

COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. Maplevue Developments Ltd.,
2026 ONCA 512
DATE: 20260713
DOCKET: COA-25-CV-0724

Simmons, Paciocco and Osborne JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant

and

Maplevue Developments Ltd., Pace Maplevue Ltd. and 2552741 Ontario Inc.

Respondents

AND BETWEEN

Alpa Stairs and Railings Inc. and Newmar Window Manufacturing Inc.

Appellants

and

Dunsire Homes Inc.

Respondent

In the Matter of an Application under Subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

Robert Kennaley, for the appellants, Alpa Stairs and Railings Inc. and Newmar Window Manufacturing Inc.

Alexander Soutter and Adam Wyville, for the respondent, Dunsire Homes Inc.

Heard: February 25, 2026

On appeal from the order of Justice Jana Steele of the Superior Court of Justice, dated April 25, 2025.

Osborne J.A.:

[1] The statutory framework governing construction liens in Ontario has long required holdbacks to protect lienholders. This appeal engages the issue of how the quantum of any deficiency in holdbacks is to be calculated under s. 78(2) of the *Construction Act*, R.S.O. 1990, c. C.30 (the “*Act*”) for the purpose of determining a priority dispute between a lienholder and a building mortgagee in circumstances where there are no subcontractor lien claims at the time of the dispute. The quantum of holdbacks is important because liens arising from improvements enjoy a statutory priority over building mortgages taken out “to secure the financing of [that] improvement” to the extent of any deficiency in the required holdbacks.

[2] The specific question on this appeal is whether any deficiency in the holdbacks under s. 78(2) of the *Act* is to be calculated as a proportion of unpaid invoices or total invoices rendered under a contract for an improvement.

[3] For the reasons that follow, I conclude that, for the purposes of a priority dispute under s. 78(2), where there are no subcontractor lien claims at the time of the dispute and a payer has fully paid invoices from a contractor for services or materials provided, there is no deficiency in the holdbacks related to those services or materials fully paid for. It follows that any deficiency must be properly calculated as a proportion of unpaid invoices from the contractor.

I. BACKGROUND: THE PROJECT, THE RECEIVERSHIP AND THE LIENS

[4] Mapleview Developments Ltd. (“Mapleview” or the “Debtor”) was developing a residential townhouse project in Barrie, Ontario. The appellants, Alpa Stairs and Railings Inc. (“Alpa”) and Newmar Window Manufacturing Inc. (“Newmar”), were contractors retained by Mapleview to supply services or materials to the development. Each of Alpa and Newmar contracted directly with Mapleview. The project ran into financial difficulty and Mapleview defaulted on its repayment obligations to its senior secured lender, KingSett Mortgage Corporation (“KingSett”). On application by KingSett, the Ontario Superior Court of Justice, Commercial List, granted an order appointing a receiver over the project on March 21, 2024.

[5] The court-appointed receiver conducted a sales process, and on August 16, 2024, Cavanagh J. approved a Sale Approval, Vesting and Ancillary Matters Order (“AVO”) approving the sale of the project to the purchaser, the respondent, Dunsire Homes Inc. (“Dunsire”).

[6] In the sale agreement, the purchase price for the project was not a fixed amount, but rather was agreed to be calculated as an amount sufficient to repay KingSett in full, together with all amounts secured by charges that ranked in priority to those held by KingSett (those being amounts secured by charges in favour of the receiver), and all “Priority Payables”.

[7] Priority Payables were defined in the sale agreement to include “any payables that have priority over the Assumed Mortgages, ... including amounts that have priority pursuant to s. 78(2) of the *Construction Act*, R.S.O. 1990, c. C.30, as determined by the Receiver in consultation with the Purchaser, both acting reasonably, or as determined by the Court”.

[8] The appellants entered into their respective agreements with Maplevue to provide services or materials to the project in 2020. They performed their obligations under the agreements until Maplevue became insolvent.

[9] By the time of the insolvency, the payment status of the appellants was as follows:

- a) Alpa had submitted periodic invoices totaling \$1,100,604.80. It received full payment for invoices rendered before April 28, 2023, but only partial payments thereafter, leaving a balance owing of \$195,615.55; and

b) Newmar had submitted periodic invoices totaling \$2,924,385.76. It received full payment for invoices rendered before March 2, 2023, but only partial payments thereafter, leaving a balance owing of \$445,756.09.

