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ALBERTA EDITION

January 2023

Featuring Counsel Comments From:

Kerry Lynn Okita and Patty Ko, Lisa Handfield, Jose Delgado and Megan Harris, Kevin Burron, Katrina Haymond, K.C. and Jason Kully

Featured Cases:

P2 Civil Practice and Procedure, Contracts, Insurance, Public Law, Municipal Law ~ ***With Counsel Comments***

P8 Family Law, Matrimonial Property, Agreement to Vary ~ ***With Counsel Comments***

P14 Construction, Builders' Liens, Trusts, Bonds ~ ***With 2 Counsel Comments***

P22 Municipal, Special Levy

P25 Public Law, Freedom of Information, *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, Confidential Information ~ ***With Counsel Comments***

1921645 Alberta Ltd v. FCT Insurance Company Ltd., 2022 ABCA 400

Areas of Law: Civil Practice and Procedure, Contracts, Insurance, Public Law, Municipal Law

~According to the majority, local improvement taxes becoming due or payable in future years after a title policy is issued are not a defect or lien on title as every title is subject to the expectation property taxes will be due or payable in future: the obligation to pay taxes in the future is an "inherent burden on every piece of real estate"~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

In September 2015, 1921645 Alberta Ltd. (the respondent) entered into an agreement to purchase a parcel of land ("Lot 15"), which was subject to a local improvement charge. Improvements to Lot 15 were originally budgeted for $3.7 million in 2011, payable over 15 years, but due to cost increases, in 2014, the charge was increased to $5.1 million payable from 2016 - 2030 by way of a municipal bylaw (the 2014 Bylaw). The sale of Lot 15 closed on December 2, 2015 and the first annual installment of the local improvement charges fell due in June 2016. The respondent did not know about the improvement tax until May 2016.

In November 2015, the respondent purchased a title insurance policy (the Policy) from FCT Insurance Ltd. and First American Title Insurance (the appellants). The Policy provided "subject to the exclusions from coverage, the exceptions from coverage contained in schedule B and the conditions, [the

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1921645 Alberta Ltd v. FCT Insurance Company Ltd., (cont.)

appellants] [...] insure, as of Date of Policy [...] "2. Any defect in or lien or encumbrance on the Title", which "includes but is not limited to insurance against loss from: [...] (b) The lien of real estate or assessments imposed on the Title by a governmental authority or public utility due or payable, but unpaid [...]". The Policy expressly excluded coverage for "3. Defects, liens, encumbrances, adverse claims or other matters: [...] (d) attaching or created subsequent to Date of Policy [...]".

The respondent commenced an action against the appellants, and obtained summary judgment against the appellants. The chambers judge found the first time Lot 15 was noted to be subject to the local improvement tax was in a schedule to the 2014 Bylaw, thus the "trigger date" for determining whether the local improvement tax was "payable" was in 2014. Because the purchase agreement, Policy date, and close of the transaction happened after the 2014 trigger date, the chambers judge found the local improvement tax was a special lien on title and was covered.

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Left to Right:
Kiu Ghanavizchian, Sunny Sanghera, Gary Mynett, Lucas Terpkosh, Vern Blair, Rob Mackay, Farida Sukhia

***1921645 Alberta Ltd v. FCT Insurance Company Ltd.,** (cont.)*

APPELLATE DECISION

The majority of the Court of Appeal allowed the appeal and dismissed the claim, finding the local improvement charges that became payable commencing in 2016 were not covered by the Policy. The majority noted that insurance coverage provisions are interpreted broadly, exclusion clauses are interpreted narrowly. It found the Policy was clear on timing of coverage, drawing clear distinctions between defects on Title arising before the "Date of Policy" and those arising thereafter. The majority found on the plain wording of the Policy, taxes becoming due or payable in future years could not be a defect or lien on title as every title is subject to the expectation property taxes will be due or payable in future: the obligation to pay taxes in the future is an "inherent burden on every piece of real estate", and an obligation to pay future taxes is not a defect in title. Finally, the majority found the municipality could not have registered a tax recovery notification on the Title because there were no tax arrears outstanding at the date the sale transaction closed: the 2016 local improvement levy was included in the 2016 property tax notice, seven and a half months after the Date of Policy.

Justice Feehan, in dissent, found that he would have dismissed the appeal and upheld the decision of the chambers judge. He noted that s. 348 of the *Municipal Government Act*, RSA 2000, c M-26, specified that "[t]axes due to a municipality [...] (d) are a special lien (i) on land and any improvements to the land, if the tax is [...] a local improvement tax". He therefore concluded a local improvement tax is a special lien, lien, and encumbrance on title once it becomes "due." He agreed with the chambers judge that the local improvement tax was imposed on Lot 15 in the 2014 Bylaw. Justice Feehan noted there was "no temporal qualifier" as to when the imposed local improvement tax was due or payable, such that the tax was due per the 2014 Bylaw "as a debt to be paid immediately or at a future date, payable in annual installments or "at any time"."

COUNSEL COMMENTS

1921645 Alberta Ltd v. FCT Insurance Company Ltd., 2022 ABCA 400

Counsel Comments provided by Kerry Lynn Okita and Patty Ko,
Counsel for the Appellants

Kerry Lynn Okita

Patty Ko

"This Court of Appeal decision affirms the reality of commercial real estate transactions and practices in Alberta. It provides clarification to the application of the municipal property tax statutory regime, including local improvement charges, to title protection and upholds a practical approach. Both the majority and dissenting decisions highlight the need for complementary safeguards for purchasers alongside title insurance in commercial real estate transactions.

Title insurance is a crucial and valuable instrument for the protection of purchaser's interests in title in both residential and commercial real estate transactions. It allows transactions to move forward expeditiously by providing purchasers with protection of their title, including against unknown title defects, such as mortgages, writs, or liens. Title insurance protects title as at the date of the policy, which is most commonly the date of the purchase closing. As noted by the Court of Appeal, the timing of the protection is clear in title insurance policies. Coverage is extended for defects that arise *before* the date of the closing and expressly excludes those that arise *after* the date of closing.

