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Joining Ontario Breach of Trust and Lien Claims in the Same Action – An Evolving Landscape

Introduction

It was undisputed law under the *Construction Lien Act* (the “**Old Lien Act**”) that a trust claim could not be joined with a lien claim. After all, there was an explicit prohibition in section 50(2) of the Old Lien Act.¹

However, when the Ontario Legislature updated the Old Lien Act to the *Construction Act* (the “**New Act**”) in 2017, section 50(2) was removed. Therefore, the question that was bound to arise before the courts in Ontario was whether, under the New Act, trust claims and lien claims can be brought together in the same action.

That question first came before the courts in the case of *Damasio Drywall Inc. v. 2444825 Ontario Limited* (“**Damasio Drywall**”) ² in December 2021 when Associate Justice Wiebe released his decision and made statements in *obiter dicta* that the prohibition still applied.

The question came before Associate Justice Wiebe again in January 2022, in the case of *6628842 Canada Inc. v. Topyurek* (“**Topyurek**”),³ where he adopted his *obiter dicta* statements from *Damasio Drywall*.

But this was not the end. In February 2022, Justice Harper rendered a decision in *SRK Woodworking Inc. v. Devlan Construction Ltd. et al.* (“**SRK Woodworking**”) ⁴ which disagreed with Associate Justice Wiebe.

Therefore, the question is, what is the current state of the law on this issue and might it evolve further as more cases on this issue are decided by the courts.

What is a Breach of Trust Action

Both the Old Lien Act and the New Act create a powerful statutory trust which provides that all funds received by an owner (other than the Crown or a municipality) for use in financing an improvement, or any amounts received by a contractor or subcontractor on account of the contract or subcontract price in respect of an improvement, constitute trust funds for the benefit of those persons who are supplying services or materials to the improvement.⁵

The Old Lien Act and the New Act then impose obligations on trustees with respect to those funds and the failure to comply with those obligations will result in a breach of trust for which the trustee is liable.⁶

¹ Section 50(2) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the “**Construction Lien Act**”).

² [2021 ONSC 8398](#).

³ [2022 ONSC 253](#).

⁴ [2022 ONSC 1038](#).

⁵ Sections 7(1) and 8(1) of the *Construction Lien Act* and of the *Construction Act*, R.S.O. 1990, c. C.30 (the “**Construction Act**”).

⁶ Sections 7(4) and 8(2) of the *Construction Lien Act* and of the *Construction Act*.

Not only might the trustee be liable for a breach of trust, but section 13 creates a powerful right to pierce the corporate veil and sue individuals for breach of trust.⁷

Joinder Under the Old Lien Act

Section 50(2) of the Old Lien Act, prohibited the joinder of breach of trust claims with lien claims, as follows:⁸

- (2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

Additionally, section 55(1) of the Old Lien Act contained a permissive joinder provision, allowing for a claim for breach of contract to be joined with a lien claim as follows:⁹

- (1) A plaintiff in an action may join with a lien claim a claim for breach of contract or subcontract.

Cases decided under the Old Lien Act interpreted the permissive nature of section 55(1) as being restrictive. That is, the language explicitly allowing for breach of contract claims to be joined with lien claims was interpreted as excluding the joinder of other causes of action.¹⁰

While the Old Lien Act did not allow for the joinder of lien and trust claims, there was no explicit prohibition against hearing trust claims and lien claims at the same time, or one after the other. As section 67(3) of the Old Lien Act provided that, except where inconsistent with the Old Lien Act, the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under the Old Lien Act. It therefore became commonplace for counsel to rely upon Rules 6.01 and 54 of the *Rules of Civil Procedure*, to seek and obtain a connecting order that allowed the breach of trust action to be tried with the lien action.¹¹

The Removal of the Prohibition Section in the Construction Act

Prior to the New Act, in 2016, the Ministry of the Attorney General commissioned a report titled *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. In the report, numerous recommendations were made to modernize and update the Old Lien Act.¹²

The report noted that the prohibition of joining breach of trust claims with lien claims stems from the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act in 1982* and that “[a]t that time, it was decided that the issues in relation to lien claims and trust claims may be very different, and the resolution of lien claims should be the primary concern under the Act.”

