

CITATION: 1626748 Ontario Inc. v. Cy Rheault Construction Ltd., 2026 ONSC 5135
COURT FILE NO.: CV-19-00000216-0000SR
DATE: 2026-09-09

[2] This is a debt collection action. The plaintiff alleges that the defendants failed to fully pay for the work completed, failed to release the plaintiff's holdback funds, and failed to pay damages when they breached the parties' contract by retaining another electrical subcontractor to complete the project.

[3] The defendants allege that the plaintiff failed to adequately staff the project, failed to meet the project schedule, overbilled for work it had not performed, and ultimately abandoned the project. The defendants advance a claim for set-off and a counterclaim seeking damages.

[4] The plaintiff brings this motion seeking to compel answers to undertakings and questions taken under advisement arising from the examination for discovery of the defendant, Roger Rheault, as well as a further and better affidavit of documents. The notice of motion also requests orders striking pleadings and striking portions of the trial affidavit of Roger Rheault.

[5] The defendants oppose the motion, arguing relevance and proportionality.

[6] Particulars of the requested undertakings and refusals are attached as Schedule A.

Positions of the parties

The plaintiff

[7] The plaintiff is an electrical contractor. On September 26, 2013, it entered into a subcontract with the defendant, Cy Rheault Construction, to provide electrical and mechanical work at the project. The total subcontract price was \$877,743.54 (\$776,764.19 plus HST in the amount of \$100,979.35). The plaintiff alleges that it was also retained to complete a fire alarm system, and that it purchased a distribution package, as extras to the subcontract.

[8] The subcontract was terminated prior to its completion. The plaintiff alleges that, when the subcontract was terminated, there remained \$262,700.26 outstanding. It claims damages for the termination of the subcontract, unpaid services, and an outstanding holdback, totalling \$128,640.46.

[9] The plaintiff has also advanced a claim for breach of trust and seeks a tracing of trust funds, as well as a finding that the defendants are liable for the misuse of trust funds. It alleges that some or all of the defendants have been paid in full for the project and that the funds they have received represented a trust fund within the meaning of the *Construction Lien Act*, R.S.O. 1990, c.C-30 (“*CLA*”), which was the relevant legislation at the material time.

[10] The plaintiff is pursuing undertakings and refused questions that it alleges are relevant to the following issues:

- a. Whether the defendants breached their construction trust.
- b. The scope of work completed by the replacement subcontractor, Con’s Electric, for the purpose of the defendants’ set-off claim.

[11] The plaintiff’s notice of motion also requests, as alternative relief, that the Court strike the defendants’ statement of defence and counterclaim, and redact inadmissible evidence from the trial affidavit of Roger Rheault.

[12] The request to strike pleadings was not addressed by the plaintiff in oral argument.

[13] With respect to the trial affidavit of Roger Rheault, the plaintiff alleges that it introduces new evidence not previously produced, improperly contains argument and transcript references, and contains redacted documents. The plaintiff argues that the new evidence requires service of a further and better affidavit of documents and may give rise to a right to further discoveries.

The defendants

[14] The defendants argue that the plaintiff's motion is a delay tactic. They submit that this motion is the plaintiff's second attempt to summarily dispose of the defendants' defence and counterclaim.

[15] The defendants argue that the disclosure sought by the plaintiff is irrelevant. They argue that the plaintiff is not entitled to the requested disclosure because it has not established that it is a beneficiary of a trust under the *CLA* or that there has been a breach of trust.

[16] They defendants further submit that this action is proceeding under the simplified rules, and that the requested disclosure is disproportionate to the issues in dispute.

[17] As it pertains to the alternative relief requested in the notice of motion, the defendants argue that striking pleadings is not warranted relief. They further argue that redacting trial evidence ought to be reserved for the trial judge.

The law

Productions under the Rules of Civil Procedure

[18] Pursuant to Rule 31.06(1) of the *Rules of Civil Procedure*, a person being examined for discovery is required to "answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action."

[19] The scope of permissible questioning on an examination for discovery was discussed by Perell J. in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, at para. 129, and may be summarized as follows:

- a. The scope of the discovery is defined by the pleadings. Discovery questions must be relevant to the issues as defined by the pleadings.
- b. The examining party may not go beyond the pleadings to attempt to find claims or defences that have not been pleaded. Overbroad or speculative discovery, also known as a "fishing expedition", is not permitted.
- c. The Rule defines the scope of discovery as being "relevant to any matter in issue". This is narrower than the scope of discovery prior to amendments to the Rules in 2010 and must be considered when reviewing the case law; it is no longer sufficient that there be a mere semblance of relevancy.