[10] Each appellant registered a construction lien for the amount owing to it, and subsequently perfected that lien under the *Act*. Other suppliers also filed and then perfected liens.

[11] Importantly, and as further discussed below, there are no subcontractor lien claimants related to either appellant. The Agreed Statement of Facts confirms that other than the appellants, no person has a claim in respect of the holdback in favour of either appellant.

[12] The AVO authorized the receiver to establish a Lien Claimants' Reserve to ensure funds were available to fund the payment of any Priority Payables claims where agreed or ordered. The reserve was required to be funded by Dunsire before the closing of the purchase of the project in the amount of \$19,704,333.28. Any funds remaining after the resolution of all Priority Payables claims were to be remitted back to the purchaser.

[13] The Receiver then brought a motion to determine whether the amount in the Lien Claimants' Reserve had priority over the mortgage held by KingSett. Cavanagh J. held that, pursuant to s. 78(2) of the *Act*, KingSett's mortgage had

priority over all construction liens, “except to the extent of any deficiency in the holdbacks required to be retained by Maplevue under the *Construction Act*”¹.

[14] The appellants and the respondent all agreed that the appellants were entitled to a Priority Payables claim under the Lien Claimants’ Reserve, but could not agree on the quantum.

II. THE MOTION AND DECISION BELOW

[15] The appellants therefore brought a motion in the receivership proceeding for a determination of the quantum of the Priority Payables claim to which they were each entitled.

[16] The appellants took the position that the quantum was to be calculated in each case as an amount equal to ten percent of the total amounts invoiced for all services and materials supplied.

[17] The purchaser, Dunsire, took the position that the quantum should be calculated as ten percent of the unpaid invoices, such that funds otherwise forming part of the holdback but which had already been paid to the appellants should be excluded from the calculation.

¹ *Kingsett Mortgage Corporation v. Maplevue Developments Ltd.*, 2024 ONSC 6477, 22 C.B.R. (7th) 291, at paras. 6, 51.

[18] Steele J. heard the motion and rendered her decision on April 17, 2025.² The motion judge observed that the entitlement to a priority payment arises under s. 78(2) of the *Act* and is based on the amount of the holdback provided for in s. 22. She concluded that, as a matter of horizontal stare decisis, she was bound by the decision of the court in *Dufferin Concrete Products v. Waterbrooke Development Ltd.* (1992), 8 C.L.R. (2d) 132 (Ont. Gen. Div.), and observed that the decision and approach in *Dufferin Concrete* has been followed in subsequent cases and has never been overturned.

[19] In *Dufferin Concrete*, the court held that once contractor invoices are paid in full, that contractor is not entitled to any priority for any holdback referable to those invoices in respect of which the owner failed to retain a holdback under the predecessor to s. 78(2) of the *Act*, as this would amount to double recovery. In other words, a contractor is entitled to a holdback only for unpaid invoices, not all invoices relating to services or materials supplied under the contract.

[20] In the decision below, the motion judge described “the longstanding principle set out in *Dufferin Concrete*”, and observed that, in that case, the plaintiff had supplied concrete materials and had been paid in respect of most but not all of the total contract price. The plaintiff argued that the quantum of the holdback should

² The motion also addressed the issue of whether another contractor had a Priority Payables claim, but that issue is not relevant to this appeal.

be equal to ten percent of the total contract value, not the lesser balance remaining unpaid.

[21] The court in *Dufferin Concrete* disagreed, concluding that to do so would make “the holdback on contracts ... closer to 20 per cent”. The court further stated that “[t]he legislation could have only intended this doubling effect when injured third parties are involved ... Consequently, the plaintiff’s holdback collectible from the mortgagee is 10 per cent of the unpaid contracts”.