The Court of Appeal appropriately found that it would be inaccurate and commercially impractical to consider property taxes that become due in the *future* to be a defect on title at the date of closing. Property purchasers

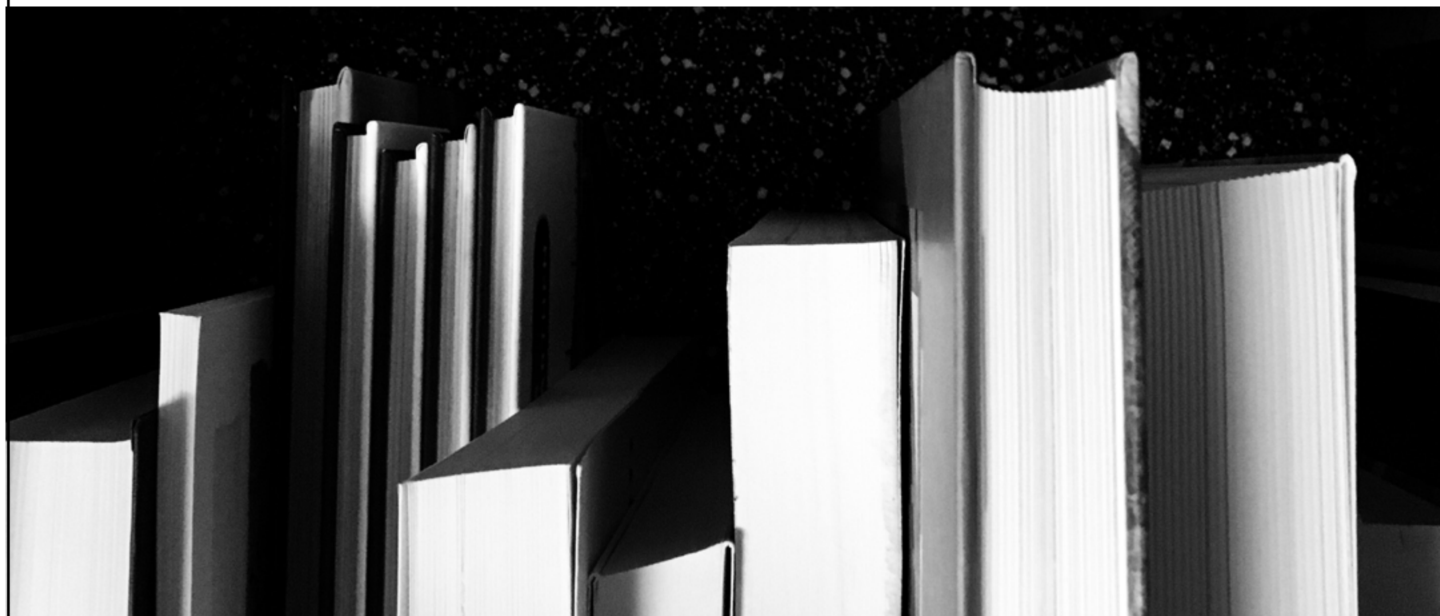
COUNSEL COMMENTS

are aware and indeed, expect that property taxes shall become due periodically throughout their ownership. The Court of Appeal affirmed that this knowledge cannot be considered a defect on title. The Court aptly stated:

> The obligation to pay taxes in the future is an inherent burden on every piece of real estate imposed by statute that runs with the land, but the obligation on the taxpayer to pay taxes in the future is in no sense a "defect" in the title.
>
> (at paragraph 11 of the majority decision)

The Court went on to affirm that it would not be reflective of commercial practices in Alberta to consider future property taxes a defect on title covered by title insurance. The Court of Appeal noted:

> It is not within the "reasonable expectations of the parties" that a policy of title insurance would be interpreted as an agreement to pay the policyholder's taxes that become due or payable in the future. That would be an unrealistic result that "the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted".
>
> (at paragraph 11 of the majority decision)



COUNSEL COMMENTS

In this case, the Court was dealing with property taxes of significant local improvement charges due over 15 years. The majority decision turned to the statutory regime under the *Municipal Government Act* and found that since the taxes could not be enforced as at the date of the closing, they could not be considered due or payable under the title insurance policy. The dissenting opinion took a differing approach to the meaning of the word "payable" and did not find the enforceability of the taxes as at the date of closing to be determinative.

Practically speaking, both the majority decision and the dissent of the Court of Appeal highlight the need for complementary protections alongside title insurance for commercial real estate purchasers. Purchasers should ensure that vendors provide full disclosure regarding their knowledge of future property taxes, including local improvement charges; these matters should be adequately addressed in appropriate vendor representations and warrantees; as well as through the other protective instruments such as an Agreement to Re-adjust, which can directly account for obligations that arise after the date of closing. Put simply, this dispute and both the majority and dissenting decision emphasize the need for commercial real estate transactions to have complementary protections for purchasers."

Kaur v. Bains, 2022 ABCA 404

Areas of Law: Family Law, Matrimonial Property, Agreement to Vary

~In the absence of an explicit agreement to vary terms of a court order or agreement, the court will take an objective view of the circumstances and, in order to avoid falling into palpable and overriding error, will specifically address any evidence suggestive of an implicit agreement~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellant wife and respondent husband were married in 2014 and separated in 2021. There is one child of their marriage, and they jointly owned the matrimonial home ("the Home"), which the appellant continued to reside in with the child after separation. On November 30, 2021, the parties attended an Early Intervention Case Conference ("EICC") and entered into a consent order ("the Order") that provided that the appellant would purchase the Home for $720,000 subject to meeting certain deadlines with respect to proof of financing and closing the transaction. Pursuant to the Order, if the appellant failed to meet the December 21, 2021 deadline for providing proof of financing to the respondent, the Home would be listed for sale.