- d. The extent of discovery is not unlimited. The court has the power to restrict an examination for discovery that is onerous or abusive to keep discovery within reasonable and efficient bounds.
- e. The party being examined may be questioned regarding hearsay evidence. An examination for discovery requires the witness to give not only their knowledge but their information and belief about the matters in issue.
- f. The party being examined may be questioned regarding their position on questions of law.

[20] Relevance in the context of discovery is broader than relevance in the context of trial. Admissibility is not a consideration at discovery but rather is an issue for trial: *XCG Consultants Inc. v. ABB Inc.*, 2013 ONSC 7035, at para. 11.

[21] The threshold to demonstrate relevance is not significant. A relevant question or document is one which makes the existence of a fact in issue more or less likely. Relevance is determined having regard to logic and human experience: *F.K. Machinery Limited v. Exxonmobile Canada Products Ltd.*, 2022 ONSC 3357, at para. 14.

[22] As noted, the scope of permissible discovery is not limitless. It is tempered by privilege and by proportionality. Pursuant to Rule 29.2.03, in assessing proportionality, the Court is required to consider:

- a. whether the time required to answer the question or produce the document would be unreasonable;
- b. whether the expense associated with answering the question or producing the document would be unjustified;
- c. whether requiring an answer to a question or the production of a document would cause undue prejudice;
- d. whether requiring an answer a question or the production of a document would unduly interfere with the orderly progress of the action; and,
- e. whether the information or the document is readily available to the party requesting it from another source.

[23] Once a party, or their counsel, gives an undertaking during oral discovery, they are required to answer that undertaking. In *Fyffe (Fyffe Logging) v. Ontrac Equipment Services Inc.*, 2008 CanLII 48133 (ON SC) at para. 12, the Court noted:

Undertakings are not subject to negotiation. They are a promise that the court enforces. Once they are given, they must be honoured. It makes no difference that the party who gave them considers them burdensome, irrelevant or overly broad after the fact.

[24] Pursuant to Rule 30.08(1), a party that fails to produce a document favourable to their case in an affidavit of documents or a supplementary affidavit, or in compliance with the *Rules*, an order of the court, or an undertaking, may not use that document at trial without leave. If the document is unfavourable to the party's case, the court may make such order as is just.

Application of the Construction Lien Act

[25] Pursuant to ss. 7 and 8 of the *CLA*, all amounts received by an owner or contractor that are to be used to finance an improvement and any amount that is required to be retained as a holdback constitute a trust fund for the benefit of the contractor or subcontractor carrying out the improvement. Pursuant to s.7(4) of the *CLA*, the owner or contractor may not appropriate or convert any part of that fund for their own use or any use inconsistent with the trust until all contractors or subcontractors have been paid.

[26] Pursuant to s. 13 of the *CLA*, every director and officer who assents to, or acquiesces in, conduct that they know or reasonably ought to know amounts to a breach of trust by a corporation that is an owner or contractor is also liable for a breach of trust.

[27] In a claim for breach of trust under the *CLA*, the plaintiff's onus is merely to demonstrate that it is entitled to the protection of the trust fund provisions in the *CLA*. The onus then shifts to the defendant to demonstrate that it complied with its obligations as trustee and that it properly disbursed the trust funds to the beneficiaries or as permitted by the *CLA*.

[28] In *St. Mary's Cement Corp. v. Construc Ltd.*, 1997 CanLII 12114 (ON CTGD), the onus on the plaintiff in a breach of trust action was described as follows:

It is common ground that there is an initial onus on the plaintiff to prove the existence of a trust under s. 8 of the Act. In order to discharge that onus in this case, the plaintiff would need to show that Construc received moneys on account of its contract price for a particular project, that the plaintiff supplied materials on that project and that Construc owes money to the plaintiff for those materials. If all of these elements are clearly proven on the evidence, the trust provisions of s. 8 come into play.

