

NOVA SCOTIA COURT OF APPEAL

Citation: *Queen’s Marque Developments Ltd. v. Guildfords Inc.*, 2025 NSCA 7

Date: 20250205

Docket: CA 535242

Registry: Halifax

Between:

Queen’s Marque Developments Limited, Queen’s Marque Limited, Queen’s Marque North Limited, and Queen’s Marque South Limited

Appellants

v.

Guildfords Inc. and Gamma Windows and Walls International Inc.

Respondents

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	December 6, 2024, in Halifax, Nova Scotia
Facts:	Queen’s Marque Developments Limited, a developer of a mixed-use project in Halifax, entered into a contract with Gamma Windows and Walls International Inc. for the supply and installation of a glazed aluminum curtain wall. Gamma subcontracted part of the work to Guildfords Inc. Disputes arose, leading Gamma to terminate the contract, which also ended Guildfords’ subcontract. Guildfords registered a builders’ lien for \$848,582.65 against the project (paras 1-4).
Procedural History:	2024 NSSC 158: The Nova Scotia Supreme Court granted summary judgment in favor of Guildfords Inc. against Queen’s Marque for \$815,206.04 (para 9).
Parties Submissions:	Appellants (Queen’s Marque Developments Limited and others): Argued that there was a genuine issue of material

fact regarding the amount due to Guildfords and that the statutory declarations by Gamma indicated all subcontractors had been paid. They also contended that the holdback was not payable without certification of substantial performance (paras [5](#), [31](#)).

Respondents (Guildfords Inc. and Gamma Windows and Walls International Inc.): Guildfords argued that the test for summary judgment was met and there was no issue of material fact. They claimed an agreement with Gamma fixed the amount outstanding under the subcontract (paras [28-30](#)).

- Legal Issues:** Whether there was a genuine issue of material fact regarding the amount justly due to Guildfords under the subcontract.
- Disposition:** The appeal was allowed, and the order for summary judgment was set aside (para [43](#)).
- Reasons:** Per Wood, C.J.N.S. (Farrar and Bryson J.J.A. concurring): The hearing judge erred in concluding there was no genuine issue of material fact regarding the amount due to Guildfords. The conflicting evidence between Gamma's statutory declarations and the affidavit of Mr. Scarfo indicated a factual dispute that required a trial. The agreement between Guildfords and Gamma did not bind Queen's Marque for purposes of quantifying the builders' lien claim against the holdback. The court found that the hearing judge should have considered the conflicting evidence and concluded that a trial was necessary to resolve the factual dispute (paras [38-42](#)).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 44 paragraphs.

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Judges: Wood, C.J.N.S., Farrar and Bryson, JJ.A.

Appeal Heard: December 6, 2024, in Halifax, Nova Scotia

Held: Appeal allowed with costs of \$5000 payable in the cause, per reasons for judgment of Wood, C.J.N.S.; Farrar and Bryson, JJ.A. concurring

Counsel: William L. Ryan, K.C., for the appellants
James P. Boudreau and Laura M. Graham, for the respondent
Guildfords Inc.
Nathan Sutherland, for the respondent Gamma Windows and
Walls International Inc.

Reasons for judgment:

[1] Queen’s Marque Development Limited (“Queen’s Marque”) is the developer of a mixed use project located adjacent to Halifax harbour (“the Project”).

[2] On September 28, 2018, Queen’s Marque entered into a contract with Gamma Windows and Walls International Inc. (“Gamma”) for the supply and installation of a glazed aluminum curtain wall and panels for the Project (“the Prime Contract”). On October 30, 2019, Gamma entered into an installation subcontract with Guildfords Inc. (“Guildfords”) for a portion of the work under the Prime Contract (“the Subcontract”).

[3] During the course of the Project, disputes arose between Queen’s Marque and Gamma with the result that in February 2022 Gamma terminated the Prime Contract. This had the effect of terminating the Subcontract as well. Guildfords’ work under the Subcontract was incomplete. On April 13, 2022, Guildfords registered a builders’ lien under the *Builders’ Lien Act*, R.S.N.S. 1989, c. 277 (“the Act”) against the Project. The amount claimed was \$848,582.65.