The appellant was unable to obtain the refinancing and close the transaction by the deadlines set out in the Order for several reasons including that she needed filed copies of the Order as well as a child support order that had been granted the day before the EICC. When the

Kaur v. Bains, *(cont.)*

appellant obtained financing and sent the closing documents to the respondent's lawyer on February 15, 2022 for a proposed closing in March, the respondent refused to sign the documents to complete the transaction. The appellant brought an urgent application wherein she sought an order dispensing with the respondent's signature on the transfer of land, relying on correspondence between counsel to assert there was an agreement reached to extend the deadlines outlined in the Order.

The chambers judge was not satisfied that there was any definitive agreement to extend the deadlines in the Order and dismissed the appellant's application.

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Kaur v. Bains, *(cont.)*

APPELLATE DECISION

The appeal was allowed. The Court held that the chambers judge committed a palpable and overriding error in failing to specifically address the contents of the December 3, 2021 letter which referred to an agreement to extend the December 21, 2021 deadline in the Order, as well as subsequent communications between counsel in relation to the anticipated transfer of the Home to the appellant. The critical portion of the December 3, 2021 letter was "...we confirm that you advised that you are amenable to treat the December 21, 2021 deadline as flexible, so long as our client is taking steps to submit her [refinancing] application." At no time after receiving this letter did counsel for the respondent contest that an agreement to extend the refinancing deadline had been reached or that the agreement to treat the December 21, 2021 financing deadline as flexible had come to an end. Therefore, the Court determined that, when viewed objectively, the January 21 and 24, 2022 correspondence between counsel, in light of the December 3, 2021 letter, are evidence of agreements between counsel that the financing deadline would be extended as long as the appellant was taking steps to secure financing. The Court found that the appellant's counsel kept the respondent's counsel informed of the steps being taken in regard to the appellant's refinancing application, that there was some delay associated with obtaining a filed copy of the child support order, and that the appellant took prompt steps to submit her application for refinancing as the transfer documents were prepared and sent to opposing counsel on February 15, 2022.

Although there was no explicit agreement to extend the January 31, 2022 closing date set out in the Order, the terms of the agreement to treat the refinancing deadline as flexible necessarily meant that the closing deadline may also have to be extended. The Court noted that the January 24, 2022 correspondence confirming the respondent would sign "the required forms, pending confirmation your client is obtaining a new mortgage altogether"

Kaur v. Bains, *(cont.)*

contained no indication that the respondent was insisting on closing January 31, 2022. On the contrary, the correspondence conveyed his agreement to reasonably extend the closing date just as the date for refinancing had been reasonably extended. In the result, the Court granted the appellant 90 days to complete the purchase of the Home.

COUNSEL COMMENTS

Kaur v. Bains, 2022 ABCA 404

Counsel Comments provided by
Lisa Handfield, Counsel for the Appellant

Lisa Handfield

"The Mother and the Father entered into the Consent Order where the Mother would buy out the Father's interest in the family home in Chestermere, Alberta, at an appraised price obtained in October 2021. The Mother was under deadlines to obtain pre-approved financing (December 21, 2021) and the sale was to close by January 31, 2022. If the Mother could not get pre-approved, the family home would be listed and sold.

The appeal hinged on a phone call between the Mother's former counsel and one of the Father's counsel (he had two from the same firm sharing the file) on December 3, 2021. Counsel agreed that the financing deadline was flexible so long as the Mother was taking steps on that front. Mother's former counsel wrote a letter confirming that agreement the same day, but sent it later. Father's counsel did not respond.

The Mother's former counsel presumed the agreement held, provided periodic updates to the Father's counsel, confirmed pre-approval in January 2022 and sent transfer documents in February 2022. The Father changed counsel and took the position that there was no agreement. The value of the family home had artificially risen significantly in a short-lived real estate bubble, and the Father, understandably, wanted to take advantage by listing and selling beyond the appraised price. The Mother filed an urgent application to dispense with the Father's signature on the transfer, but this application was dismissed.

The issue for me was whether an agreement between counsel existed. It was certainly imperfect: the late confirmation letter had no response; and the Father's former counsel who actually took the call on December 3, 2021 sent no

COUNSEL COMMENTS

correspondence on which either party could rely. At the end of the day there was an alleged verbal agreement that one party argued did not happen.

The Father relied on basic contract law, essentially that silence does not mean acceptance. I would agree that if this had been an agreement just between the parties, the Father was probably right. However, it seemed to me that there was a higher standard for agreements between counsel. I leaned heavily on the Law Society of Alberta's *Code of Conduct*, suggesting there was a duty for counsel to inform the other if there is an apparent misunderstanding. Since the Father's counsel did not inform (or say anything at all), there was an agreement.

To my surprise, the Court of Appeal chose not to address the *Code of Conduct* in any fashion, instead relying on the content of the Mother's former counsel's confirmation letter. It is unfortunate as many practitioners could have benefited from guidance on how and when we, as counsel, held to a higher standard. How are those sections of the *Code of Conduct* to be applied in our daily practice, is another question us as practitioners would have welcomed the Courts guidance on."

Tempo Alberta Electrical Contractors Co Ltd v. Man-Shield (Alta) Construction Inc., 2022 ABCA 409

Areas of Law: Construction, Builders' Liens, Trusts, Bonds

~Section 48 of the Builders' Lien Act*, RSA 2000, c B-7 permits the substitution of a lien bond for money paid into court as security. S. 22 of the* Act*, however, may prevent the substitution where the funds paid into court are impressed with a statutory trust~*

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The respondent, Man-Shield (Alta) Construction Inc., was the general contractor for a construction project. The respondent hired the appellant, Tempo Alberta Electrical Contractors Co. Ltd., as an electrical subcontractor. The appellant issued a certificate of substantial performance in relation to its work and afterward both the respondent and the appellant filed builders' liens against the project land. One of the appellant's liens was removed from title when the project owner paid over $1 million into court as security. The owner settled the respondent's claim and as part of the settlement, assigned its right in the money in court to the respondent.