[29] Pursuant to s. 39 of the *CLA*, any person having a lien or who is the beneficiary of a trust under the *CLA* is entitled to receive information upon request from an owner or contractor. In this action, at the relevant time, there was no statutory right to receive a tracing of trust funds. The plaintiff did have the ability at common law to seek a tracing order upon demonstrating a right to receive trust funds.

Analysis

Undertakings

[30] As noted by the Court in *Fyffe*, unconditional undertakings must be satisfied once they are given, without exception. Unless otherwise qualified, they are a promise not only of the party, but

also the counsel, who gives them. An undertaking is an acknowledgement that a question is proper and that the subject-matter of the undertaking is relevant: *Towne v. Miller*, 2001 CanLII 28006 (ON SC), at para 8.

[31] Upon reviewing the transcript of the examination for discovery of Roger Rheault, conducted on July 22, 2024, I am satisfied that the following undertakings were given by the defendant's counsel unconditionally and must be satisfied:

- a. **To provide a copy of the entire Prime Contract between 2359193 Ontario Inc. and Cy Rheault Construction Ltd.** It is the plaintiff's evidence that the contract was provided for Phase 2, but not Phase 1, of the project. As there was no qualification when the undertaking was given, I find that the entire Prime Contract for all phases of the project must be produced.
- b. **To provide a copy of the first financing agreement for the project.** An unconditional undertaking was given to disclose the first financing agreement.
- c. **To provide a copy of the agreement with Con's Electric for its work on the project and a copy of all communications with respect to the work it did on the project.** The undertaking agreed upon by counsel was to provide a copy of the agreement with Con's Electric for the work it performed on the project, as well as any communications with Con's Electric regarding their scope of work and/or that would demonstrate they were retained to conduct deficiency work.
- d. **To provide communications between 2359193 Ontario Inc. and La Caisse and Don Narbonne regarding the status of the project at the time of the extension of financing or the second financing agreement being entered into.** This undertaking was qualified to provide that the communications to be produced were those in the possession of the defendants.
- e. **To provide a copy of the contract with Wright Architect.** An unconditional undertaking was given to disclose this contract.

[32] The plaintiff also submits that the defendants gave an undertaking, "To provide proof that 10 percent was held back by La Caisse and rolled into the financing deal for phase 2." While it is true that this was initially given as an undertaking, counsel immediately altered his position on the record and gave this undertaking under advisement after his client expressed concerns about the scope of the information included in the requested documents. This request will therefore be considered a refusal for the purpose of this motion.

Refusals

[33] Upon reviewing the transcript of the examination for discovery of Roger Rheault, conducted on July 22, 2024, the refusals can be distilled into three requests:

- a. To provide a copy of the second financing agreement for the project (Q. 96, P. 23 and Q. 110, P. 27);

- b. To provide tracing of all funds received from La Caisse and flowing through the project (Q. 263, P. 79 and Q. 270, P. 82); and,
- c. To provide proof that 10 percent was held back by La Caisse and rolled into the financing deal for phase 2 (Q. 274, P. 84).

1. To provide a copy of the second financing agreement for the project

[34] In his examination for discovery, Roger Rheault provided the following evidence, either on his own behalf or through his counsel:

- a. The plaintiff was involved in “phase 1” of the contract, but not “phase 2” of the contract. (Q. 95-96, PP. 22-23)
- b. Funds were held back from the plaintiff. (Q. 177, P. 50)
- c. The “phase 2” financing of the project included holdbacks from “phase 1” of the project. (Q. 265, P. 80)

[35] At trial, to establish its breach of trust claim, the plaintiff will be required to prove that the defendants received funds on account of the project to which the plaintiff is entitled. Based upon the evidence provided at discovery, I am satisfied that the defendants may have received funds in both the “phase 1” financing and the “phase 2” financing to which the plaintiff may be entitled, including holdback funds. As such, the second financing agreement is relevant, and it must be produced.

2. To provide tracing of all funds received from La Caisse and flowing through the project

[36] Question 270 in the examination of Roger Rheault consisted of the following exchange between counsel:

Q. So, we can start with those, but I am entitled to everything, and if you want to send me that first, that's fine. Because I don't want to read through it any more than you want to give it to me, but -- neither does your lawyer, but I need to see the accounting on the project. I need a tracing of all the money that's trust money coming from La Caisse. So, start with what you can and we'll go from there, but I would like -- you can take it however you want. I'm asking for the undertaking for the complete tracing of all funds that flowed from La Caisse and where they ended up, that came from La Caisse on this project.