[4] On May 26, 2022, Guildfords filed a Statement of Claim naming Gamma, Queen’s Marque and three associated companies involved in the Project as defendants. The relief sought included:

- a. A declaration that it held a valid builders’ lien in the amount of \$848,582.65;
- b. An order for payment of the claimed amount by Gamma and Queen’s Marque;
- c. Sale of the Project lands; and
- d. Judgment against Gamma for any deficiency.

[5] Queen’s Marque filed a defence on June 27, 2022 disputing the builders’ lien claim and cross-claiming against Gamma for any amounts it was required to pay Guildfords. The defence alleged:

- a. Deficiencies in the work of Gamma and Guildfords;
- b. Failure by Gamma to achieve substantial performance of the Prime Contract;

- c. Gamma had been paid in full for any amounts owing under the Prime Contract; and
- d. Payments were made under the Prime Contract relying on statutory declarations provided by Gamma stating that all subcontractors had been paid in full with the exception of the required holdback.

[6] On February 15, 2023, Gamma filed a defence disputing Guildfords' claim on the basis there was no outstanding amount due and payable under the Subcontract. In the alternative, Gamma alleged deficiencies in Guildfords' work.

[7] On September 14, 2023, Guildfords filed a Notice of Motion seeking summary judgment pursuant to *Civil Procedure Rule* 13.04 against Queen's Marque with respect to the holdback retained under the Prime Contract. According to the Notice, the evidence relied upon in support of the motion was the affidavit of William Brown, the President of Guildfords, the affidavit of Robert Scarfo, the Vice-President of Gamma, and the response to interrogatories by Doug McIsaac, Chief Financial Officer of Queen's Marque.

[8] The responding evidence filed by Queen's Marque consisted of an affidavit of Mr. McIsaac and Guildford's response to interrogatories.

[9] The Summary Judgment Motion was heard by Justice Diane Rowe of the Nova Scotia Supreme Court on December 7, 2023. By written decision dated May 27, 2024 (2024 NSSC 158), she allowed the motion and entered judgment against Queen's Marque in the amount of \$815,206.04.

[10] Queen's Marque alleges a number of legal errors on the part of the hearing judge. I have concluded, for the reasons below, that Justice Rowe erred in concluding there was no genuine issue of material fact in issue in relation to Guildfords' builders' lien claim and, on this basis, I would allow the appeal.

Availability of Summary Judgment in Builders' Lien Proceeding

[11] Builders' liens are created by statute. The elements of the claim and the procedure for enforcement are found in the *Act*. That legislation defines the circumstances in which a subcontractor, such as Guildfords, is entitled to claim directly against an owner, such as Queen's Marque, with whom they have no contractual relationship.

[12] The motion before Justice Rowe, as well as the appeal, were argued on the assumption the procedure for summary judgment set out in *Civil Procedure Rule 13* was applicable to a builders' lien proceeding. Counsel were not aware of the decision in *Crane Canada Inc. v. Tribeca Mechanical Ltd.*, 2007 NSSC 160 where Justice Suzanne Hood considered this issue.

[13] In *Crane*, the court was asked to set aside an order for summary judgment of a builders' lien. After interpreting the relevant provisions of the *Mechanics' Lien Act* (the predecessor to the *Act*), the court said:

[9] Section 36 provides for a notice of trial to be served on all defendants. No notice of trial has been served nor has the plaintiff Crane applied to fix a date for the trial of the lien action. The specific provisions are different from the provisions in the *Civil Procedure Rules* which allow for default judgment. In my view, however, they are not inconsistent with an application for summary judgment as long as the summary judgment application deals only with the money claim made in the statement of claim. There is no power for a judge on the summary judgment application to make determinations about the validity or amount of a lien. A separate trial is needed.

[14] The distinction made in *Crane* was that summary judgment could be used to establish liability between contracting parties but not the amount or validity of any builders' lien. That would require a trial.

[15] The panel directed counsel to the *Crane* decision and asked them to make submissions on the issue at the appeal hearing. Counsel for the respondent provided a copy of the decision in *Boehner Trucking and Excavating Ltd. v. United Gulf Developments Ltd.*, 2004 NSSC 34 (as well as a supplemental decision at 2004 NSSC 180), which they say establishes the availability of summary judgment in builders' lien proceedings.