The respondent applied to replace the money paid into court with a lien bond in the same amount. The applications judge granted the application. The appellant unsuccessfully appealed to the chambers judge and appealed again to the Court of Appeal. The appellant also brought an application to adduce fresh evidence regarding the respondent's precarious financial position.

Tempo Alberta Electrical Contractors Co Ltd v. Man-Shield (Alta) Construction Inc., (cont.)

APPELLATE DECISION

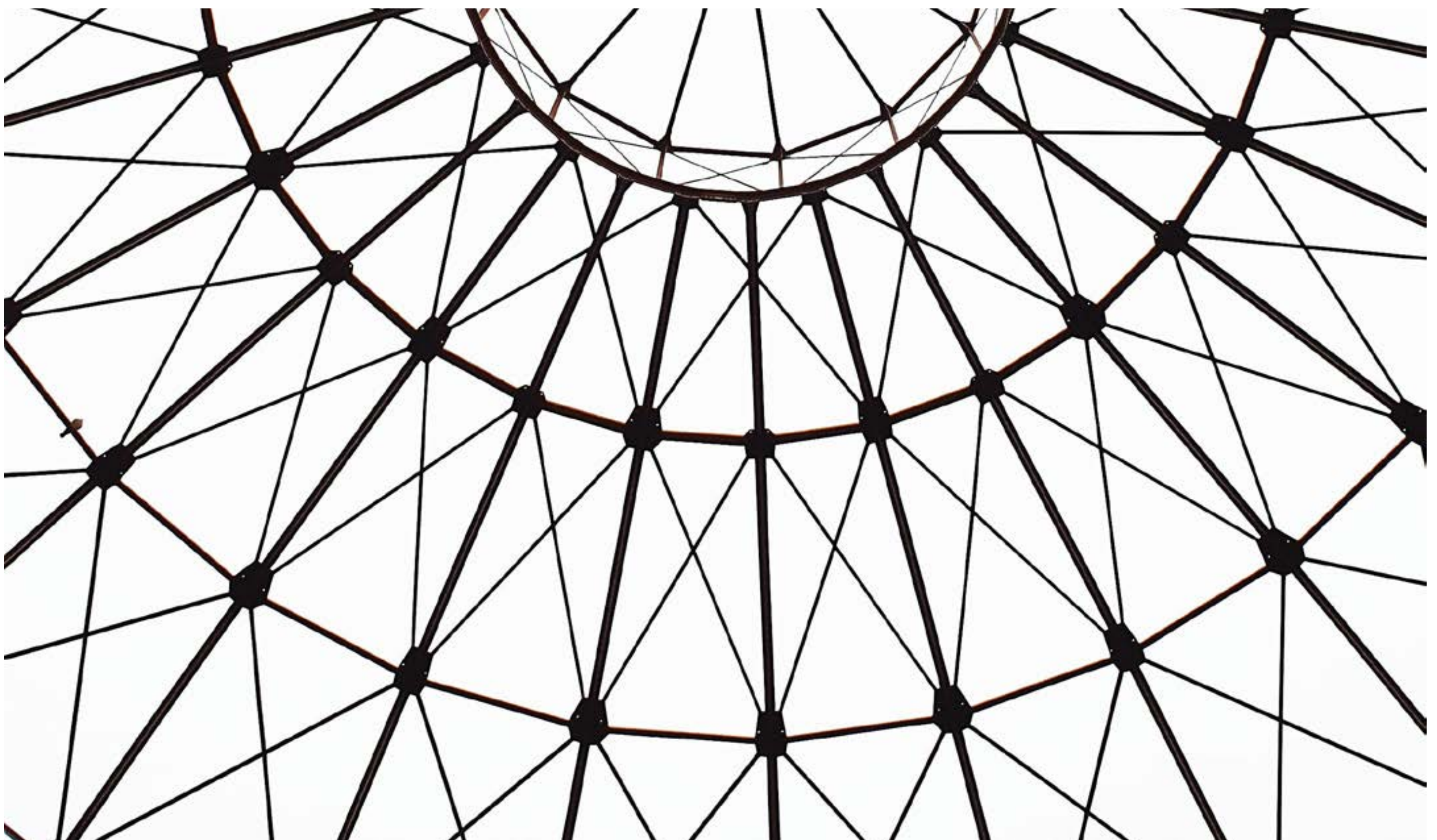
The Court of Appeal dismissed the application for fresh evidence and allowed the appeal in part. The Court considered two issues on appeal: (1) whether s. 48 of the *Builders' Lien Act*, RSA 2000, c B-7 (the "*Act*") permits the substitution of a lien bond for money paid into court; and (2) whether the money paid into court was impressed with a trust by virtue of s. 22 of the *Act*. The Court noted that s. 48 of the *Act* was silent regarding whether security can be substituted once paid into court. The Court found that the limited case authority on the issue suggested that security may be substituted, provided there is no prejudice to the lien holder. The Court concluded that there was no prejudice to the appellant here because the lien bond was for the same amount and there was no suggestion that the insurer issuing the bond was not financially secure.

Section 22 of the *Act*, however, prevented the substitution. Once the appellant issued its certificate of substantial performance and the owner paid the funds into court after the certificate was issued, the funds were impressed with a trust. Therefore, the respondent could not use the money for its own purpose outside the contractual chain. The Court reiterated the principle from previous jurisprudence that the lien and trust provisions in the *Act* were separate and distinct remedies, available concurrently to claimants. In this case, if the funds paid into court were replaced by a lien bond and the appellant's lien was found to be invalid, the lien bond paid into court would be extinguished and the funds that had been replaced by the lien bond would have been spent outside the contractual chain. The appellant would be left without a remedy. The Court noted this is the problem that the trust provisions in lien legislation were meant to address.

