" as one of the grounds for a discharge of a

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<sup>2</sup> [HMI Construction Inc. v. Index Energy Mills Road Corp.](#), 2017 ONSC 4075

lien pursuant to section 47. Rather, the appropriate remedy for a willfully exaggerated lien is an award of damages pursuant to section 35(1) and/or an award of costs pursuant to section 86.

Another question does arise though with respect to the construction of section 35(2), which Justice Williams did not address. That is – how could a person act in good faith in willfully exaggerating their lien? The concepts appear contradictory – either the person acted in good faith and made an error in exaggerating their lien, or the person was willful and therefore did not act in good faith. It seems that the result determined by Justice William’s is logical and appropriate – reduce the value of the lien by the exaggerated amount - but query whether section 35(2) actually allows the court to take that action given the contradiction in its language. Importantly, Justice William’s actually found that the lien was not willfully exaggerated. As a result of that finding, based on the language of the provision, section 35(2) should not have applied.



[Joshua Strub](#), Partner  
T. 647-924-2264  
[jstrub@margiestrub.com](mailto:jstrub@margiestrub.com)



[Darina Mishiyev](#), Senior Law Clerk  
T. 647-294-7279  
[dmishiyev@margiestrub.com](mailto:dmishiyev@margiestrub.com)

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