[16] Subsequent to the appeal hearing the decision in *Uni Property Developers Ltd. v. 12740311 Canada Inc.*, 2025 NSSC 24 was released. In that case Justice Scott Norton considered the conflicting jurisprudence on the issue. He concluded the Supreme Court of Nova Scotia should, in appropriate cases, "permit and promote" summary judgment in builders' lien proceedings.

[17] The issue of the availability of summary judgment for the enforcement of a builders' lien was not argued before the hearing judge nor in the facts on appeal. Since I have concluded the hearing judge erred in her application of the test for summary judgment, it is unnecessary for us to consider this issue.

Elements of a Builders' Lien Claim by a Subcontractor

[18] Section 6 of the *Act* creates the builders' lien. It describes the work performed and material furnished which will give rise to a lien and how the amount is to be determined. Section 8 sets out the property interest which may be attached. According to s. 6(1), the lien is limited to the "sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner".

[19] Section 13 requires a person primarily liable on a contract under which a lien may arise to maintain a holdback of 10% of the value of the work, service and materials for a period of 60 days after the contract is substantially performed. By virtue of s. 13(4), the liens of subcontractors are a charge on the holdback arising under the contract between the owner and contractor. This section establishes the right of Guildfords to claim against the holdback maintained by Queen's Marque with respect to the Prime Contract.

[20] Section 13A of the *Act* sets out the process whereby a subcontract may be certified complete:

13A (1) A subcontract may, upon the request of the contractor or a subcontractor, be certified complete by the architect, engineer or other person upon whose certificate payments are to be made.

(2) Where there is no architect, engineer or other person upon whose certificate payments are to be made and the owner and the contractor determine that a subcontract is complete, the subcontract may be certified complete by the owner and the contractor acting jointly.

(3) Where there is a failure or refusal to certify, within a reasonable time, that a subcontract is complete, any person may apply to a court having jurisdiction to try an action to realize a lien, and the court, upon being satisfied that the subcontract is complete and upon such terms as to costs or otherwise as it considers fit, may issue an order certifying the subcontract to be complete.

(4) Where a subcontract is certified complete, the subcontract is deemed to have been completed on the date of certification.

[21] The effect of a subcontract being certified complete is described in s. 13B. In particular, subsection 1 says:

13B (1) Where a subcontract has been certified complete under Section 13A, the owner may, without jeopardy in respect of any other lien, make

payment reducing the holdback required by Section 13 to the extent of the amount of holdback the payer has retained in respect of the completed subcontract if all liens that may be claimed against the holdback have expired or have been satisfied or discharged in accordance with this Act.

[22] The remaining subsections of s. 13B set out the requirement that the holdback amount paid be passed on through the contractual chain to any subcontractors.

[23] An owner may release a portion of the holdback to the contractor in relation to work done by a subcontractor provided the subcontract is certified to be complete. In accordance with s. 13A, this can only be done by:

- a. The architect, engineer or other person responsible for certifying payment;
- b. An agreement between the owner and contractor; or
- c. The court.

[24] Despite being the contracting parties, the contractor and subcontractor alone have no authority to certify the subcontract to be complete for purposes of payment of the holdback by the owner.

[25] To prove it has a builders' lien which attaches to the holdback maintained by Queen's Marque, Guildfords must provide evidence of the work performed and materials furnished to the Project as well as the "sum justly due" under the Subcontract.

Summary Judgment Hearing and Decision

[26] The evidence on the motion was not voluminous nor disputed, except with respect to the amount justly due to Guildfords under the Subcontract.

[27] The holdback maintained by Queen's Marque with respect to the Prime Contract was acknowledged in their defence and Answers to Interrogatories. It was approximately \$2.2 million.

[28] The affidavits of Mr. Scarfo of Gamma and Mr. Brown of Guildfords attached copies of the Subcontract as well as a reconciled statement of account as between Guildfords and Gamma. They both said an agreement was reached in April 2023 fixing the amount outstanding under the Subcontract at \$815,206.04.

This sum consisted of \$457,669.20 for work and materials, holdback of \$310,901.60 and HST of \$46,635.24.

