

CITATION: 1277703 Ontario Inc. o/a Classic View v. Yokey et al
2026 ONSC 4636

COURT FILE NO.: CV-18-00137700-0000

DATE: 20260731

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: 1277703 ONTARIO INC. O/A CLASSIC VIEW, Plaintiff

AND:

NAAMA YOKEV and AKIVA YOKEV, Defendants/Plaintiffs by Counterclaim

AND:

1277703 ONTARIO INC. O/A CLASSIC VIEW, 2059656 ONTARIO INC. and
OMRI YAFFE, Defendants by Counterclaim

BEFORE: Associate Justice Mak

COUNSEL: Giancarlo Mignardi, for the Plaintiff and Defendants by Counterclaim

Joshua Freeman, for the Defendants/Plaintiffs by Counterclaim

HEARD: February 27, 2026, by videoconference

REASONS FOR DECISION

- [1] The plaintiff alleges that the defendants owe \$260,000 plus HST for materials and services provided at the defendants' property for the construction of a residential building. The defendants/plaintiffs by counterclaim (the "defendants") allege the plaintiff and/or the defendants by counterclaim caused them to lose \$500,000 by abandoning the project and leaving deficient and incomplete work.
- [2] The defendants bring this motion for an order extending the time for the service of expert reports, including the report of Eden Engineering & Design Inc, dated November 2, 2018, *nunc pro tunc* to June 26, 2024. The plaintiff and defendants by counterclaim oppose this motion.

Factual Background

- [3] The defendants retained the plaintiff and/or the defendants by counterclaim to make improvements to the defendants' property. The plaintiff and/or defendants by counterclaim are alleged to have supplied these services between March 26, 2018 to September 14, 2018.
- [4] On September 27, 2018, the plaintiff registered a claim for lien on the defendants' property.

- [5] On October 10, 2018, the Statement of Claim was issued under the *Construction Lien Act*, R.S.O. 1990, c. C. 30 (“*Construction Lien Act*”).
- [6] The defendants delivered a Statement of Defence and Counterclaim on or about November 16, 2018. The plaintiff and defendants by counterclaim served a Reply and Defence to Counterclaim on or about December 12, 2018.
- [7] On or about April 23, 2019, the plaintiff served a trial record on the defendants.
- [8] On July 26, 2022, the parties attended at a pre-trial conference before Sutherland J. Sutherland J.’s endorsement ordered that expert reports, if any, are to be served pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “*Rules*”), and a further pre-trial conference was to be conducted by October 1, 2023 to certify the proceeding is ready for trial and can be placed on the fall 2023 trial sittings.
- [9] At the plaintiff’s request and with the consent of the defendants, on August 16, 2023 the court ordered the deadline for a second pre-trial conference to be extended to August 31, 2024.
- [10] At the second pre-trial conference on June 18, 2024, Sutherland J. fixed the trial date for January 2025, and ordered a third pre-trial conference. He also ordered, on consent of the parties, that the plaintiff’s claim for lien is discharged for failing to perfect the lien as required under the *Construction Lien Act*.
- [11] On June 26, 2024, the defendants served the plaintiff and defendants by counterclaim with the expert report authored by Eden Engineering & Design Inc., dated November 2, 2018 (the “report”).
- [12] On July 10, 2024, the plaintiff and defendants by counterclaim advised the defendants that they oppose the use of the report at the upcoming trial, and advised the defendants they would need to bring a motion if they intended to use the report at trial.
- [13] As of the date of the motion hearing, the third pre-trial conference has not been scheduled. At the plaintiff’s request and on the consent of the defendants, the trial was adjourned to the September 2025 sittings and then to the September 2026 sittings.
- [14] The issues before the court are as follows:
- (a) Did the defendants serve the report late when they served it on June 26, 2024?
 - (b) If yes, should the court extend the time for the service of expert reports, and in particular, the report, to June 26, 2024?

Were the Defendants Late When They Served their Expert Report on June 26, 2024?