[22] As noted by the motion judge, that approach was followed in subsequent cases, including in a decision by Brown J. (as he then was) in *Pegah Construction Ltd. v. Panterra Mansions Joint Venture Corp.*, 2014 ONSC 3966, 37 C.L.R. (4th) 58, in which he stated, at para. 11:

That result [that the holdback obligation is significantly lower] arises from a series of cases dealing with the method for calculating the statutory holdback in circumstances where the supplier has contracted directly with the owner. The principle emerging from those cases – often referred to as the principle in *Dufferin Concrete Products v. Waterbrooke Developments Ltd.* – is that the proper holdback of the lien claimant who has a direct contract with the owner is 10% of the unpaid contract.

[23] Having concluded that she was bound by the decision in *Dufferin Concrete*, the motion judge then calculated the quantum of each appellant’s Priority Payables claim accordingly (i.e., in an amount equal to ten percent of the value of the unpaid invoices only).

III. THIS APPEAL AND THE POSITIONS OF THE PARTIES

[24] The appellants submit that *Dufferin Concrete* was wrongly decided, that the interpretation of the holdback provisions of the *Act* in that case was in error, and that the appellants as suppliers are entitled to a holdback equal to ten percent of their total invoices for services and materials supplied to the project, rather than only ten percent of the unpaid invoices. They submit that a “deficiency in the holdbacks required to be retained by the owner under Part IV” should be calculated the same way whether or not there are subcontractor lien claims, and whether or not any of the contractor’s invoices were fully paid. The appellants argue that Part IV of the *Act* mandates a flat ten percent holdback for all contracts without exception, and there is no statutory reason to read the “deficiency” in such holdback differently depending on whether there are subcontractor lien claims involved.

[25] The appellants submit that: “[t]he key error in *Dufferin Concrete* was to read into the *Construction Act* a deduction that is not to be found in the *Act*, and that undermines the historical purpose of lien legislation ‘to offer protection to persons doing work or providing services or furnishing materials in respect of any building or improvement’”.

[26] Finally, the appellants submit that while the decision in *Dufferin Concrete* has been followed in subsequent cases, the issue it decided has never been

considered by this court, and that clarity on that issue would be of significant assistance to the construction industry in Ontario.

[27] The respondent submits that the motion judge made no error in following *Dufferin Concrete*, and that to allow the appellants' interpretation to succeed would be to require a double payment of a holdback they have already been paid. The respondent submits that, where there are no subcontractor lien claims at the time of the priority dispute under s. 78(2) of the *Act*, the holdback ought to be equal to ten percent of all invoiced amounts which were not paid in full. In other words, if the ten percent holdback was already fully paid to the contractor on invoices rendered by the contractor, there is no deficiency in that ten percent holdback.

[28] The appellants submit that they bring this appeal as of right pursuant to s. 193 (b) and (c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, (the "*BIA*") but in the alternative, and if leave is required, they submit it should be granted pursuant to s. 193(e) of the *BIA*. The respondent does not challenge the submission that the appeal lies as of right, and also agrees that in the alternative, leave should be granted.

IV. ANALYSIS

1. Jurisdiction

[29] As to jurisdiction, I am satisfied that an appeal to this court lies as of right pursuant to s. 193 of the *BIA*. The motion resulting in the order under appeal was

brought pursuant to the direction of the Superior Court in the AVO and in the context of the receivership proceeding. Decisions relating to s. 78 of the *Act* and applications for directions in receivership proceedings may be (and in my view should be in this case), governed by the appeal routes set out in the *BIA*, and not the *Act*: *Dal Bianco v Deem Management Services Limited*, 2020 ONCA 585, 82 C.B.R. (6th) 161, at paras. 11-12.

[30] This appeal satisfies the criteria for s. 193(c) of the *BIA* as set out by this court in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635, at para. 53. The order under appeal is more than procedural since it determines the lien claimants' entitlements; it involves the value of Debtor property since the claims are paid out of the Lien Claimants' Reserve (which comes out of the sale price of the Debtor's property); and the order under appeal results in a loss to the appellants (i.e., receiving a ten percent holdback on only unpaid invoices as opposed to all invoices). This appeal also clearly involves property exceeding \$10,000 in value.