[29] The affidavit of Mr. McIsaac on behalf of Queen's Marque attached the Prime Contract as well as the payment claims submitted by Gamma. Clause GC 5.2.6 of the Prime Contract required Gamma to include a statutory declaration with each payment application confirming that any indebtedness for which Queen's Marque might be in any way responsible had been paid in full except for holdback and identified amounts in dispute. The payment applications by Gamma attached as exhibits to the McIsaac affidavit included the required statutory declaration signed by various corporate officers, including Mr. Scarfo.

[30] Guildfords argued the test for summary judgment was met, there was no issue of material fact in dispute and Queen's Marque had not identified any delays or deficiencies in Guildfords' work. They submitted it was an appropriate case for summary judgment to be granted.

[31] Queen's Marque said there was a dispute of material fact with respect to what amount, if any, Guildfords was justly due under the Subcontract. They relied on Gamma's defence asserting there was no amount due and owing to Guildfords as well as the statutory declarations of Gamma confirming all payments to subcontractors had been made, subject to the retention of the statutory holdback. They also argued the holdback was not due and payable until the Prime Contract and the Subcontract had been certified as substantially performed under the applicable provisions of those agreements. There was no evidence this had occurred.

[32] Although not mentioned in its pre-hearing brief, Queen's Marque raised a new issue at the hearing. They said Guildfords had delayed disclosure of the agreement with Gamma concerning the amount owed under the Subcontract and this amounted to an abuse of the process. They relied on the principles set out in *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234 and *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47.

[33] In her decision, the hearing judge outlined the test for summary judgment found in *Arguson Projects Inc. v. Gil-Son Construction Ltd.*, 2023 NSCA 72. Her analysis followed the steps set out in that decision. She started by concluding there was no genuine issue of material fact in relation to the lien claim. In response to Queen's Marque's argument that the amount justly due was uncertain, and required determination by a trial, she said:

[25] Queen’s Marque interprets the disparity in the evidence as indicating that there is a genuine issue of material fact to be determined, as there is a dispute concerning the actual outstanding amounts owed to Guildfords by Gamma under the Subcontract. It submits that this disparity is indicative of a genuine fact in issue, as Gamma had issued statutory declarations to Queen’s Marque that all outstanding payments to subcontractors had been made, with total amounts appended, as referenced in the affidavit of Douglas McIsaac (McIsaac Affidavit, Tab “B” at p. 262).

[26] On my review of the evidence presented on the motion, there is no genuine issue of material fact. Guildfords has satisfied its burden on this Step, as there is no evidence of a disputed issue of material fact concerning the creation and perfection of its statutory lien. All of the foregoing material facts are uncontroverted. There were no contradictory material facts in evidence offered by Queen’s Marque but for the intimation that there was a disparity in the evidence that was unaddressed, rather than a dispute of material fact. The amount agreed upon as outstanding is less than the amount in the Notice of Action.

[34] With respect to the conflict between the evidence filed by the parties, the hearing judge observed:

[31] There is no evidence put forward by Queen’s Marque to contradict the evidence of Mr. Scarfo’s evidence that Queen’s Marque did not agree to or request changes to the work undertaken by Guildfords under the Subcontract or the subsequent amount owed. Neither witness was cross examined on their evidence. The Court can’t engage at this Step in inferring what the evidence might be concerning the potential import of Mr. McIsaac’s evidence of Gamma’s statutory declarations that were provided in the context of the Prime Contract.

[35] In response to the argument by Queen’s Marque that there could be no claim against the holdback in the absence of certification of substantial performance, the hearing judge said:

[46] Queen’s Marque argues that as the Prime Contract and the Subcontract set out a scheme in which the holdback amount is due and payable after the issuance of a certificate, and as no certificate was completed in the circumstances by Queen’s Marque, then the holdback is not payable.

[47] Guildfords replies this is not a reasonable interpretation of the statute advanced by Queen’s Marque, and relies on the statute provisions and case law cited above.

[48] The Court finds that the lack of mandatory holdback release provisions negating the requirement for an owner to pay out a lien is not a reasonable interpretation of the *Act*, and if accepted, would overturn the purpose of the *Builders’ Lien Act*. The legislation’s intent is to mandate owners and

contractors to retain a holdback to ensure that those who labour at their request receive some compensation for their work and materials. This is not an issue of law requiring determination by the Court in this matter.

[36] The hearing judge also rejected the argument that the delayed disclosure of the agreement between Gamma and Guildfords amounted to an abuse of process. She granted summary judgment in favour of Guildfords in the amount of \$815,206.04 plus interests and costs.