Tempo Alberta Electrical Contractors Co Ltd v. Man-Shield (Alta) Construction Inc., (cont.)

The Court commented that lien legislation aims to balance the interests of owners and those who supply owners with labour and materials and must be given a practical interpretation so as not to unduly prejudice the rights of owners and third parties. Courts must adopt a strict interpretation in determining whether a lien claimant has satisfied the requirements to lien and a liberal approach regarding to whom the statute applies.

While the appeal was ongoing, the appellant obtained summary judgment against the respondent for holdbacks, progress claims, and change orders, and the respondent lost an application to declare a second lien invalid. The respondent appealed the summary judgment order, but not the dismissal of its application to strike the second lien. The Court ordered the respondent to pay back into court the value of the appellant's summary judgment order.



COUNSEL COMMENTS

Tempo Alberta Electrical Contractors Co Ltd v. Man-Shield (Alta) Construction Inc., 2022 ABCA 409

Counsel Comments provided by Jose Delgado and Megan Harris, Counsel for the Appellant

Jose Delgado

Megan Harris

"The Court of Appeal's decision in *Tempo Alberta Electrical Contractors Co. v Man-Shield (Alta) Construction Inc.*, 2022 ABCA 409, provides clarity on the application of the trust provided for by Section 22 of the *Alberta Builders' Lien Act* (and, presumably, the *Prompt Payment and Construction Lien Act*).

The Court of Appeal has confirmed that, where a certificate of substantial performance is issued and cash is paid into Court to stand in place of the land, a contractor can replace that cash with an adequate lien bond pursuant to Section 48 of the *BLA*. However, the posting of a lien bond to stand in place of the cash as security does not relieve the contractor of the trust obligations imposed by the *BLA*. The cash will still be impressed with a trust and cannot be disposed of by the contractor outside the contractual chain.

This decision is a win for subcontractors in Alberta. It closes a loophole that would allow contractors to gain significant leverage over their subcontractors by having use of cash intended to pay for the work of the subcontractor, simply by posting a lien bond for the subcontractor to chase. This decision will require contractors to maintain the cash in trust even if they post a lien bond into court as replacement security.

The key fact was that the project had been completed and Tempo issued a certificate of substantial completion.

COUNSEL COMMENTS

This fact had been pleaded, but a trust had not been specifically pleaded because, when the Statement of Claim was filed, the cash had been paid into Court. Man-Shield did not apply to replace it with a lien bond until over two years after it had been paid into court. It was in response to that application that the trust set out in Section 22 of the *BLA* was asserted.

At the hearing, the panel did comment that Man-Shield's technical arguments relating to Tempo not pleading a trust did not get it very far because of the ample notice it had to respond to the trust argument. However, this decision does suggest that counsel should be pleading the Section 22 trust whenever appropriate to stay ahead of Section 48 applications made in similar circumstances.

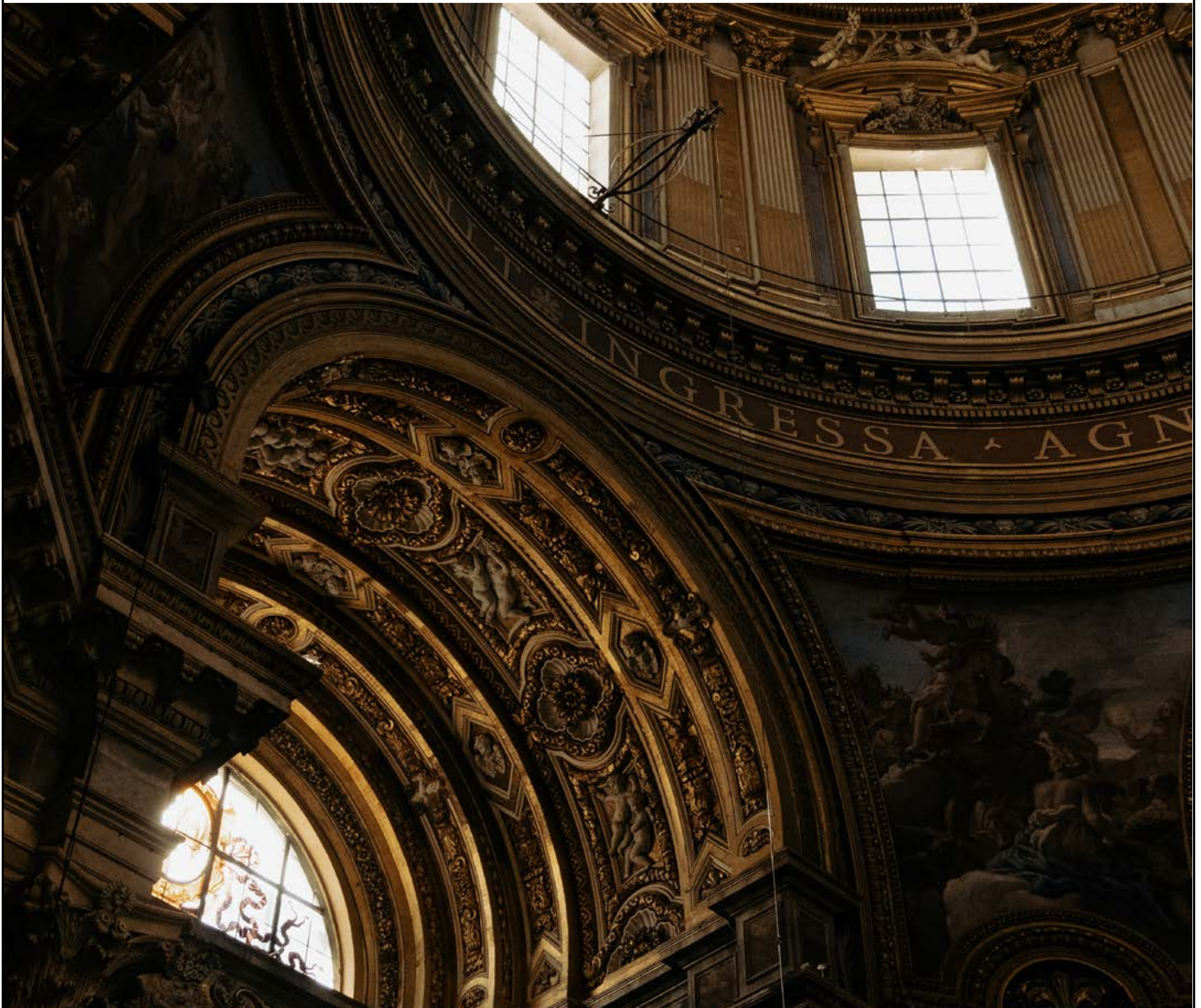
From Tempo's perspective, it is worth noting that, although the panel had concerns about the breadth and quantum of the statutory trust, they did not comment on Man-Shield's failure to take steps to demonstrate a valid reason for not paying Tempo. Rather than dealing with the merits of Tempo's claim, Man-Shield's position was that Section 48 allowed them to replace the cash with a lien bond, without any consideration of the merits, and that the lien bond was adequate security. Given that the Court of Appeal considered the merits, including the $678,407.88 judgment that Tempo already obtained in a successful summary judgment application, which judgment was not considered at the Justice level, Tempo was able to satisfy the panel as to some floor to the trust.