[31] In any event, if necessary, I would grant leave under s. 193(e). Granting leave to appeal under s. 193(e) is "discretionary and must be exercised in a flexible and contextual way": *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. This court has previously granted leave under s. 193(e) in cases where, as here, the appeal raised a matter of statutory interpretation "of some importance" and where it would be helpful for

this court, as an appellate court, to resolve the questions raised by the parties: see *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, 2023 ONCA 1, 4 C.B.R. (7th) 253, at para. 10.

[32] Further, the respondents did not oppose this court hearing the arguments under appeal, which is another factor to be considered in the exercise of discretion to grant leave: *Proex Logistics Inc. (Re)*, 2025 ONCA 832, at para. 58; *North House Foods Ltd. (Re)*, 2025 ONCA 563, 20 C.B.R. (7th) 1, at para. 46.

2. Applicable Standard of Review

[33] There is no dispute that, as this appeal concerns a matter of statutory interpretation, it engages a question of law only and the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

3. The Statutory Framework

[34] The *Act*, like its legislative predecessor the *Construction Lien Act*,³ sets out a comprehensive regime governing construction contracts, liens and payment rights. Its legislative purpose is clear and straightforward: to protect contractors, subcontractors and suppliers who provide services or materials to improve a property in Ontario (referred to as lien claimants): *Scott, Pichelli & Easter Limited v. Dupont Developments Ltd.*, 2022 ONCA 757, 475 D.L.R. (4th) 364, at para. 9.

³ The *Act* was revised and renamed on July 1, 2018.

[35] A construction lien (sometimes referred to as a builder's lien) is a claim for unpaid services or materials that may be registered against title to the property improved. That serves as public notice to all, including mortgagees, other lenders and/or potential purchasers, that there is an outstanding claim related to improvements to the property.

[36] The *Act* sets out the technical provisions and relevant timelines for preserving liens (by registering the claim for lien against title –required to be done within 60 days) and perfecting liens (by commencing an action to enforce the lien and registering a certificate of action against title so the lien will not expire – required to be done within 90 days): ss. 31(1) and (2); 34(1); and 36(1) and (2).

[37] Where the services or materials are supplied by the contractor who has entered into an agreement with the owner, there is privity of contract and a claim for unpaid invoices is straightforward. However, the *Act* goes further and recognizes the reality that construction and property improvement projects often involve work by different construction trades who lack any direct contractual relationship with the owner. Instead, they are subcontractors engaged by a contractor.

[38] The *Act* provides that not only can these subcontractors qualify as lien claimants notwithstanding the lack of privity of contract with the owner, but they are also further protected by the statutory requirement for holdbacks. That

protection is balanced, however, against the rights of a building mortgagee by providing that the lien holder has priority over the building mortgagee only to the extent of any deficiency in the required holdbacks.

4. The Relevant Statutory Provisions

[39] I begin with the text of the relevant statutory provisions.

[40] Part XI of the *Act* addresses “Priorities”, including priorities between liens and mortgages (which is the dispute here). Dunsire, as purchaser, stands in the shoes of the building mortgagee whose debt it satisfied through the purchase of the townhouse project, for the purposes of the priority dispute. Section 78(2), which applies to building mortgages (mortgages [taken] with the intention to secure the financing of an improvement), provides:

Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. [Emphasis added.]

[41] In the present case, there is no dispute that, as a result of the application of s. 78(2) (and the November 2024 decision of Cavanagh J. made in this proceeding), KingSett’s mortgage has priority over the appellants’ liens “except to the extent of any deficiency in the holdbacks required to be retained by Maplevue”.

[42] Accordingly, to succeed, the appellants must establish that there is such a “deficiency in the holdbacks ... under Part IV” (i.e., s. 22) for the purpose of determining a dispute about the extent of the priority granted under s. 78(2).

[43] Section 1(1) of the *Act* defines “holdback” as “the 10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by Part IV”.

[44] Part IV of the *Act* addresses holdbacks and includes s. 22(1) which is the key provision obligating a payer to retain a holdback:

Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback in respect of the supplied services or materials have expired or been satisfied, discharged or otherwise provided for under this Act. [Emphasis added.]

[45] Section 22(3) operates to confirm that this obligation applies irrespective of whether the contract or subcontract provides for partial payments (as occurred here) or payment in full on completion.