Analysis

[37] In its Notice of Appeal, Queen's Marque raises eight grounds:

1. The Motion Judge erred in finding that there were no genuine issues of material fact with respect to Guildfords Inc.'s Motion for Summary Judgment, including by specifically failing to ascertain the import of Gamma Windows and Walls International Inc.'s statutory declarations that all outstanding payments to subcontractors had been made;
2. The Motion Judge erred in failing to recognize and address, in the course of considering Guildfords Inc.'s Motion for Summary Judgment, the factual and legal dispute as to whether the Respondents had committed contractual breaches germane to the holdback funds owing under the *Builders' Lien Act*, RSNS 1989, c277;
3. The Motion Judge erred in failing to recognize and properly address a question of law concerning whether an undisclosed settlement agreement between Gamma Windows and Walls International Inc. and Guildfords Inc. relating to amounts owing under the subcontract affects the holdback amount to be retained by Queen's Marque Developments Limited;
4. The Motion Judge erred in determining there was not a real chance of success by Queen's Marque Developments Limited on the issues pleaded and on the affidavit of evidence tendered by Queen's Marque Developments Limited;
5. The Motion Judge erred in not giving weight to the fact that there had not been full disclosure, discovery examination and collection of other evidence in determining the motion;
6. The Motion Judge erred in determining that the intent of the *Nova Scotia's Builder's Lien Act*, *supra*, mandated a payment of a holdback and thus misinterpreted Sections 13(2) and 13(3) of the *Builder's Lien Act*, *supra*.
7. The Motion Judge erred in dealing with Sections 44A and 44B of the *Builder's Lien Act* and how the trust provisions affected the matters at issue; and,

8. The Motion Judge erred in determining that the overarching legislative purpose of the *Builder's Lien Act, supra*, is solely to ensure subcontractors will have an assurance there will be some money to recover for work and materials supplied, and in not giving equal consideration to the intention to provide protection for owners and their potential liability when dealing with construction contracts.

[38] I am satisfied the hearing judge erred in concluding there was no genuine issue of material fact in dispute in relation to the amount justly due to Guildfords under the Subcontract. It is unnecessary to deal with the other grounds of appeal.

[39] The issue of the amount owing under the Subcontract was raised by Queen's Marque. In response to Mr. Scarfo's affidavit describing an agreement that Guildford's was owed \$815,206.04 under the Subcontract, Queen's Marque provided statutory declarations signed by Gamma stating that subcontractors (which would include Guildfords) had been paid. Mr. Scarfo was one of the corporate officers who signed these declarations. The affidavit of Mr. Scarfo and the declarations were inconsistent. If Gamma had paid its subcontractors, as declared under oath, there would have been nothing due to Guildfords other than the holdback under the Subcontract.

[40] The hearing judge set out the conflicting evidence and then concluded, without explanation, that there was no factual issue in dispute with respect to the amount due to Guildfords. At paragraph 31 of her decision, she stated the court should not consider the "potential import" of the conflicting evidence. With respect, she should have done so and, if she had, would have concluded there was a factual dispute requiring trial.

[41] Agreements between contractors and subcontractors are not determinative of an owner's obligations under the *Act*. An obvious illustration is s. 13A which provides alternative methods for certifying substantial completion of a subcontract for purposes of holdback release by an owner. It does not include an agreement between the contractor and subcontractor.

[42] As a matter of contract, Guildfords and Gamma may agree on the amount Gamma is to pay for the services received under the Subcontract; however, such an agreement does not bind Queen's Marque for purposes of quantifying the builders' lien claim against the holdback.

Conclusion

[43] The hearing judge erred in finding there was no material issue of fact requiring trial. She should not have granted summary judgment and I would set aside her order.

[44] Although Queen's Marque has been successful, I would not award them costs of the appeal. The abuse of process argument raised at the motion hearing was done at the last minute and without proper notice. It was pursued at the appeal hearing and, in my view, had no merit. I conclude the appropriate costs disposition is to fix the appeal costs at \$5,000.00 and order them payable in the cause of the builders' lien proceeding which will continue in the Supreme Court of Nova Scotia.

Wood, C.J.N.S.

Concurred in:

Farrar, J.A.

Bryson, J.A.