We think that the decision clarifies that Section 48 cannot be used to avoid the application of the trust in Section 22 of the *BLA*. Further, counsel should be taking steps to establish the extent of that trust as early as possible in order to avoid a contractor using cash outside of contractual chains prior to paying their subcontractors.

We were satisfied with the outcome, and in particular with the finding that, given that a Section 22 trust was established, Man-Shield's initial application should have been dismissed. However, we were surprised at the Court's comment that the appeal had an element of mootness. We believe this comment was based on the dismissal of Man-Shield's previous application to have our client's second lien declared invalid and the fact that Man-Shield had not appealed that decision. The panel's reasoning was surprising to us because of the validity of the second lien

claim could, presumably, still be challenged by Man-Shield at trial. This could result in significant prejudice to our client if the funds had not imposed with a trust and subsequently spent by Man-Shield.

More importantly, establishing that the trust operates even if a lien bond is posted avoids the prejudice that we submitted a subcontractor in Tempo's position suffers. It means that a contractor cannot simply use the cash intended to pay for the work of a subcontractor outside of the contractual chain while litigation is ongoing. This helps incentivize a resolution of claims, which is one of the main objectives of Alberta's builders' lien legislation."



COUNSEL COMMENTS

Tempo Alberta Electrical Contractors Co Ltd v. Man-Shield (Alta) Construction Inc., 2022 ABCA 409

Counsel Comments provided by
Kevin Burron, Counsel for the Respondent

Kevin Burron

"This case is notable in two respects. First, the court confirmed that a party who has paid security into court to remove a builders' lien under section 48 of the *Prompt Payment and Construction Lien Act*, R.S.A. 2000, c. P-26.4 (the "*Act*") may replace that security with another form of security as long as there is no demonstrable prejudice to the lienholder. Second, the court made clear that the central point of the Supreme Court of Canada's decision in *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43 applies to the construction trust created by section 22 of the *Act*: that if money paid by the owner is impressed with a trust, substituting a lien bond for that money does not discharge the trust.

The ability to replace one form of security with another was not the main source of controversy in this case. Tempo mainly objected to replacement of the existing cash security with a bond based on the cash being impressed with a statutory trust. It did so even though its claims were fully secured and there was no real issue of the suitability of the bond or the financial stability of the surety. This seems to have played a role in the decision, as the court noted that "this flavours the appeal with an element of mootness."

A significant issue at oral argument was the question of how much of any payment made by the owner was covered by the statutory trust, given the wording in section 22 of the *Act* to the effect that such a payment is held in trust "*to the extent that*" the contractor receiving the payment owes money to other persons who provided work or materials for the construction project. This qualifying language is in

COUNSEL COMMENTS

contrast to the Manitoba legislation in *Stuart Olson* which imposed a trust on *all* money received by a contractor from the owner. Unfortunately, the Court of Appeal did not answer this question. The court noted the difference in language, but decided the case "leaving aside the breadth and quantum of the statutory trust existing."

In the end, the court seems to say that whatever the quantum of the statutory trust might have been, it was at least the amount of the summary judgment Tempo had been awarded (which had been stayed pending appeal). Therefore, Man-Shield should not have been allowed to replace all of the cash with a bond. The fact that the balance of Tempo's claim was still disputed, that Tempo took no steps to apply to stay the original order allowing removal of the cash security, and Tempo's admission that it would not be prejudiced in respect of the validity of its lien, all seem to have led the court to conclude that only the summary judgment amount needed to be re-deposited.

Therefore in respect of the section 22 construction trust, the case may be confined to its particular facts beyond confirming the general application of Stuart Olson in Alberta. One could read the decision as suggesting that the court would have been inclined to apply the statutory trust to the entirety of the cash lien security were it not for these particular facts. On the other hand, it might be argued that doing so would fail to give meaning to the qualifying language in section 22. A more in-depth analysis and definitive statement by the Court of Appeal as to the breadth of the statutory trust may need to wait for another case with a factual matrix more amenable to the discussion."