A. When Did Subrules 53.03(1) and (2) of the Rules start to apply to this action?

- [15] Subrule 53.03(1) of the *Rules* states: “A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).”
- [16] Subrule 53.03(2) states “A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).”
- [17] The defendants submit they did not serve the report late when they served it on June 26, 2024. They state that only after the claim for lien was discharged at the second pre-trial conference on June 18, 2024 did this action become an ordinary civil proceeding to which r. 53.03 would apply, and that only when the third pre-trial conference is scheduled will the deadlines for delivering expert reports be triggered under r. 53.03.
- [18] The plaintiff and defendants by counterclaim submit r. 53.03 has always applied to this action, and therefore the defendants served the report late when they served it on June 26, 2024. The plaintiff and defendants by counterclaim correctly note that the court has applied r. 53.03 and/or enforced compliance with r. 53.03 in matters commenced under the *Construction Lien Act*, including trials under this Act: see e.g. *Thyssenkrupp Elevator v 1147335 Ontario Inc.*, 2013 ONSC 485 at paras. 42 to 67, *Keen Landscaping Inc. v. Stewart*, 2017 ONSC 1925 at paras. 11 to 14, and *Chang Xin Construction v. 2049390 Ontario Inc.*, 2025 ONSC 1503.
- [19] The parties rely on the *Construction Lien Act* in this action. The court agrees that the *Construction Lien Act*, as it read on June 29, 2018, applies because according to the pleadings, the contract for the improvement was entered into before July 1, 2018. Section 87.3(a) of the *Construction Act* states that the *Construction Lien Act* and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if a contract for the improvement was entered into before July 1, 2018.
- [20] For clarity, all references to the *Construction Lien Act* in this decision refer to the *Construction Lien Act* as it read on June 29, 2018.
- [21] In their motion materials and oral submissions to the court, the parties did not reference the below relevant legislation that the court must consider for this motion:
 - (a) Subrule 50.02(1) of the *Rules* states that unless the court orders otherwise, within 180 days after an action is set down for trial, the parties shall schedule with the registrar a date and time acceptable to all parties and consistent with the requirements of subrule (2.1) to appear before a judge or associate judge for a pre-trial conference.

- (b) Subrule 50.02(2) of the *Rules* states that if the parties do not schedule a pre-trial conference within 180 days after the action is set down for trial, the registrar shall, subject to any previous order, schedule a date and time consistent with the requirements of subrule (2.1) for the parties to appear before a judge or associate judge for a pre-trial conference; and give notice to the parties to appear at the scheduled date and time.
- (c) Rule 1.02(1) of the *Rules* states that the *Rules* apply to all civil proceedings in the Superior Court of Justice, except for proceedings in the Small Claims Court, proceedings governed by the *Family Law Rules*, and if a statute provides for a different procedure.
- (d) Section 67(3) of the *Construction Lien Act* states: “Except where inconsistent with this Act, and subject to subsection (2) [interlocutory steps outside of those provided for in the *Construction Lien Act*], the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act.”
- (e) Section 61(6) of the *Construction Lien Act* states: “Rule 50 of the Rules of Civil Procedure does not apply to an action under this Act.”

[22] A reading of the relevant legislation leads me to conclude the following:

- (a) Rule 53.03 applies to all actions commenced under the *Construction Lien Act*;
- (b) Rule 53.03 does not apply to actions commenced under the *Construction Lien Act* to the extent that the rule is inconsistent with s. 61(6) of the *Construction Lien Act*;
- (c) The effect of ss. 61(6) and 67(3) of the *Construction Lien Act* is that in a *Construction Lien Act* action, the pre-trial conference that takes place has *not* been scheduled pursuant to rr. 50.02(1) or (2);
- (d) Subrules 53.03(1) and (2) refer to the deadlines for the service of expert reports *only* in relation to a pre-trial conference scheduled under rr. 50.02(1) or (2). Therefore, subrules 53.03(1) and (2) do not apply a pre-trial conference in a *Construction Lien Act* action because this pre-trial conference has not been scheduled pursuant to rr. 50.02(1) or (2) of the *Rules*; and
- (e) Subrules 53.03(1) and (2) apply to a *Construction Lien Act* action that has been converted to the ordinary procedure, but only from the time the action is converted to the ordinary procedure.

[23] In applying my analysis of the relevant legislation to the facts on this motion, I find that r. 53.03 applied to this action when it was commenced under the *Construction Lien Act*, except to the extent that r. 53.03 is inconsistent with s. 61(6) of the *Construction Lien Act*. The effect of ss. 61(6) and 67(3) is that when this action was a *Construction Lien Act* action, the pre-trial conferences that took place on July 26, 2022 and June 18, 2024 were not scheduled pursuant to rr. 50.02(1) or (2) of the *Rules*, and therefore the deadlines for service

of expert reports pursuant to rr. 53.03(1) and (2) also did not apply, unless ordered otherwise by the court.