MR. PATERSON: We'll just take that under advisement for now.

MS. MCKENZIE: Okay.

MR. PATERSON: Just given -- I mean, again, just given the scale of this, it's going to be huge. I mean, it's not going to be useful or relevant to anybody. **So, it's -- you are entitled to it, I agree, but just in terms of being practical here.** So, maybe we'll take that under advisement.

[Emphasis added]

[37] In determining the defendants' obligation to answer this question, it is important to distinguish between tracing for the purpose of trial, for which the undertaking is being requested, and the tracing order sought as relief by the plaintiff in its statement of claim.

[38] The plaintiff has advanced a claim for breach of trust by the defendants. To prove its claim at trial, the plaintiff is required to establish the existence of a trust and an entitlement to funds from that trust. The burden then shifts to the defendant to demonstrate that it did not breach its trust obligations in its disposition of the funds. The defendant may discharge its evidentiary burden through an accounting of the trust funds; often this is satisfied by providing a tracing.

[39] While failing to provide a tracing at trial is not necessarily fatal to a defendant's position, a defendant that elects not to marshal such evidence does so at its own peril: *St. Mary's Cement*.

[40] In the matter before me it is my view that, at the discovery stage, the plaintiff is not entitled to a tracing. Rather, it is entitled to any evidence upon which the defendants intend to rely at trial to demonstrate that they did not breach their trust obligations in their disposition of funds earmarked for the project.

[41] It is possible that the defendants' evidence will consist of documents tracing the disposition of the funds. The defendants may, however, elect to satisfy their onus with other evidence. Regardless of how the defendants elect to proceed, they must be mindful of Rule 30.08 – they cannot expect to appear at trial and present documentary evidence for the first time that has not previously been disclosed to the plaintiff.

[42] This relief is separate and distinct from the plaintiff's request for a tracing order as a form of substantive relief. The entitlement to such an order is an issue which will be determined at trial.

3. To provide proof that 10 percent was held back by La Caisse and rolled into the financing deal for phase 2

[43] As noted above, the defendant's counsel gave this undertaking and then changed his position after the defendant expressed concerns about, "intercompany financial information" that was included in the documents. There was no issue raised at that time regarding relevance.

[44] In my view, the holdback evidence is relevant to understanding what funds were received by the defendants on account of the project. This is relevant to the breach of trust claim which has been advanced by the plaintiff. As such, this is evidence which must be produced.

[45] I acknowledge the defendants' concern that this disclosure may contain some sensitive corporate financial information which is not relevant to this proceeding. I will therefore also be directing that the defendants may redact any irrelevant information, provided they identify the nature of the information redacted to permit the plaintiff to decide whether to challenge the redactions.

Further and better affidavit of documents

[46] The plaintiff alleges that the trial affidavit of Roger Rheault, sworn April 16, 2026, includes exhibits and other evidence that the plaintiff is receiving for the first time. The plaintiff identifies examples such as evidence regarding Jain Sustainability Consultants Inc., Winmar, and Wright Architects.

[47] Pursuant to Rule 76.03, parties to an action under the simplified rules are required to serve affidavits of documents disclosing, to the full extent of the party's knowledge, information and belief, all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

[48] I have reviewed the affidavit of documents disclosed by the defendants, as well as the undertakings given and refused at the examinations for discovery of the defendants. I agree with the plaintiff that there appear to be documents in the trial affidavit of Roger Rheault which are not disclosed elsewhere by the defendants.

[49] Documentary evidence should not be disclosed for the first time in a trial affidavit. While the trial judge could simply elect to strike the documentary evidence from the affidavit pursuant to Rule 30.08, this does not necessarily assist the plaintiff, who may wish to question the defendants regarding the documents and potentially rely on them at trial.

[50] In my view, the only appropriate remedy is to order the defendants to serve and file a further and better affidavit of documents. As this may give rise to a need for further discoveries, I am also going to direct that a Rule 50.13 conference be scheduled at the earliest date available to the Court and the parties to address next steps.

Striking pleadings and striking trial affidavits

[51] As noted above, while the plaintiff requested an order striking the defendants' pleadings in their notice of motion, it is not relief that was addressed in oral argument.

