Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

MANUAL OF CONSTRUCTION LAW

Howard M. Wise

Release No. 7, August 2026

This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparation stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Release 2026-7 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), and Chapter 5 (Construction Liens).

Thomson Reuters®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

Highlights:

Recent case law introduced with this release include the following:

Contracts—Breach of Contract by Contractor—Unilateral Termination of Contract—Based on Breakup of Personal Relationship—Contractor Unable to Claim Payment for Items Previously Ordered—Contractor Unable to Rely Upon Article 2129 of *Civil Code of Quebec*—Abandonment Without Valid Cause—Where the contractor unilaterally terminated the renovation contract with the owner, and abandoned the worksite, following the breakup of the romantic relationship between the owner and the contractor's principal, and subsequently sought to deliver windows that were previously ordered, its claim for payment was denied as the contractor could not rely on Article 2129 of the *Civil Code of Quebec,* which allowed a contractor to be paid for work performed before termination, as the abandonment was not in good faith, but was without valid cause. In this case, the owner, NG, and her company entered into renovation contracts with the corporate contractor for the subject property in June 2018. NG was in a romantic relationship with JG, the director of the contractor when the contracts were made. After the work had started, there was an acrimonious breakup of their relationship, and work was abandoned by the contractor in October 2018. Ten months later, the contractor attempted to deliver the "commercial windows" to the property, but NG refused them. The contractor brought legal proceedings seeking payment of $57,047 for the windows that were never installed. The trial judge found that NG and her company were liable for payment of the windows. Although the contractor abandoned the construction site, the trial judge applied Article 2129 of the *Civil Code of Quebec* where a contract was unilaterally terminated in good faith. The trial judge ordered NG and her company to pay to the contractor the amount sought. NG and her company appealed, and their appeal was allowed.

Article 2129 of the *Civil Code of Quebec* only applied to unilateral terminations made in accordance with arts. 2125 and 2126 of the Code. The trial judge erred in law by concluding that application of art. 2129 was not dependent on whether the termination of the contract was for serious cause or not, or occurred at an inopportune moment. The contractor's abandonment of the worksite without a serious reason, and at an inopportune moment constituted a contractual fault. Article 2129, which allowed a contractor to be paid for work performed before termination, did not apply when the contractor was at fault for abandoning the work without valid cause, and without attempting to limit the losses of its clients. This fault triggered the sanction of termination by the owner provided for in art. 1605 of the Code, thereby precluding application of art. 2129. The contractor's fault therefore precluded any claim for the windows, especially since they were delivered ten months after the abandonment, when the contractual relationship was broken and they were no longer of any use to NG and her company. The losses alleged by the contractor resulted directly from its own wrongdoing, and no unjust

enrichment could be invoked. The contractor was not entitled to reimbursement for the cost of the windows: *Gélinas c. LG Constructions TR inc.,* 2025 CarswellQue 12962, 2025 QCCA 1483 (C.A. Que.).

Contracts—Breach of Contract—Limitation Period—Moisture Infiltration—Some Repairs by Builder—Extent of Water Damage Discovered Four Years Later During Upgrades—Action For Damages Against Builder Timely—Where the owners hired the contractor to build their summer home, which was completed in January 2011, and beginning in August 2011, experienced moisture infiltration, and following a consultant's report the contractor completed some recommended repairs, but not the chimney repairs, which were made by a third party in 2015, during upgrade work, that uncovered extensive water damage, the owners' action for damages in 2016 was not statute-barred where the claim was discovered in 2015. In this case, the owners contracted with the contractor to construct a $5,000,000 summer home, which was substantially completed in January 2011. Beginning in August 2011, the owners complained of water leaks. In August 2012, they hired an architectural firm to investigate the moisture infiltration, and other building envelope repairs. An inspection report was prepared in October 2012, recommending repairs and upgrades relating to the chimneys, saddles, and cladding. The contractor completed some of the recommended repairs, but it refused to do the chimney repairs recommended in the report without payment, asserting that such work was not required. In 2015, during upgrade work by a third party, MG, extensive concealed water damage and construction defects were discovered behind walls and roofing, requiring substantial repairs. In July 2016, the owners commenced an action seeking damages, alleging that the cost to rectify the breach of contract, including the repair of deficient chimneys and moisture damage, was $750,000. The contractor brought a motion for summary judgment dismissing the action as statute-barred. The contractor's motion was denied.