[46] Under s. 14(1) of the *Construction Act*, a lien arises at the time services or materials are supplied:

A person who supplies services or materials to an improvement ... has a lien ... for the price of those services or materials.

[47] Accordingly, s. 22(1) imposes on a payer (which may be an owner, contractor or subcontractor) the obligation to retain the ten percent holdback as

the services or materials are actually supplied “until all liens that may be claimed against the holdback in respect of the supplied services or materials have ... been satisfied ...”.

[48] Moreover, the term “deficiency in the holdbacks” is not defined in Part IV (or anywhere else in the *Act*). The term appears in the statute only twice, both times in s. 78 in relation to priority disputes between lien claimants and mortgagees: ss. 78(2) and (5).

[49] Accordingly, an analysis of whether there is “any deficiency in the holdbacks” in the context of a priority dispute under s. 78(2) plainly requires consideration of two factors: whether there are any liens that may be claimed against the holdback at the time of the priority dispute; and if so, whether those liens have been satisfied.

[50] In my view, when those factors are properly applied to the circumstances here, the position advanced by the appellants cannot succeed. I reach this conclusion since, where an invoice has been paid to the contractor in full, no lien can arise, or if it did, any lien has been fully satisfied. This is the inescapable result, since the amount of the invoice has been paid in full to the contractor and there is no other lien claimant at the time of the priority dispute under s. 78(2) (i.e., a subcontractor) who could have any claim for all or part of that amount.

[51] It then follows from the plain language of s. 22(1) that for the purposes of a priority dispute under s. 78(2), where there are no subcontractor lien claimants at the time of the priority dispute, there is no deficiency in the holdbacks in relation to the services or materials supplied by the contractor pursuant to those fully paid invoices. No amounts remain owing to the contractor and there are, at that time, no other lien claimants.

[52] Here, both appellants supplied services or materials and rendered periodic invoices as the work progressed. With respect to some but not all invoices, the owner did not deduct ten percent in respect of the required holdback, but instead, initially paid the invoices to both appellants in full. In other words, rather than the owner paying ninety percent of the invoiced amount and retaining ten percent as a holdback, that ten percent was also paid to the contractor.

[53] In these circumstances, where there are no subcontractor lien claims, I agree therefore with the position of the respondent that any “deficiency in the required holdbacks” for the purposes of a priority dispute under s. 78(2) must be interpreted to account for the full payments made to the appellants. Put otherwise, when an invoice has been paid in full, in the absence of subcontractor lien claims at the time of a s. 78(2) priority dispute, there is no deficiency in the required holdbacks in favour of the contractor relating to the invoiced amount.

5. The Appellants' Proposed Interpretation Would Lead to Commercial Absurdity

[54] Even if I were in error with respect to the analysis set out above and the relevant provisions were ambiguous, the application of relevant principles of statutory interpretation would support the conclusion I reach.

a. Principles of Statutory Interpretation

[55] The general principles of statutory interpretation were recently set out by Paciocco J.A. of this court in *Trebell v. Canada Life Assurance Company*, 2026 ONCA 481, at paras. 31-34:

The modern approach to statutory interpretation requires the meaning of a statutory provision to be “determined by reference to its text, context and purpose”: *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, 502 D.L.R. (4th) 59, at para. 30. Specifically, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

As the Supreme Court of Canada has reaffirmed, “The starting point in any interpretive exercise is the text of the provision”: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, 498 D.L.R. (4th) 316, at para. 28. Therefore, although “the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise”: *CISSS A*, at para. 24. Paying due

attention to the text of a provision means focusing on the “‘natural meaning’ that appears when the provision is simply read through as a whole”: *C/SSS A*, at para. 28, citing *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735.

However, the plain meaning of a provision cannot be treated as determinative, and “a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms”: *Piekut v. Canada (National Revenue)*, 2025 SCC 13, 502 D.L.R. (4th) 1, at para. 45, citing *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31. Context and purpose assist in both identifying and resolving latent ambiguity in the text, so that “a meaning that is harmonious with the Act as a whole” may be discerned: *Piekut*, at paras. 43-44; see also *Hunt v. Canada*, 2026 FCA 88, at para. 13. That said, the text itself is the best indicator of legislative purpose, because it specifies “the means chosen by the legislature to achieve its purposes” and tells an interpreter just how far the legislature intended to go to achieve a more abstract goal: *C/SSS A*, at para. 24. Therefore, “the overarching purpose of a legislative scheme informs, but need not be the decisive factor in the interpretation of a particular provision within that scheme”: *R. v. Rafilovich*, 2019 SCC 51, [2019] 3 S.C.R. 838, at para. 30 (emphasis in original).