Rocky View Water Co-Op Ltd. v. Cidex Developments Ltd., 2022 ABCA 422

Areas of Law: Municipal, Special Levy

~Section 18(2)(a) of the Rural Utilities Act, RSA 2000, c R-21 allows a rural utility to pass a special levy on its members. A special levy is a levy other than one which is imposed annually based on the number of utility service contracts held, or monthly based on water service available but not used. Where the utility does not comply with notice requirements under its Bylaws, however, a resolution passing a special levy may be invalid~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellant, Rocky View Water Co-Op Ltd., was a rural water utility co-operative. The appellant commenced an action against the respondent, Cidex Development Ltd., for the payment of a capital surcharge that the respondent had not paid for three years. The respondent was a real estate development corporation that purchased lands falling within the appellant's service area and was a member of the appellant. At the time of the appeal, the respondent was entitled to 200 connections to the appellant's water system but had yet to make those connections.

In March 2018, the appellant circulated an agenda for its upcoming annual general meeting. The appellant's Board of Directors planned to introduce a resolution to impose a capital surcharge on inactive members who had not yet set up water services. The agenda for the meeting did not include the proposal as an item to be discussed. The respondent did not attend the meeting. The Board modified the proposal to instead charge Class B shareholders, of which the respondent belonged, the capital surcharge and passed the resolution. The resolution required the respondent pay $48,000 annually. The Board passed the same resolution in 2019 and 2020. In the agendas for those years, the agenda referred to "Capital Surcharge Renewal". The respondent has never paid the capital surcharge.

The summary trial judge dismissed the respondent's action on the basis that the respondent was not authorized under s. 18(2)(a) of the *Rural Utilities Act*,

Rocky View Water Co-Op Ltd. v. Cidex Developments Ltd., *(cont.)*

RSA 2000, c R-21 the (the "*Act*") to pass the capital surcharge resolution. The summary trial judge determined that to impose a special levy, the rural utility must: (1) identify a specific purpose outside its ordinary financial needs and requirements; (2) quantify as best it can how much money it needs to achieve that purpose; and (3) design a levy that is rationally connected to the purpose for which it has been imposed both with respect to the amount of the levy and the members responsible for paying it. The judge found that the respondent's reason for the special levy did not satisfy the test. Further, the summary trial judge found that the notice provided to members of the appellant did not specifically advise that the Board would propose a special levy at the meeting and did not meet the notice requirements under the appellant's bylaws.

APPELLATE DECISION

The Court of Appeal found that the trial judge erred by establishing a test to determine whether a levy constituted a special levy, but dismissed the appeal on the basis that the appellant did not provide adequate or meaningful notice of the proposed resolution in 2018. The Court commented that the appropriate analysis of s. 18(2)(a) of the *Act* ought to be done in accordance with the well-established principles of statutory interpretation. The Court found that s. 18(2)(a) was unambiguous: a special levy is a levy other than one which is imposed annually based on the number of utility service contracts held, or monthly based on water service available but not used. A special levy is every other type of levy imposed on members for a purpose identified in the special levy resolution. The Court found that a special levy need not be outside the appellant's ordinary financial needs and requirements or quantify how much money is required to achieve its purpose. The Court further found that while a "purpose" must be specified in the resolution, the special levy need not be detailed, financially justified, mathematically calculated, or explained. The Court found that the special levy resolution in this case was appropriate and proper under s. 18(2)(a) of the *Act*.

Rocky View Water Co-Op Ltd. v. Cidex Developments Ltd., *(cont.)*

The Court found, however, that the appellant's bylaws required that notice be given of each annual general meeting at least 10 days prior by mailing or delivering to each member a notice stating the date, time, and place of the meeting or by advertising its date, time, and place in a newspaper circulating throughout the appellant's locality. The Court found that while the respondent received notice of the 2018, 2019, and 2020 annual general meetings, the 2018 notice made no reference to the proposed special levy resolution. As adequate notice was not provided to all members in 2018, the resolution was invalid. The Court further found that the 2018 notice error was not cured by the notices in 2019 and 2020.

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2022 ABCA 397

Areas of Law: Public Law, Freedom of Information, *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, Confidential Information

~The RCMP are a Government of Alberta agent per the Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25~*

BACKGROUND

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In August 2016, an Edmonton Police Service (EPS) officer (the officer) interacted with various individuals at his home, an incident transpired (the incident), and the RCMP were called and attended the officer's property at that time. The RCMP opened a file regarding the incident. The officer retired and in 2017, he discussed his personal safety concerns with EPS about the individuals involved in the incident. EPS assessed the officer's concerns and as part of this assessment, requested information from the RCMP. The RCMP provided their file from the incident, but marked it as confidential. The officer made an access request to EPS under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (FOIPP), for records from the RCMP's file for the purposes of laying a private investigation. EPS responded to the request but withheld three pages of records (i.e. the RCMP's report) in their entirety per s. 21(1)(b) of FOIPP. "Section 21(1)(b) exempts the head of a public body from disclosing information if the disclosure could reveal information supplied in confidence by a "government, local government body or organization listed in clause (a) or its agencies"." The officer submitted a request for review of EPS' decision to refuse access to the report to the Office of the Information and Privacy Commissioner (OIPC).

OIPC referred the matter to adjudication in 2018, but in 2019, EPS learned the RCMP provided the officer with a copy of the report. Upon discovering this, EPS reviewed the report and applied s. 17 of FOIPP to redact information that would intrude on the privacy of third parties. EPS provided a redacted report to the officer. The matter proceeded before an adjudicator