The motion judge found the "required repairs" were properly characterized as upgrades even though one chimney saddle was missing. The motion judge found the owners first knew that "injury, loss or damage" had occurred after May 2015 when MG began upgrade work; that" injury, loss or damage" was caused or contributed to by an act or omission, namely, the construction defects noted by MG in June 2015; that the act or omission was that of the contractor against whom the claim was made, based on construction defects noted by MG in June 2015; and that, having regard to the nature of the "injury, loss or damage", a legal proceeding would be the appropriate means to seek to remedy it based on the construction defects as noted by MG in June 2015. The motion judge found the absence of a chimney saddle. was not something that would lead the owners to conclude, given the contractor's assurances that saddle was not necessary or required by the Ontario Building Code, O. Reg. 350/06, that a proceeding would be an appropriate means to seek to remedy it without yet having discovered the damage caused by the omission of the saddle. The contractor appealed, and its appeal was dismissed.

The motion judge properly applied the discoverability test, and applied the proper limitations regime. The owners' claim was discovered in 2015 when the extensive damage and causation became known and the proceeding was appropriate. There was no error in making a distinction between the repairs and the upgrades. The motion judge properly considered causation as part of the discovery issue. The findings regarding the purported assurances regarding the construction were fact based, and owed deference on appeal. Although the owners did not have a cross-motion, a "boomerang order" finding that the limitation period was not breached was proper, and the motion judge understood the requirements for the order. Moreover, the motion judge had canvassed the issue with the parties and determined that both had put their best foot forward. Accepting new arguments that the order, which was agreed to by both parties, was inappropriate, would sanction a tactical delay. The appellate court upheld the motion judge's award of $435,000 to the owners: *Saxberg v. Seargeant Picard Incorporated*, 2024 CarswellOnt 19832, 2024 ONCA 931 (Ont. C.A.), affirming 2024 CarswellOnt 5843, 2024 ONSC 1079 (Ont. S.C.J.).

Construction Liens—Discharge of Lien—Whether Lien Excessive—Owner Paying Full Principal Amount of Lien—Common Law Payment Allocation Principles Applying—Payments Applied First to Interest—Lien Reduced to Amount of Contractual Interest Owing—Where the owner paid the full principal amount of the claim for lien, and sought the discharge of the lien, its motion to discharge the lien was dismissed as the common law payment allocation principles applied with payments generally applying first to interest and then principal, and the lien was accordingly reduced to the amount of the contractual interest owing. In this case, the contractor had been contracted by MTCC to install a new roof on three condominium buildings. It completed the work in April 2023, but remained unpaid and preserved its lien in June 2023. The contractor later confirmed that the correct principal amount owing was $811,919. Between August 2023 and August 2025, payments totalling $811,919 were made to or held in trust for the contractor by MTCC, and the affected unit owners. The lien was never discharged. MTCC argued that the principal amount of the lien had been paid in full, and that the contractor was improperly using the lien to secure interest and costs. It relied on an alleged agreement that the payments would be applied to the principal, and that the interest and costs would be deferred. The contractor disputed any binding agreement or direction on the allocation of the payments, and took the position that the payments were made without specifying how they were to be applied. It argued that it was entitled to allocate the payments first to the accrued contractual interest and then to the principal, leaving $93,004 outstanding on the lien. MTCC brought a motion to discharge the lien, and vacate the registrations of its claims for lien. MTCC's motion was dismissed.

Section 47 of the *Construction Act* permitted the discharge of a lien where the claim was frivolous, vexatious, an abuse of process, or on any proper ground. The applicable question was whether there was a triable

issue on the basis for the discharge. Although interest and costs had not formed part of a lien, there was an important distinction between a lien having been paid in full and payments having been made equal to the lien amount. The court found that common law payment allocation principles applied in the lien context. A debtor could direct allocation of payments through a plain and irrevocable expression of intention. Absent such direction or agreement, a creditor could allocate payments as it saw fit, and payments were generally applied first to interest and then principal. The *Construction Act* had not restricted those common law rights. The court held that the record was insufficient to determine whether there was a binding agreement or clear direction requiring allocation to the principal, whether any such direction bound the contractor, or whether MTCC's breach of the alleged payment plan relieved the contractor from it. Accordingly, the contractor's lien was reduced to $93,004, without prejudice to revisiting the proper allocation of payments in the reference: *Hamati Roofing Ltd. v. MTCC No. 581*, 2026 CarswellOnt 6255, 2026 ONSC 2348 (Ont. S.C.J.).