Where a textual, contextual and purposive analysis of a provision yields ambiguity, an interpreter may resort to so-called secondary principles of interpretation: *Piekut*, at para. 48. Ambiguity means that “the provision must be reasonably capable of more than one meaning”: *R. v. Basque*, 2023 SCC 18, 482 D.L.R. (4th) 203, at para. 74, citing *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 29. One secondary principle of interpretation relied upon heavily by the motion judge is that “absent a clear intention to this effect, it must be presumed that Parliament [does] not intend to produce ... absurd results”: *Basque*, at para. 73. However, where a provision does not admit of ambiguity,

the legislature's intention "must be enforced however harsh or absurd or contrary to common sense the result may be": *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 34.

[56] The prime directive in statutory interpretation is to "adopt an interpretation that is appropriate": *Piekut v. Canada (National Revenue)*, 2025 SCC 13, 502 D.L.R. (4th) 1, at para. 49, citing Ruth Sullivan, *The Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), at § 2.9.

[57] The Supreme Court of Canada further reinforced its approach from *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; and in *R. v. Breault*, 2023 SCC 9, [2023] 1 S.C.R. 340, where it stated in the latter case, at para. 25, that "[e]very statutory interpretation exercise involves reading the words of a provision 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament'": *Rizzo & Rizzo Shoes*, at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87; *Bell ExpressVu*, at para. 26; and *R. v. J.D.*, 2022 SCC 15, [2022] 1 S.C.R. 287, at para. 21.

[58] To accept the position of the appellants would yield a result that, in my view, is inconsistent with the legislative objective of balancing the rights of payers and building mortgagees. It would also be commercially absurd and unfair since it would condone a "double counting" of that same ten percent paid to the contractor.

[59] That is unfair in the context of a priority dispute under s. 78(2) to the building mortgagee (or a party such as Dunsire who stands in its shoes) and who is effectively required to pay the same contractor holdback amounts the contractor has already been paid by the owner, resulting in the contractor receiving payment twice.

[60] It is also unfair to the owner's other creditors who are inevitably disadvantaged as a result of its insolvency to the extent of that ten percent that is both paid directly to the contractor and also accounted for as part of the "deficiency in the holdbacks" for the benefit of the only party who can assert a beneficial entitlement to it – the same contractor.

[61] It has been a longstanding principle of construction lien law in Ontario that the premature payment of a holdback cannot give a lien claimant a greater right, or put the owner in any worse position, than if the owner had retained the holdback as required: *Brooks v. Mundy* (1914), 16 D.L.R. 119 (Ont. C.A.), at para. 6; *Otis Elevator Co. Ltd. et al. v. Commonwealth Holiday Inns of Canada Ltd. et al.* (1972), 2 O.R. 536 (Ont. Co. Ct.), at para. 10; and *Doig v. Stehn* (1924), 2 D.L.R. 627 (Sask. C.A.).

[62] Put simply, the effect of the appellants' submission is that a contractor should have a priority over building mortgagees to the extent of ten percent of invoices already fully paid – where that same ten percent has already been paid

to that same contractor. The contractor would effectively be paid the same holdback amount twice – once when the owner failed to retain the ten percent holdback and paid the contractor’s invoice in full, and a second time when the contractor is granted priority over the building mortgagee arising from a “deficiency in the holdbacks” in respect of invoices that have already been paid in full.