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), *(cont.)*

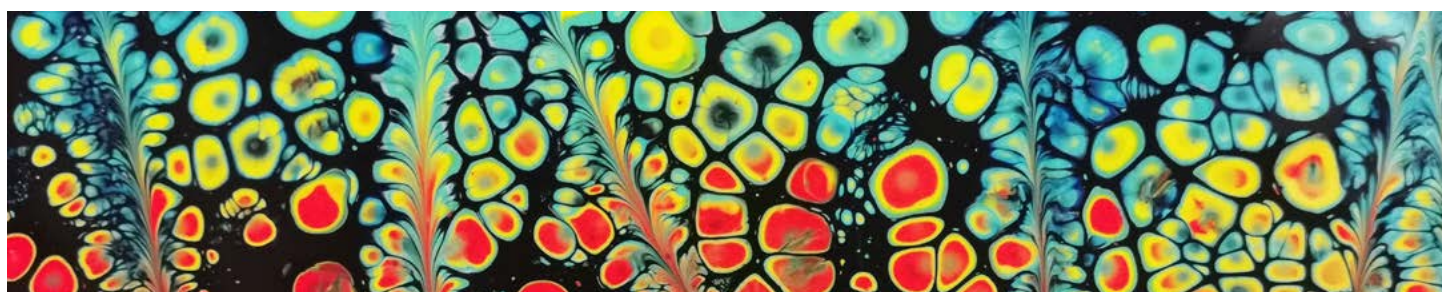
with OIPC, who found the RCMP were acting as a provincial police service under the *Police Act*, RSA 2000, c P-17, and the RCMP was therefore an agent of the provincial government such that the RCMP's disclosure of the report to EPS, a "public body", was "intragovernmental" instead of "intergovernmental" in nature and therefore not subject to s. 21(1)(b) of FOIPP. As a result, the adjudicator held that s. 21(1)(b) of FOIPP did not apply to the report. The adjudicator ordered EPS to disclose some of the information withheld under s. 17(1). EPS sought judicial review of the adjudicator's findings under s. 21(1)(b) of FOIPP only. The chambers judge dismissed the application, finding the adjudicator's decision to be reasonable. EPS appealed the s. 21(1)(b) FOIPP finding. EPS sought a declaration that the RCMP, acting as a provincial police service, is not sn agency of the provincial government for the purposes of s. 21(1)(b) of FOIPP but was instead a "local government" body caught by that very section and sought to remit the matter back to the adjudicator for consideration of outstanding criteria of s. 21(1)(b) the adjudicator did not address.

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), *(cont.)*

APPELLATE DECISION

The Court of Appeal granted the appeal. It found the adjudicator ignored the "express and unambiguous wording" of FOIPP, which "defines "local government body" as including the RCMP in this instance." The Court noted the adjudicator considered only one of the total four criteria required for consideration in determination of whether a document should be exempted from disclosure, and remitted determination of these three criteria back to OIPC.

The Court considered whether it was unreasonable to interpret s. 21(1)(b) to mean that a public body can only refuse to disclose information supplied by a non-Government of Alberta entity. It found that given the "clear and unambiguous statutory language, punctuated by the disjunctive "or" between 21(1)(a) and 21(1)(b)," it was not reasonable to conflate the two subsections to interpret s. 21(1)(b) to mean that a public body could only refuse to disclose information supplied by a non-Government of Alberta body. Further, it was "equally unreasonable" to ignore other statutory language by failing to consider how "local government body" defined or characterized the RCMP as an agent of the Government of Alberta. The Court reviewed definitions within FOIPP and the *Police Act*, and noted s. 13 of the *Interpretation Act*, RSA 2000, c I-8: "[d] efinitions . . . in an enactment . . . (a) are applicable to the whole enactment . . . except to the extent that a contrary intention appears in the enactment." It determined there were no contrary intentions in FOIPP preventing a finding that the RCMP was a local government body.



COUNSEL COMMENTS

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2022 ABCA 397

Counsel Comments provided by Katrina Haymond, K.C. and Jason Kully, Counsel for the Appellant

Katrina Haymond, K.C.

Jason Kully

"The adjudicator's interpretation of s. 21(1)(b) was so narrow, it significantly constrained the circumstances in which a public body could rely on s. 21(1)(b) to refuse access to records, even if the information in the records had been provided explicitly or implicitly in confidence. The Court of Appeal's decision is important for police services (including the RCMP), since it enables police services to continue to withhold records received in confidence (from other police services and a variety of other public bodies) where appropriate. While the decision is important for police services, it applies more broadly to any public body subject to the FOIPP Act. The Court's decision affirms that a public body can, in appropriate circumstances, exercise its discretion to refuse to disclose records provided to it in confidence by all of the entities referred to in s. 21(1)(b) (and their agencies) including government, local government bodies, and aboriginal organizations.

Importantly, the Court of Appeal rejected the Information and Privacy Commissioner's submission that the Adjudicator's narrow interpretation of s. 21(1)(b) was reasonable, because it was consistent with the purpose of the FOIPP Act, which is to provide a right of access subject to specific limited exceptions. The

COUNSEL COMMENTS

decision serves as a reminder that the FOIPP Act is about freedom of information and the protection of privacy. Interpreting the FOIPP Act in a manner that promotes increased access will not be considered reasonable where the express wording provides a public body with discretion to withhold records, and the public body exercises its discretion reasonably.

While the Court's decision is specific to the interpretation of the FOIPP Act, it is of value to all administrative decision-makers (and lawyers who appear before them), since it serves as a reminder that the ordinary rules of statutory interpretation apply to the interpretation of administrative statutes. While the courts, applying the reasonableness standard of review, will be reluctant to interfere with a tribunal's interpretation of its own statute, where a tribunal misapplies the basic rules of statutory interpretation, the decision will not withstand judicial scrutiny. Here, even though the words of the statute were not ambiguous, the adjudicator unreasonably utilized the heading preceding s. 21 in a way that transformed the plain and ordinary meaning of s. 21(1)(b). The Adjudicator's reliance on the heading as an interpretive aid in this instance was unreasonable."

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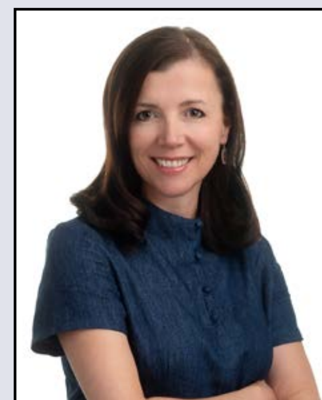

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