Construction Liens—Appeal of Judgments—Lien Action Referred to Construction Lien Associate Judge—Parties Entering Minutes of Settlement—Final Repost Upholding Minutes of Settlement—Homeowners Appealing Enforcement of Settlement to Court of Appeal—Appeal Quashed—Section 71(1) of *Construction Act* Requiring Appeal to Divisional Court—Where the contractor claimed there was a settlement of its lien action with the homeowners following a reference to the Construction Lien Associate Judge, and the parties entering minutes of settlement, which were upheld in the Associate Judge's Final Report, the homeowners appeal to the Court of Appeal, on the basis that they were appealing an order enforcing a settlement, was quashed as s. 71(1) of the *Construction Act*, provided that appeals lay to the Divisional Court, applied to all appeals involving only proceedings brought under the Act. In this case, the homeowners contracted with the contractor to renovate their house. A dispute arose between the parties, and the contractor filed and perfected a construction lien. The lien remained on title. A judgment of reference was issued on April 21, 2023, ordering that the matter be referred to the Construction Lien Associate Judge for trial under s. 58(1)(a) of the *Construction Act*, R.S.O. 1990, c. C.30. The parties, who were all represented by counsel, agreed to terms of settlement following a settlement conference in the fall of 2024. The terms included judgment in favour of the contractor.in the amount of $85,000 and a dismissal of the homeowner's counterclaim. The contractor claimed that the homeowners have failed to perform the material terms of the settlement, and brought a motion seeking to enforce the settlement of the lien action with the homeowners, and the mortgagees. The contractor submitted that all parties agreed to a settlement of this action and the counterclaim. The contractor argued that it was entitled to judgment in accordance with the consent to judgment to which the homeowners agreed. The homeowners did not dispute that they agreed, at least in principle, to the terms of settlement, and signed minutes of settlement. However, their position was that there was no binding settlement because the agreement was

reached without voluntary and informed consent or proper legal advice.

The contractor's motion was granted with the Associate Judge affirming the settlement agreement with the contractor entitled to judgment in accordance with the parties' settlement as set out in the signed minutes of settlement. The Final Report was issued on October 31, 2025. The homeowners filed a notice of appeal with the Court of Appeal on December 11, 2025. The contractor responded with a motion to quash the appeal on the basis that the Court of Appeal; lacked jurisdiction to hear the appeal, pursuant to s. 134(3) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. By operation of r. 54.09(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, when the homeowners did not file a motion opposing confirmation of the report within 15 days of service, the report was confirmed. The homeowners took the position that they were appealing an order enforcing a settlement, which came within the subject matter jurisdiction of the Court of Appeal. Further, the amount in issue was greater than $50,000, which brought it within the monetary jurisdiction of this court. Accordingly, they submitted that the Court of Appeal had jurisdiction to hear the appeal. The contractor's motion to quash the appeal was granted.

Despite the general *Rules of Civil Procedure*, there were specific rules governing construction lien disputes which took priority. Section 71(1) of the *Construction Act* provided that "an appeal lies to the Divisional Court from a judgment or order on a motion to oppose confirmation of a report under this Act." Section 71(1) of the Act had been interpreted broadly by the Court of Appeal. This provision applied to all appeals involving only proceedings brought under the *Construction Act: MGW-Homes Design Inc. v. Pasqualino*, 2024 ONCA 422 (Ont. C.A.), at paras. 31-35; *Chaly v. Structured Restoration Inc.,* 2025 ONCA 901 (Ont. C.A.), at paras. 6-7. The report that the homeowners wished to appeal from was a "judgment" within the meaning of s. 71(1), and accordingly an appeal would arguably lie to the Divisional Court. The homeowners requested that if the Court of Appeal found that this court did not have jurisdiction, that the appeal be traversed to the Divisional Court, which was done in the *Chaly* case. The Court of Appeal found this was not an appropriate case to do so.

Although the homeowners did not have a right of appeal to the Court of Appeal, neither did they have a right to a direct appeal to the Divisional Court. The complicating factor was that they did not oppose the confirmation of the Final Report within the requisite time period, or at all. As with references conducted under r. 54 of the *Rules of Civil Procedure*, there was no right of direct appeal from a reference conducted under s. 58 of the *Construction Act: Martin v. 11037315 Canada Inc.,* 2025 ONCA 44 (Ont. C.A.), para. 13. The proper procedure was to have opposed confirmation of the report. That did not happen. Given that the report was already confirmed, it was now necessary for the homeowners to seek leave in the Superior Court to extend the time to file a motion in opposition to the report. Given that a goal of the *Construction Act* was to promote expeditious resolution of disputes, it could not be assumed that leave to extend time would be given: *Dani Building System Inc. v. Hos-*

sain 2026 CarswellOnt 8104, 2025 ONCA 362 (Ont. C.A.), setting aside/quashing 2025 CarswellOnt 17951, 2025 ONSC 6093 (Ont. S.C.J.).