[63] I can see no language in the *Act*, and particularly in either ss. 22(1) or 78(2), that imposes such a requirement and, in my view, this would yield an absurd result and an interpretation that cannot be said to reflect the intent of the legislature.

b. Legislative Objective of Maintaining a Balance

[64] It is also important to recall that the legislation is not intended to favour lien claimants, but rather to strike a balance. As observed by Penny J. of the Ontario Superior Court of Justice, Commercial List, in *BCIMC Construction Fund Corp. et al. v. 33 Yorkville Residences Inc et al.*, 2022 ONSC 2326, 4 C.B.R. (7th) 238, at para. 27, aff’d 2023 ONCA 1, 4 C.B.R. (7th) 253, at para. 14:

First, contrary to the lien claimants’ submission, there is no broad principle that the *Act* should be interpreted to favour lien claimants. Rather, it is well accepted that the *Act* is remedial legislation that provides a means for contractors and subcontractors to obtain payment for labour and material supplied to a property, while balancing the competing interests of owners, contractors, subcontractors, and mortgagees in the construction process. Indeed, the parties seem to agree that the true object and purpose of the *Act* is to balance the interests of the various parties in the construction process and to fairly allocate risk and benefit between those who fund

construction and those who provide services and materials. Section 78(2) is an important element in that balancing done by the legislature.

[65] The text of s. 78(2) has not been substantially changed since it was introduced (although the *Act* has since been renumbered). Legislative history materials support the conclusion that the purpose of s. 78(2) was to “[provide] a reasonable balance between the interest of the mortgagees who finance the construction of improvements and the lien claimants who do the actual work on the improvement it is only fair that the mortgagee’s interest be partly subordinated to the liens of the suppliers to the improvement, to ensure that there will be money available to pay them for the work that they have done” (emphasis added): *Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, April 1982) at pp. 179-180.⁴

[66] As the respondent submits, this balance is achieved by, among other things, limiting the priority of lien claimants over mortgagees to any deficiency in the holdback amount: *Bianco v. Deem Management Services Limited*, 2021 ONCA 859, 159 O.R. (3d) 542, at para. 29.

[67] The result in *Dufferin Concrete* (and in *Pegah*) maintains this balance. That may be why, notwithstanding the significant passage of time since that case was

⁴ The 1982 Report has been frequently relied on as interpretive aids in construction lien cases, including by this court.

decided, there have been very few decisions engaging the issue, and no decisions supporting the interpretation urged on this court by the appellants.

[68] In *Dufferin Concrete*, as here, the owner became insolvent, there were no subcontractor lien claims and the dispute was effectively between the contractor and the mortgagee. The court accepted that, while the premature payment of holdback “will not result [in the] discharge of the liens of persons other than the person who is paid” (i.e., the contractor who receives the payment):

[T]o give the plaintiff what it wants ... and not credit ... the first 23 invoices paid in full, in effect, makes the holdback on contracts ... closer to 20 per cent. The legislation could have only intended this doubling effect when injured third parties are involved, in my opinion. In these circumstances I agree that failure to retain the 10 per cent holdback is to deprive those claiming under [the contractor], not [the contractor] itself.

[69] It is a critically important fact on this appeal that there were no subcontractor lien claims at the time of the priority dispute under s. 78(2). The record is silent on whether there were any subcontractor lien claimants at an earlier point in time. The result might be very different if there were subcontractor lien claimants, and nothing in this decision should be taken as endorsing the result in *Dufferin Concrete* where such parties are present at the time of a priority dispute under s. 78(2).

[70] But where there are no subcontractor lien claimants at the time of the priority dispute, s. 78(2) simply confirms that liens have priority over a building mortgage

to the extent of any deficiency in the holdbacks required to be retained by the owner, even if that mortgage is first ranking security registered on title.

[71] Accordingly, in my view, any "deficiency in the holdbacks" pursuant to s. 78(2), in circumstances where there are no subcontractor lien claimants at the time of the dispute, must account for fully paid invoices and therefore be calculated in an amount equal to ten percent of the amount of unpaid invoices, and not the full contract amount, all as calculated by the motion judge.

V. RESULT AND DISPOSITION

[72] For all of these reasons, I would dismiss the appeal with costs in the agreed-upon amount of \$40,000 all inclusive, and as also agreed, leave undisturbed the costs award of the motion judge below.

Released: July 13, 2026 "J.S."

"Osborne J.A."

"I agree. Janet Simmons J.A."

"I agree. David M. Paciocco J.A."