- [24] For the foregoing reasons, I find that rr. 53.03(1) and (2) only applied to this action once the action was converted to ordinary procedure, or unless otherwise ordered by the court. The court has the jurisdiction to order deadlines for the service of expert reports in *Construction Lien Act* actions: see e.g. *Perfect Plastering Limited v. 863704 Ontario Ltd.*, 2017 ONSC 7433 at Appendix “I”, Paragraph C(4) to (9).
- [25] Therefore, the next issue for the court to consider on this motion is whether the court ordered a deadline or deadlines for the service of expert reports to be completed prior to June 26, 2024 – the date when the defendants served their expert report.

B. What do the Contents of the Endorsements State about Service of Expert Report?

- [26] The defendants submit a reading of the two endorsements arising from the two pre-trial conferences leads to the conclusion that no deadline for expert reports was determined as of the date of the second pre-trial conference on June 18, 2024, and that due to this lack of deadline, Sutherland J. ordered a third pre-trial conference. The plaintiff and defendants by counterclaim disagree with the defendants’ position.
- [27] After considering the parties’ motion materials and their submissions at the motion hearing, for the following reasons I reject the defendants’ submission and find that expert reports were to be served not less than 90 days prior to the second pre-trial conference, which ultimately took place on June 18, 2024, and responding expert reports were to be served not less than 60 days prior to second pre-trial conference.
- [28] In the endorsement arising from the first pre-trial conference (the “first endorsement”), Sutherland J. ordered a comprehensive timetable for the remaining pre-trial steps in the action. The “Order to Go” listed a number of items ordered, including deadlines for the service of affidavits of documents, completion of examinations for discovery, completion of answers to undertakings, the last date to bring motions for undertaking and refusals, and the date by which the second pre-trial conference was to be conducted.
- [29] In the midst of this list of ordered deadlines was the order “Expert reports, if any, to be served pursuant to the Rules.” Near the bottom of the list was the order “Further pretrial to be conducted by October 1, 2023, to certify that the proceeding is ready for trial and can be placed on the Fall 2023 trial sittings.”
- [30] Reading the order “Expert reports if any, to be served pursuant to the Rules” in the context of the other items ordered in the first endorsement, together with the understanding that rr. 53.03(1) and (2) did not apply to the action at the time of the first pre-trial conference, and that the court has the jurisdiction to order deadlines for the service of expert reports in *Construction Lien Act* actions, I find that the evident and correct reading of the order pertaining to expert reports is that expert reports were to be served pursuant to the timelines prescribed by rr. 53.03(1) and (2) the *Rules* in advance of the second pre-trial conference.

[31] This reading of the order “Expert reports, if any, to be served pursuant to the Rules” is the only way to give effect to this order, for two reasons:

- (a) This reading is the only way to give effect to the order in the first endorsement “Further pretrial to be conducted by October 1, 2023, to certify that the proceeding is ready for trial and can be placed on the Fall 2023 trial sittings”. In other words, the only way this proceeding could be certified as ready for trial and could be placed on the Fall 2023 trial sittings is if prior to the second pre-trial conference on or before October 1, 2023, the parties served their expert reports for the expert witnesses they intend to call at trial. Otherwise, by the time of the second pre-trial conference on or before October 1, 2023, if the parties had not completed service of their expert reports for the experts that they intend to call at trial, the court would not be able to certify the proceeding is ready for trial and would not be able to place the matter on the fall 2023 trial sittings.
- (b) It would be nonsensical for the parties to interpret this order for expert reports as a mere restatement that the deadlines prescribed by rr. 53.03(1) and (2) do not apply to this action. This misinterpretation would lead to the absurd result that the order “Expert reports if any, to be served pursuant to the Rules” is simply reiterating that no deadline exists for the service of expert reports in what was then a *Construction Lien Act* action, despite the fact that the second pre-trial conference was to take place by October 1, 2023 to certify the proceeding is ready for trial and can be placed on the Fall 2023 trial sittings.

[32] The first endorsement also states:

At the next pretrial discussion on witness list and the time required for each witness, joint document books, expert reports, admissibility and authenticity of documents and whether the trial is in person, by zoom or a hybrid.