⁷ Sections 13(1) and 13(1) of the *Construction Lien Act* and of the *Construction Act*.

⁸ Section 50(2) of the *Construction Lien Act*.

⁹ Section 55(1) of the *Construction Lien Act*.

¹⁰ [Juddav Designs Inc. v. Cosgriffe, 2010 ONSC 6597](#).

¹¹ Section 67(3) of the *Construction Lien Act* and Rules 6.01 and 54 of the R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*.

¹² [Bruce Reynolds and Sharon Vogel's 2016 Report, Striking the Balance: Expert Review of Ontario's Construction Lien Act](#).

The report also noted that Ontario is the only common law province that prohibits the joinder of lien and trust claims. Ultimately, the report included recommendation number 39 which stated:

The prohibition on joinder of lien claims and trust claims under section 50(2) should be removed from the Act, subject to a motion by any party that opposes joinder on the grounds of undue prejudice to other parties.

The analysis leading to the recommendation in the report explains that “[t]he very problem this provision seeks to address is exacerbated by the duplication of proceedings it can cause, contributing to the courts’ backlog and costs to the parties.”

The New Act

In the New Act, section 50(2) as it read in the Old Lien Act was removed. Section 50(2) of the New Act now contains a provision similar to the old section 67(3), as follows:¹³

- (2) Except to the extent that they are inconsistent with this Act and the procedures prescribed for the purposes of this Part, the *Courts of Justice Act* and the rules of court apply to actions under this Part.

Further, in the New Act, section 55(1) was also removed.¹⁴

However, section 88(1) of the New Act set out a long list of matters which the New Act permitted to be addressed by regulations. Two of those matters are set out below, one of which specifically related to the procedures that apply to actions, as follows:¹⁵

- (a) respecting anything that, under this Act, may or must be prescribed or done by regulation;
- ...
- (l) for the purposes of Part VIII, governing procedures that apply to actions;

Importantly, in addition to substantially increasing and modifying the list of matters for which the Lieutenant Governor in Council may make regulations, the New Act also included additional wording in the introductory sentence of section 88(1). In the Old Lien Act, the provision read “*The Lieutenant Governor in Council may make regulations*”. In the New Act, section 88(1) reads: “*The Lieutenant Governor in Council may make regulations respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, including regulations*”.

In 2009, the government passed four regulations under the New Act. The regulations not only addressed general matters, adjudications and forms, but O. Reg. 302/18 – Procedures for Actions Under Part VIII of

¹³ Section 50(2) of the *Construction Act*.

¹⁴ Section 55 of the *Construction Act*.

¹⁵ Section 88(1) of the *Construction Act*.

the Act addressed procedures with respect to actions under the New Act. Section 3(2) contains the same language that was previously in section 55(1) of the Old Lien Act, as follows:¹⁶

(2) A plaintiff may, in an action, join a lien claim and a claim for breach of a contract or subcontract.

The Evolving Case Law

The question of the effect of these legislative and regulatory changes were eventually bound to find their way to the courts and in late 2021 and early 2022, we received guidance for the first time.

The Damasio Drywall Decision

In *Damasio Drywall*, the plaintiff brought a motion for an order granting leave to amend their statement of claim in a lien action to add additional parties and allege a trust claim against those parties.

As stated by Associate Justice Wiebe, his comments are *obiter dicta* for the benefit of the public, as the plaintiff chose to withdraw its motion.

The plaintiff argued that section 50(2) of the Old Lien Act contained an explicit prohibition against joining a trust claim with a lien claim, which was repealed and not carried forward into the New Act. Further, while the language of section 55(1) of the Old Lien Act was carried into O. Reg 302/18, the section 50(2) language was not carried into O. Reg 302/18. As a result, the plaintiff argued that there was no longer any prohibition and the New Act ought to be interpreted as allowing for the joinder of trust claims with lien claims.

