

# In the Court of Appeal of Alberta

**Citation: Rojda Stucco Ltd v McNeill, 2024 ABCA 376**

**Date:** 20241121  
**Docket:** 2403-0066AC  
**Registry:** Edmonton

**Between:**

**Rojda Stucco Ltd.**

Appellant

- and -

**Scott McNeill and Taylor McNeill**

Respondents

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**The Court:**

**The Honourable Justice Anne Kirker  
The Honourable Justice William T. de Wit  
The Honourable Justice Tamara Friesen**

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## **Memorandum of Judgment**

Appeal from the Order by  
The Honourable Justice M.E. Burns  
Dated the 4th day of March 2024  
Filed the 30th day of April 2024  
(2024 ABKB 102, Docket: 2203 04478; 2103 16224)

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## Memorandum of Judgment

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### The Court:

### Introduction

[1] The appellant Rojda Stucco Ltd appeals a chambers judge's order dismissing its application to increase an amount held in trust pursuant to s 48 of the *Builders' Lien Act*, RSA 2000, c B-7<sup>1</sup> pending the outcome of Rojda's debt action against the respondents, Scott and Taylor McNeill. Rojda and two other subcontractors have not been paid for the work they performed on construction of the respondents' home. Rojda says the chambers judge erred in failing to secure the full amount of these unpaid claims.

[2] For the following reasons, the appeal is dismissed.

### Background

[3] In August 2019, the McNeills entered into a purchase agreement with Infiniti Master Builder for construction of a home on land owned by Infiniti. Infiniti would maintain ownership of the land until the home was complete.

[4] The McNeills paid Infiniti a total of \$1,136,874.94 pursuant to the purchase agreement. This included a payment of \$385,000 for the land and \$751,874.94 for work done and materials provided in building the house. No holdbacks occurred and no lien fund was created.

[5] Infiniti contracted with Rojda to complete a portion of the work on the house. Rojda performed the work between May 2021 and September 2021 and issued Infiniti an invoice for \$74,025, which has never been paid.

[6] Infiniti stopped work on the project in September 2021. On December 14, 2021, the McNeills registered a caveat on the certificate of title for the lands to protect their interest in the property. In an affidavit sworn December 21, 2021, Norman Lux, a professional quantity surveyor hired by the McNeills, concluded that the value of the work done, and materials provided prior to the work stoppage totalled \$548,932.

[7] Rojda Stucco filed a builder's lien on the property on January 5, 2022, registering its claim for \$74,025 against the title for the lands still owned by Infiniti. Four other subcontractors also

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<sup>1</sup> The *Builders' Lien Act* is now the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4, which came into force August 29, 2022. The applicable statutory sections are virtually identical.

filed liens in and around that time. Infiniti assigned itself into bankruptcy on January 7, 2022, and the trustee released any interest Infiniti held in the home and land.

[8] On February 9, 2022, the McNeills obtained an order which directed that title to the property would transfer to them free and clear of the liens, including Rojda's lien, upon their payment of \$54,893.20 into trust. The order further provided that any party having an interest in the lands could apply to vary the amount held in trust; the provisions of s 48(2) of the *Builders' Lien Act* applied to the funds; and the order was without prejudice to any arguments, remedies or causes of action available to any affected parties.

[9] On March 15, 2022, Rojda commenced its debt action against the McNeills to recover the \$74,025 owed, plus interest and costs. As Rojda's contract was not with the McNeills, the claims are made on a *quantum meruit* basis, or in the alternative, unjust enrichment.

[10] On December 18, 2023, Rojda Stucco filed an application to increase the funds held in trust pursuant to the February 9, 2022, order. It sought to have the McNeills pay into trust the full amount of Rojda's claim plus 15%, as well as the two remaining lien claimants' full claims plus 15%, for a total of \$164,395.75.

### **Issue on appeal**

[11] The issue on appeal is whether the chambers judge erred in dismissing the application to increase the amount being held in trust pending a determination as to whether the McNeills are liable for Rojda's claims.

[12] This is a question of mixed fact and law and absent an extricable error of law, it is reviewed for palpable and overriding error, a deferential standard: *Housen v Nikolaisen*, 2002 SCC 33 at paras 36-37, [2002] 2 SCR 235; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at paras 44-45, [2017] 1 SCR 688. Decisions that involve an exercise of discretion are owed deference on appeal. An appellate court will not intervene unless the decision maker proceeded arbitrarily, on a wrong principle, or failed to properly apply the applicable test: *Avli BRC Developments Inc v BMP Construction Management Ltd*, 2023 ABCA 147 at para 12.