A joint witness list along with time estimates of direct and cross examination of each witness to be filed with the parties’ pretrial memos.

[33] From these statements, I find Sutherland J. contemplated the parties would discuss various items, including expert reports, at the second pre-trial conference, but these statements do not expressly or implicitly permit the parties to serve their expert reports after the second pre-trial conference in light of the order in the first endorsement that “Expert reports, if any, to be served pursuant to the Rules.”

[34] The endorsement arising from the second pre-trial (the “second endorsement”) states:

The defendants have an expert report that they intend to serve within seven days. After service, if a motion is required concerning late service, such a motion may be brought. The plaintiff to advise if a motion is required within 14 days after service of the expert report.

A further pretrial is required to certify that the parties are ready for trial.

[35] From these statements in the second endorsement, I find that Sutherland J. did not expressly permit late service of the report. Instead, it was contemplated that after the defendants served the report, the plaintiff and defendants by counterclaim could consent to the report's late service – likely pursuant to r. 53.03(4)(c) of the *Rules*, which allows the time provided for service of expert reports to be extended on the written consent of the parties – and if they did not consent, the defendants were permitted to bring this motion. In light of the late service of the report, a third pre-trial conference was required so the court could then certify the parties were ready for trial.

[36] The second endorsement also stated:

At the next pretrial discussion on witness list and the time required for each witness, joint document books, expert reports, admissibility and authenticity of documents and whether the trial is in person, or a hybrid.

A joint witness list along with time estimates of direct and cross examination of each witness to be filed with the parties' pretrial memos.

[37] With respect to these statements, I adopt and rely upon my reasoning above at paragraph 33. From these statements, I find Sutherland J. contemplated the parties would discuss various items, including expert reports, at the third pre-trial conference. These statements did not expressly or implicitly permit the parties to serve their expert reports after the second pre-trial conference, in light of the in the first endorsement which states "Expert reports, if any, to be served pursuant to the Rules", and the second endorsement that expressly discussed late service of the defendants' report.

[38] For the foregoing reasons, I find when the defendants served the report on June 26, 2024, they served the report late and in breach of the order in the first endorsement.

Should the Court Extend the Time for Service of Expert Reports, and in Particular, the Report, to June 26, 2024?

[39] Subrule 53.03(4)(b) of the *Rules* states that the time provided for service of a report or supplementary report under this rule may be extended or abridged by the court on a motion.

[40] The *Rules* do not specify the criteria for the exercise of the court's discretion under r. 53.03(4)(b). However, the parties agree that the test under r. 53.08(1) applies to the relief sought by the defendants on this motion, and the court has applied this test for motions under r. 53.03(4): see *Pelrine et al. v. Chung et al.*, 2026 ONSC 1601 at para. 59 for a list of several such rulings from the court.

[41] The plaintiff and defendants by counterclaim urge the court to also deny the requested extension based on the report's alleged non-compliance with r. 53.03(2.1). Subrule 53.03(2.1) prescribes information that must be contained in an expert report. The plaintiff did not point me to any case law where the court has applied this subrule to motions brought pursuant to r. 53.03(4). I also note that where an expert report does not contain the information required under r. 53.03(2.1), the court has applied r. 53.08(1) to determine

whether this report can be admitted a trial: see *Snodden v 2568832 Ontario Inc.*, 2023 ONSC 6759 at paras. 28 to 44. Therefore, to determine whether the defendants are entitled to the relief sought on this motion, I decline to consider whether the content of the report complies with the requirements listed in r. 53.03(2.1), and will consider only the test under r. 53.08(1).

- [42] The test under subrule 53.08(1) is conjunctive. This subrule provides that leave may be granted to admit the evidence if the party responsible for the failure establishes a reasonable explanation for the failure, and granting the leave would not cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or cause undue delay in the conduct of the trial.
- [43] I will first address whether the defendants have established a reasonable explanation for their failure to serve the report 90 days prior to the second pre-trial conference. For the following reasons, I find the defendants have not established a reasonable explanation for this failure.
- [44] The defendants submit that if the time for delivery of expert reports was the date of the second pre-trial conference in June 2024, inadvertence of their counsel in delivering the report is a sufficient reasonable explanation. The defendants cite *Quinn et al v. Rogers et al.*, 2024 ONSC 1967 at para. 25 in support of their position.
- [45] In the affidavit of defendants' counsel sworn in support of this motion, he states as follows:

While I believed that I had delivered an expert report previously, it appears that I did not send the report before the second Pre-Trial Conference of June 18, 2024, presumably because the action was still following the Construction Lien process and because the [first] Endorsement and the Rules did not require it until after the second Pre-Trial.
- [46] The affidavit of defendants' counsel also contains statements that the parties did not discuss a timetable for the exchange of expert reports within 60 days following the filing of the trial record or at any time prior to the first or second pre-trial conference, and that the wording of the first endorsement suggested that expert reports were to be discussed at the second pre-trial conference. At the motion hearing, the defendants submitted that if there was some misunderstanding or misapplication of the *Rules*, including not applying the correct rule, this was solely through solicitor's inadvertence.
- [47] As previously discussed, I have found that expert reports, including the report, were to be served 90 days prior to the second pre-trial conference. Based on my above reasoning in paragraphs 26 to 38, although I find 53.03(1) and (2) did not apply to the action when it was under the *Construction Lien Act*, I find it was unreasonable for the defendants' counsel to have concluded that the first endorsement did not require service of the report until after the second pre-trial conference.
- [48] I do not find the defendants' reliance on *Quinn* to be helpful because *Quinn* is clearly distinguishable from this matter. In *Quinn*, the defendants' counsel stated the expert reports were served 41 days instead of 60 days before the pre-trial conference because they had

mistakenly believed the pre-trial conference was at the end of March 2024, and that their expert reports were accordingly due at the end of January 2024. The court accepted the evidence of the defendants' counsel that failing to deliver the expert reports in accordance with r. 53.03(2) was due to an inadvertent mistake.

- [49] In contrast to *Quinn*, on the evidence before me I cannot find that counsel for the defendants served the report late due to mere inadvertence, and that this inadvertence is a reasonable explanation for the late service. Unlike *Quinn*, defendants' counsel did not serve the report late based on a mistaken fact, e.g. an incorrect pre-trial conference date. Rather, I find defendants' counsel served the report late due to an unreasonable misreading of the order for expert reports made in the first endorsement, as per my reasons above at paragraphs 26 to 38. Therefore, I do not find that the defendants have provided to the court a reasonable explanation for late service of the report.
- [50] As the defendants have not satisfied the first part of the test under r. 53.08(1), I decline to extend the time for service of the report. Therefore, I will not address the second part of the r. 53.08(1) test, i.e. whether allowing late service of the report would not cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or cause undue delay in the conduct of the trial.

Disposition

- [51] For the foregoing reasons, the court declines to extend service of expert reports, including the report, to June 26, 2024, and dismisses the defendants' motion.
- [52] I am aware that since the report was served on June 26, 2024, the trial date has been moved twice and is now scheduled for September 2026. The defendants submit the plaintiff and defendants by counterclaim have had ample time since being served with the report to obtain their own responding report. As such, one may ask why the court has denied the defendants' request to extend the deadline for service of the report. The answer is that the test under r. 53.08(1) is conjunctive; it requires the defendants to satisfy both branches of the test.
- [53] I echo and agree with the following observations of Mathai J. in *Pelrine*:

[110] There is no doubt that applying the conjunctive test [of r. 53.08(1)] will lead to situations where a client is burdened by the "sins of counsel". This will occur in every case where counsel cannot establish a reasonable explanation for missing the service deadline. This, however, is not a "bug" of r. 53.08(1), it is an intentional feature.

[111] The previous version of the rule was treated as an "escape clause". It did not encourage compliance with the deadlines set forth in the *Rules*. The overuse of this "escape clause" contributed to the crisis in the civil justice system. In elevating the requirements for seeking an indulgence, the amendment was intended to send a message: missing deadlines has consequences for the civil justice system and will not be tolerated absent

satisfaction of a stringent test. Where no reasonable explanation is provided, then r. 53.08(1) ensures that the “sins of counsel” are not occasioned on the civil justice system.

Costs

- [54] Each of the parties provided costs outlines at the motion hearing. If the parties cannot agree to the disposition of the costs of the motion, they may each make submissions in writing, not exceeding three single-sided pages, double-spaced with 12-point Times New Roman or Arial font – the plaintiff and defendants by counterclaim within 20 days and the defendants within 10 days thereafter – to the attention of the Trial Coordinator.

Associate Justice C. Mak

Date: July 31, 2026