Associate Justice Wiebe was not persuaded. Instead, he opined that while neither the section 50(2) prohibition nor the section 55(1) joinder provision were in the New Act, the *“the Legislation appears to have had a change of mind and decided to resurrect the joinder limitation of the old section 55(1).”*

Associate Justice Wiebe found that the language of section 55(1), as resurrected in section 3(2) of O. Reg. 302/18, acts as a complete limitation prohibiting the joinder of trust claims with lien claims, other than breach of contract claims. Associate Justice Wiebe found that *“[a] trust claim cannot pass the test of O. Reg 302/18 section 3(2) as that section has been historically interpreted.”*

Effectively, Associate Justice Wiebe’s view was that the decision not to carry section 50(2) of the Old Lien Act into the New Act or the regulation was not sufficient to establish legislative intent that trust claims can be joined with lien actions. Rather, Associate Justice Wiebe effectively considered that the inclusion of the language from section 55(1) of the Old Lien Act into the New Act, was indicative of the legislature’s intent to prohibit the joinder of trust claims with lien claims, stating *“[i]f the Legislature intended to allow trust claims to be joined with lien claims, it should have stated so explicitly, given this mandate and the nature and complexity of a trust claim. It did not.”*

It is worth noting that when the initial version of O. Reg 302/18 was passed, the language that was in section 50(2) that prohibited a trust claim from being joined with a lien claim and the language that was

¹⁶ Section 3(2) of O. Reg. 302/18: Procedures For Actions Under Part VIII under the *Construction Act*.

in section 55(1) that permitted a breach of contract claim to be joined with a lien claim were missing from the regulation. Repealing these provisions and excluding them from the initial version of the regulation was consistent with the intent of *Striking the Balance* that recommended that trust claims be joined with lien claims. However, as Associate Justice Wiebe noted:

... that in the spring of 2019 the Legislature reintroduced the joinder limitation of old section 55(1) by adding section 3(2) to O. Reg. 302/18. The wording was the same. That means, in my view, that the Legislation [sic] appears to have had a change of mind and decided to resurrect the joinder limitation of the old section 55(1). Therefore, trust claims may again be prohibited from being joined with lien claims.

Importantly, and as will be clear from the discussion below, it was not the “Legislature” that added language to O. Reg. 302/18 but rather the Lieutenant Governor in Council.

The Topyurek Decision

Less than one month after the *Domasio Drywalls* decision, Associate Justice Wiebe was given the opportunity to address the issue again in *Topyurek*.

In *Topyurek*, the plaintiff commenced a lien action which included a claim for breach of contract and breach of trust. The motion before Associate Justice Wiebe was brought by the plaintiff for default judgement against the defendants.

In a short decision, Associate Justice Wiebe dismissed the motion for three reasons, one of which was that the plaintiff had improperly joined a trust claim with its lien claim. Associate Justice Wiebe adopted his comments made in *obiter dicta* in the *Domasio Drywalls* decision and found that the joinder was improper.

Therefore, the comments made in *obiter dicta* in *Domasio Drywalls* became *ratio* in *Topyurek*.

But the saga of this procedural issue does not end there.

The SRK Woodworking Decision

Just two weeks after the *Topyurek* decision, Justice Harper released his decision in *SRK Woodworking* which addressed the very same legal issue, that is whether the moving party could amend its pleading to add a breach of trust claim with its lien action.

In *SRK Woodworking*, Justice Harper provided a detailed analysis of the issue, focusing on principles of statutory interpretation. A few key principles of statutory interpretation that Justice Harper followed include:

1. Repeal, revocation or amendment of an act or regulation does not imply anything about the previous state of the law or that the act or regulation was previously in force.¹⁷

¹⁷ Section 56 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sched. F.

2. An act and its regulations, which are consistent with that act, shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.¹⁸
3. The mere fact of an amendment is not necessarily significant.¹⁹
4. That the modern principle of statutory interpretation permits a court to look beyond the plain meaning of the text of a statute in order to discern its true meaning.²⁰
5. The challenge for courts when interpreting statutes is determining the scheme, objective, or intention of the legislature.
6. The principle of statutory interpretation referred to as *expression unius est exclusio alterius* (to express one is to exclude others) must be used with care.

