KOSKIE MINSKY
JUSTICE MATTERS

# Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

## New administrative dismissal rule does not override existing appellate powers

In anticipation of the new rule governing administrative dismissals (Rule 48.14), which came into effect on January 1, 2017, Justice Glithero of the Ontario Superior Court of Justice recently set out the applicable procedure in circumstances where an administrative dismissal date falls between an order refusing to restore an action to the trial list and the hearing of the appeal of that order.

In ***Apa Holdings Inc v Duscio*, 2016 ONSC 7814**, a construction lien matter involving a claim for $250,000, the plaintiff brought a motion to restore the action to the trial list nearly seven years after it was initially struck. The motion was dismissed on September 8, 2016, and the plaintiff appealed. As the hearing of the appeal was scheduled to take place on February 6, 2017, the plaintiff brought a motion for an extension of time so the action would not be administratively dismissed on January 1, 2017, as prescribed by Rule 48.14 of the *Rules of Civil Procedure*. The plaintiff argued that the administrative dismissal of the action would render the appeal moot.

The defendant disagreed with the plaintiff's position, citing subsections 134(1)(a) and (c) of the*Courts of Justice Act* as providing appellate courts with the necessary jurisdiction to make an order setting aside the administrative dismissal and restoring the action to the trial list should the Court consider it just. To that end, the Ontario Court of Appeal previously made such an order in ***Carioca's Import & Expert Inc v Canadian Pacific Railway*, 2015 ONCA 592**, when it restored the underlying action to the trial list after it had been both struck off the list and administratively dismissed.

Relying on *Carioca*, Justice Glithero agreed with the defendant's position in finding that it would be within the Divisional Court's purview to revive the action at the hearing of the appeal as a result of "the obvious nature of its power to do so" under the *CJA*.

Rule 48.14 was enacted in response to a significant uptake in recent years in the number and cost of

claims made to LawPRO involving administrative dismissals. The new rule mandates that any action not set down for trial within five years after being commenced will be administratively dismissed. Now that the rule is in force, courts will likely be tasked with clarifying its meaning and effect on other procedural aspects under the *Rules*. Justice Glithero's decision helps to resolve one such issue, reminding litigants to rest assured that appellate courts continue to possess the necessary authority to overturn administrative dismissal orders when appropriate.

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# Notice Holdback Under the Construction Lien Act: State Your Intention

In *Trenchline Construction Inc. v Metrolinx,* 2016 ONSC 6136, Master Wiebe released a thorough decision, touching on numerous contentious issues between the parties not the least of which revolved around what constitutes a written notice of lien under s. 24 of the *Construction Lien Act* (the "*CLA*"). Metrolinx was the owner of a project called the Willowbrook Rail Maintenance Facility Fuel Rehabilitation Project (the "Project"). Trenchline was a subcontractor that installed the piping system for the contractor Unimac. Trenchline alleged that it issued ten written notices of lien under s. 24 of the *CLA* to Metrolinx between May 24, 2011 and December 10, 2011 claiming the total sum of $1,085,210.09. In the event that Trenchline's notices were deemed to be written notices of lien under s. 24 of the *CLA*, Metrolinx would have been required to maintain notice holdback of the entire $1,085,210.09.

Master Wiebe wrote a characteristically thorough and well-reasoned decision wherein he ultimately concluded that only one of the ten notices qualified as a written notice of lien pursuant to s. 24 of the *CLA*. Master Wiebe identified four items a written notice of lien must contain in order for same to constitute a valid notice, specifically: (1) the name of the lien claimant; (2) the premises; (3) the payor; and (4) the amount owed. However, he affirmed a fifth equally important component, namely, a warning to the payor by the notice giver of a present intention to preserve the lien. Without this fifth component, the correspondence does not constitute a notice of lien pursuant to s. 24 of the *CLA*.

Master Wiebe described this fifth component as a "clarion call" and he used this phrase five times in the decision. As stated, "[o]nly a clarion call to disturb the contractual flow of funds should cause the owner to do so." He determined it is not necessary to use the word "lien" in the notice and there are no magic words that will trigger the determination. However, what is necessary is a warning from the lien claimant to the recipient that the dispute between the lien claimant and its payor reached "the lien stage" and the status quo flow of funds is to be interrupted immediately.

By way of example, one of the correspondences written by Trenchline to Metrolinx identified that Trenchline intended to place a lien on the Project, however this correspondence stated that it would only lien if the outstanding amount was not straightened out at a future site meeting. Master Wiebe

determined this statement did not constitute a present intention to lien and therefore did not reach the threshold of becoming a written notice of lien pursuant to s. 24 of the *CLA*.

This decision is another example of the strict interpretation of the *Construction Lien Act* and the unforgiving operation of the statute. By failing to articulate a present intention to lien in nine of the ten written notices, Trenchline was denied approximately $800,000 in notice holdback liability that it otherwise could have asserted against Metrolinx. To borrow Master Wiebe's phrase, this decision should act as a "clarion call" to all lien claimants that when delivering a written notice of lien it is imperative to articulate a present intention to lien.



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