### **Analysis**

[13] Lien legislation provides an efficient and cost-effective way for contractors, subcontractors and other lien holders to ensure they are paid for improvements they have made to land through provision of labour and materials, while also taking into account the interests of landowners for whom that work was performed: *Noranda Exploration Co Ltd v Sigurdson*, [1976] 1 SCR 296 at

302; *Maple Reinders Inc v W Dalton Energy Corp*, 2007 ABCA 247 at para 21, 284 DLR (4th) 249; and *Factors Western Inc v DCR Inc*, 2021 ABCA 433 at para 58, 42 Alta LR (7th) 57.

[14] To this end, s 48 of the *Act* allows an applicant to obtain a court order removing a lien from title and substituting security for the interest in land. This allows the affected parties to focus on present project completion, rather than on future litigation. A determination under s 48 is simply a decision as to whether the liens can be removed; “neither the validity of the claim nor its amount are determined at that point”: *Maple Reinders* at para 34.

[15] Section 48(1) states:

48(1) The court may, on application, order that the registration of a lien be removed from the title to the land concerned

(a) where security is given or payment is made into court for

- (i) the amount of the claim,
- (ii) the maximum amount for which the lien may properly attach under section 18(3) or (4) or 23(3) or (4), or
- (iii) such lesser amount as the court determines,

and any costs that the court may fix . . .

[16] The chambers judge who granted the February 9, 2022, order had discretion with respect to the amount of security or payment ordered to serve in place of the land, subject to the maximums described in s 48(1)(a)(i) and (ii), and so did the chambers judge who was then asked to consider whether that amount should be increased. As stated in *Maple Reinders* at para 33, “The court has the flexibility to take account of the particular circumstances and set the security at an amount that is enough, but not more than enough, to cover the claim.”

[17] The maximum amount of the lien fund is determined by the formulae in s 18 of the *Act*: *Maple Reinders*, para 32. Section 18(4) provides:

(4) Except as provided in section 13(1), when, in respect of liens to which this section applies, there is more than one lien claim arising from work done or materials furnished for and at the request of the contractor or the same subcontractor, they do not attach so as to make the major lien fund liable in their cumulative total for a sum greater than the total of

- (a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor, as the case may be, and
- (b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

[18] Section 4 of the *Act* further provides, with respect to valuation:

**4** For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

- (a) the contract price, or
- (b) the actual value of the work done and materials furnished, if there is not a specific contract price.

[19] Here, Infiniti was the contractor and Rojda, the lien claimant. The specific contract price is contained in the purchase agreement between Infiniti and the McNeills. The professional quantity surveyor who attended at the site in order to determine “the value of the work actually done, or materials actually furnished” performed a “detailed analysis using the stage of completion of the work under the agreement,” meaning the purchase agreement. No contrary valuation evidence was put before the chambers judge. See *Community Capital Management (1976) Ltd v Master Mechanical Plumbing & Heating Ltd*, 1981 ABCA 149 at para 10, 124 DLR (3d) 741.

[20] The chambers judge accepted that the valuation of the work actually done pursuant to the purchase agreement was \$548,932. As provided by s 18(4)(b), no additional sums were owed by the McNeills to Infiniti under that contract. In fact, they paid more to Infiniti than the value of the work done and materials provided in building the house.

[21] In the result, the chambers judge dismissed the application to increase the payment from the amount already paid into trust under the February 9, 2022, order, which was \$54,893.20 or 10% of the valuation of work actually done and materials actually furnished under the purchase agreement.

[22] Here, the chambers judge considered s 48(1)(a)(ii) and s 18(4) in exercising her discretion to dismiss the appellant’s application. We see no reviewable error in her reasoning. Further, s 48(1)(a)(iii) allows the court to make a security order in “such lesser amount as the court determines”. There is no justification for intervention here.

[23] Unfortunately, in paragraph 16 of the reasons, the chambers judge appears to depart from determining the issue of appropriate security, which was properly before her, to determining the issue of the McNeills' maximum liability, which was not properly before her. We consider this to be an error in expression. It is of no consequence to the chambers judge's decision to dismiss the application and does not affect the ultimate adjudication of the appellant's claim against the respondents.

**Conclusion**

[24] The appeal is dismissed.

Appeal heard on October 1, 2024

Memorandum filed at Edmonton, Alberta  
this 21st day of November 2024

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Kirker J.A.

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Authorized to sign for de Wit J.A.

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Friesen J.A.

**Appearances:**

A.M. Chak  
for the Appellant

K.P. Chapotelle  
for the Respondents