

Court of King's Bench of Alberta

Citation: 1951789 Alberta Ltd. v. Britannia Block General Partnership Inc., 2025 ABKB 324

Date: 20250528
Docket: 2001 08204
Registry: Calgary

Between:

1951789 Alberta Ltd. operating as Urban Interiors Group

Plaintiff

- and -

Britannia Block General Partnership Inc.

Defendant

**Memorandum of Decision
of the
Honourable Applications Judge J.R. Farrington**

- [1] I heard this matter as a special chambers application on April 24, 2025.
- [2] The Defendant makes an application to release or reduce security that it posted for the plaintiff's lien that stands in the place of the subject land against which the plaintiff registered a lien and certificate of lis pendens.
- [3] There are two bases on which a release or reduction of the security might be available.
- [4] The first is on the basis of the facts of the dispute, and whether the facts as now known justify a reduction in the amount that is necessary as security for any lienable claims. Applications Judge Mason granted an order on July 27, 2021 removing the lien and certificate of

lis pendens in exchange for the posting of \$1,595,842.50 and a bond was posted. The parties seem to agree that the order was granted by consent so there would not have been an adjudication at that time with respect to contested facts.

[5] The second basis on which the security could conceivably be removed or reduced is on the basis of s. 46 of the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4, or, as was argued, “by analogy” thereto.

[6] With respect to the first ground, the plaintiff’s brief cites a total claim of \$1,198,422.96 but that is stated to be in error. Counsel for the lien claimant subsequently clarified that there is a total lien claim of \$1,408,607.84 in correspondence dated May 8, 2025.

[7] The most contentious part of the plaintiff’s claim is a significant delay claim of \$801,567.27 supported by expert evidence. Over the years of builders’ lien jurisprudence in Alberta and elsewhere, some delay claims are allowed as liens and some are not. The answer tends to depend upon the nexus to the improvement on the land. If the delay charge relates to work associated with creating the improvement on the land, they are sometimes allowed as lien claims. If they are not, and they are more in the nature of general office overhead, they are often not allowed. The issue is fact specific.

[8] This is not the place or forum for adjudication of the lien claim, and particularly the delay claim as being valid or not. Such a determination would be tantamount to summary judgment, and in my view it would be inappropriate to indirectly grant summary judgment or summary dismissal in this type of forum to either party. If the issue is to be determined summarily on the facts, it would need to be done in accordance with summary judgment principles. Indeed, there are unheard summary judgment applications outstanding. I view the test on this application to be in the nature of whether there is an arguable claim.

[9] The delay claim as a lien is certainly not specious. It is supported by expert evidence, and it may be of a type that would ultimately be found to be claimable. That would suffice for any factual inquiry regarding security reduction. Once security is posted as here, the lien is no longer registered against the lands so any reduction would need to be done with caution. In my view, the claims as advanced by the plaintiff are arguable, and I am not inclined to reduce or vacate the security solely on the basis of the facts and merits of the dispute.

[10] That brings the matter to the second issue, and that is whether the security should be reduced on account of delays in the enforcement process, and alleged unfairness and expense to the defendant with respect to the continued posting of the security.

[11] Section 46 of the *Prompt Payment and Construction Lien Act* was not specifically relied upon in the application, but it was said to be argued by “analogy”. Section 46 provides:

46(1) A lien that has continued to exist by reason of registration of the certificate of lis pendens relating to that lien continues to exist until

- (a) the proceedings are concluded, or
- (b) the certificate of lis pendens is discharged,

whichever occurs later.

(2) Notwithstanding subsection (1), if no trial has been held within 2 years from the date of the registration of the certificate of lis pendens, any interested party may apply to the

court to have the certificate of lis pendens vacated and the lien to which it relates discharged.

[12] The wording specifically contemplates that a lien for which a certificate of lis pendens has been registered continues to exist for the later of the conclusion of the proceedings, or the removal of the certificate of lis pendens, whichever is later. Notably, it specifically contemplates that enforcement proceedings may endure after the removal of the certificate of lis pendens.

[13] In addition, section 48(2) of the *Prompt Payment and Construction Lien Act* provides:

(2) Money paid into court or any security given under subsection (1)

- (a) stands in place of the land,
- (b) is subject to the claims of the person whose lien has been removed, and
- (c) shall not affect the amount required to be retained under [section 18\(1\), \(1.1\) or \(1.2\)](#) or [23\(1\), \(1.1\) or \(1.2\)](#).

[14] The wording of the *Builders' Lien Act* at the time of the events in this case was identical to the present wording of the *Prompt Payment and Construction Lien Act* with the exception of the addition of the reference to section 23(1.2) in section 48(2)(c). No argument was made that there is any difference between considering this case under the current version of the *Prompt Payment and Construction Lien Act* or its legislative predecessor, the *Builders' Lien Act*, although based upon the timing of the contract and work here it is likely the latter that applies.

[15] I find that the application for release of the security does engage section 46 of the *Prompt Payment and Construction Act* by virtue of the combined effects of section 46 and 48 of the *Act*.