In his analysis to determine legislative intent, Justice Harper relied on a summary prepared by the Ministry of the Attorney General that explained key changes that came into force on July 1, 2018. With respect to the joinder of trust and lien claims, the summary stated that “[t]he prohibition on joinder of lien claims and trust claims has been removed.”²¹

Justice Harper also relied upon the analysis and recommendations made in the report *Striking the Balance*, although he did note that the entire recommendation was not adopted because the joinder was to be “subject to anyone opposing bringing a motion” was not carried forward into the New Act.

Justice Harper went on to address trust claims and prompt payment and adjudication. He concluded that since the prompt payment and adjudications schemes did not apply to the matter before him, there was no reason why trust and lien claims could not be part of the same action. Justice Harper pointed out that the adjudication provisions do not apply to claims for breach of trust, nor may a lien action be referred to adjudication.

However, while not stated by Justice Harper, certainly the inclusion of prompt payment and adjudication to provide a swift and summary mechanism to resolve payment issues on construction projects emphasizes the reasonableness of allowing joinder of trust and lien claims. After all, there is less of a need for summary lien proceedings by the existence of adjudication, notwithstanding the fact that section 50(3) of the New Act remains clear that procedures in an action shall be as far as possible of a summary character.²²

Of particular interest is Justice Harper’s analysis in *obiter dicta*, that O. Reg. 302/18, section 3(2) was unlawfully passed.

Justice Harper refers to the language in section 88 of the New Act and asks where section 3(2) of O. Reg 302/18 is a “matter necessary or advisable to carry out effectively the intent and purpose of the Act”.

Justice Harper found that matters of fundamental importance should be dealt with in legislation so that parliamentarians have a chance to consider and debate the matter and goes on to find that there is nothing in section 88 of the New Act that gives authority to pass a regulation that dictates what actions

¹⁸ Section 64 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sched. F.

¹⁹ *Sullivan on the Construction of Statutes* (5th ed.) at p. 592 to 593.

²⁰ [R. v. Tenny, 2015 ONSC 1471.](#)

²¹ [Amendments to the construction lien and holdback provisions.](#)

²² Section 50(3) of the *Construction Act*.

may be brought. In Justice Harper’s view, this is a matter of fundamental importance and should be dealt with in the statute.

Justice Harper’s reasoning and conclusion in this regard is interesting.

First, nothing in section 3(2) of O. Reg 302/18 addresses what actions may be brought. Instead, section 3(2) deals with the procedure for joining a breach of contract claim with a lien claim, permitting (but not requiring) that they be brought together.

Second, Justice Harper relies on section 88(1)(a) as the appropriate enabling provision, questioning whether the joinder of a breach of contract and lien claim fall within a matter that “*may or must be prescribed by regulation.*” In doing so, Justice Harper ignores section 88(1)(l) which provides for making regulations “*for the purposes of Part VIII, governing procedures that apply to actions*”. Surely the allowance or restriction on the joinder of causes of action is a procedural matter.

Third, Justice Harper conducts no analysis of the fact that the introductory sentence to section 88(1) provides that “[t]he Lieutenant Governor in Council may make regulations respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, ***including regulations***” [emphasis added]. This implies that the list that follows, while not exhaustive, has been determined by the legislature to be matters necessary or advisable to carry out effectively the intent and purpose of the New Act.

Conclusion

There is a clear divide between Associate Justice Wiebe and Justice Harper on the joinder issue. Perhaps more importantly is the question of whether section 3(2) of O. Reg 302/18 is unlawful.

Before this issue reaches an appellate court, the Legislature should step in and fix section 3(2) of the regulation so that it permits a breach of trust claim to be joined with a lien claim, consistent with the recommendation in the report *Striking the Balance*. In the interim, Justice Harper’s decision in *SRK Woodworking* is likely binding law that can be relied upon. But plaintiffs must be cautioned by the state of flux and consider whether, while more costly, it makes sense to continue following the old approach of commencing separate lien and trust actions.



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