[16] A builders' lien is a powerful remedy. It provides a form of security for what would otherwise be an unsecured claim. The security does not come without a cost to the owner. A party that posts security cannot be expected to do so indefinitely. If a lien remains on title, alienation and other financial use of the land is restricted. If a lien is removed and security is posted, the loss of use of the posted funds or the payment of premiums for the posting of a bond (as here), endure for the duration of the posting. All of that comes at a cost (sometimes substantial) to an entity defending an unproven claim. For example, the cost of the bond thus far seems to be in the \$100,000 range. There is a tradeoff. The *Act* gives security where there would otherwise be none in recognizing the contribution of lien claimants to permanent improvements. But it imposes an obligation to pursue lien claims more promptly than many other types of claims.

[17] The lien here was registered on February 4, 2020. The Statement of Claim and certificate of lis pendens were filed June 30, 2020, and the certificate of lis pendens was presumably registered shortly thereafter. Applications Judge Mason's order permitting the posting of the security was granted and filed July 27, 2021. The procedure card reflects the provision of an affidavit proving lien, what appears to be a dispute about the answering of questions, and filed, but unheard summary judgment applications. Some of the hearing of this matter was no doubt delayed by booking times for special chambers dates for this application to vacate the security, but that delay was not excessive. This application was filed July 8, 2024, which is approximately 4 years post certificate of lis pendens, and it was heard in April of 2025.

[18] The matter is significantly past the two-year mark, and it appears nowhere near trial. The plaintiff's brief refers to this application as a s. 53 pre-trial application at paragraph 72, but it is not one of those on its face, as that application is made by a plaintiff to move its lien claim forward. The application here is by the defendant.

[19] Master Robertson held in *1361556 Alberta Ltd v Ristorante Cosa Nostra Inc*, 2021 ABQB 157 that the two-year period is a guideline and I agree. It is not mandatory in the same manner as Rule 4.33 requires progress in an action or else there will be a mandatory dismissal. Nevertheless, the legislation does give a target, and possible consequences with respect to the failure to meet the target, albeit on a discretionary basis. Recall that the *Act* expressly encourages the prompt resolution of lien claims (sections 46 and 49(6) and the *Act* generally).

[20] As noted, there are significant costs associated with posting the security given the amount of the lien. They appear to be approximately \$30,000 per year. The alternative of posting cash is not necessarily a desirable one either, because the cash amount is significant and it cannot be used for other things once posted.

[21] In *1361556 Alberta Ltd v Ristorante Cosa Nostra Inc*, Master Robertson held at paragraphs 33 to 37:

[33] [Section 46](#) of the [Builders' Lien Act](#) provides as follows:

46(1) A lien that has continued to exist by reason of registration of the certificate of lis pendens relating to that lien continues to exist until

- (a) the proceedings are concluded, or
- (b) the certificate of lis pendens is discharged,

whichever occurs later.

(2) Notwithstanding subsection (1), if no trial has been held within 2 years from the date of the registration of the certificate of lis pendens, any interested party may apply to the court to have the certificate of lis pendens vacated and the lien to which it relates discharged.

[34] It has now been about five years since the CLP's were registered at the land titles office, and accordingly the defendants are in a position to bring the application under section 46(2) to have the builders' lien aspect of the claims dismissed.

[35] Subsection 46(2) is not mandatory. That is, the provision merely states that the application may be brought after two years. It says nothing about what the Court should or should not do.

[36] For direction on section 46 we must look to case law. The case law is clear: the onus on such an application is on the lien claimant to explain why there has been a delay. The case law generally does not require too much in the way of explanation, but there must be some explanation.

[37] The important cases on the topic include these:

- (a) *A.R. Baziuk Architect Ltd v Isaak Properties Ltd*, [1984 CanLII 1152](#): no explanation for the delay at all was given;

(b) *West Fab Homes Ltd v Duncan*, [1996 ABCA 382](#): The Court of Appeal accepted a non-litigation delay as a proper explanation: the plaintiff had held off while it waited for advice from the defendants' bankruptcy trustee as to whether it was going to get paid from that source; and

(c) *Heron Building Co v Sunset Diesel Service Ltd*, [2006 ABQB 137](#): Master Breitkreuz accepted the explanation that the delay resulted from the *plaintiff's* insolvency; he then imposed terms on the parties to move the case along.

[22] In the circumstances here, the parties are well past the two-year goal and the matter does not seem particularly close to resolution or trial. It would appear to me to be an appropriate case in which to apply section 46 of the *Act* to release the security for the lien. Accordingly, I release the security. I direct that the proceedings shall proceed as unsecured claims.

[23] Even if section 46 did not apply, the substitution of security for land is discretionary and subject to oversight by the Court. Given the state of the action, its progress thus far, the nature of the claim which includes a delay claim to a lien which may or may not be allowed as to quantum and security, it is reasonable to release the security. The defendant maintained the security as accessible to the claim of the plaintiff for a reasonable period of time.

[24] If the parties cannot agree on costs they may address them at the end of one of my chambers lists when I am sitting in morning chambers. They can make arrangements to do so through the Applications Judges Assistant if needed.

[25] Thank you very much to counsel for their always helpful and on point submissions and materials.

Heard on the 24th day of April, 2025

Dated at the City of Calgary, Alberta this 28th day of May, 2025

J.R. Farrington
A.J.C.K.B.A.

Appearances:

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JSS Barristers
Andrew Wilson, KC
Mike Albert
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