[52] Striking a pleading is an exercise of discretion. It is a remedy of last resort, typically reserved for litigants who are not otherwise amenable to observing their statutory obligations or the court's directions: *Ponnampalam v. Thiravianathan*, 2023 ONSC 1361, at para. 6.

[53] At this time, I do not view the defendants' conduct as rising to a level which would warrant striking their pleadings. This request by the plaintiff is therefore denied.

[54] The plaintiff also requests that I strike portions of the trial affidavit of Roger Rheault. In my view, that is an issue which ought to be addressed either as a pretrial motion with the trial

judge, or at trial; it is an issue of the admissibility of trial evidence. It would be premature for me to address a request to strike trial evidence on this motion as it is possible that I will not be the trial judge. This request by the plaintiff is therefore also denied.

Disposition

[55] In disposition of this motion, I hereby order and direct the following:

1. The defendants shall forthwith, but in any event within 30 days of the date of this order or such later date as may be agreed in writing between the parties, provide the following to the plaintiff:
 - a. A copy of the entire Prime Contract between 2359193 Ontario Inc. and Cy Rheault Construction Ltd.
 - b. A copy of the first financing agreement for the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd.
 - c. A copy of the agreement with Con's Electric for its work on the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd. and a copy of all communications with respect to the work it did on the project.
 - d. A copy of any communications in the possession of the defendants between 2359193 Ontario Inc. and La Caisse and Don Narbonne regarding the status of the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd. at the time of the extension of financing or the second financing agreement being entered into.
 - e. A copy of the contract with Wright Architect.
 - f. A copy of the second financing agreement for the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd.
2. The defendants shall forthwith, but in any event within 60 days of the date of this order or such later date as may be agreed in writing between the parties, provide the following to the plaintiff:
 - a. All documentary evidence upon which it intends to rely at trial in support of its position that it satisfied its trust obligations in its disposition of funds earmarked for the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd. This order is made without prejudice to the plaintiff's right to request further discoveries and/or further and better disclosure once it has received the defendants' documentary evidence. This order is also made without prejudice to the plaintiff's ability to request a tracing order at trial.
 - b. Evidence that 10 percent of funds were held back by La Caisse and rolled into the financing deal for phase 2 of the project between 2359193 Ontario Inc. and Cy Rheault Construction Ltd. The defendants may redact any irrelevant information

from the disclosed documents, provided they identify the nature of the information redacted.

- c. A further and better affidavit of documents.
3. The plaintiff's request to strike the defendants' pleadings and strike portions of the trial affidavit of Roger Rheault, sworn April 16, 2026, are denied, without prejudice to the plaintiff's ability to re-file motions seeking this relief.
4. The parties shall contact the trial co-ordinator by email within 15 days of the date of this order to schedule a case conference pursuant to Rule 50.13.
5. If the parties are unable to agree upon costs of this motion, they may make submissions in writing, not exceeding 3 pages double-spaced, within 30 days of the date of this order.

Cullin J.

Released: September 9, 2026

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1626748 ONTARIO INC. o/a GEM ELECTRIC
MOTOR SERVICE INC.

Plaintiff

– and –

CY RHEAULT CONSTRUCTION LTD. and 2359193
ONTARIO INC., CAROLE RHEAULT-GIBOULEAU
and ROGER RHEAULT

Defendants

DECISION ON MOTION

Cullin J.

Released: September 9, 2026

SCHEDULE A

1626748 Ontario Inc. v. Cy Rheault Construction Ltd.
Court File No. CV-19-00000216-0000SR

**Discovery of Roger Rheault
Conducted July 22, 2024**

No.	Reference	Request
1.	Undertaking Q. 35, P. 8	To provide a copy of the Prime Contract between 2359193 Ontario Inc. and Cy Rheault Construction Ltd.
2.	Undertaking Q. 110, P. 27	To provide a copy of the first financing agreement for the project.
3.	Undertaking Q. 158, P. 42	To provide a copy of the agreement with Con's Electric for its work on the project and a copy of all communications with respect to the work it did on the project.
4.	Undertaking Q. 176, P. 53	To provide communications between 2359193 Ontario Inc. and La Caisse and Don Narbonne regarding the status of the project at the time of the extension of financing or the second financing agreement being entered into.
5.	Undertaking Q. 274, P. 84	To provide proof that 10 percent was held back by La Caisse and rolled into the financing deal for phase 2.
6.	Undertaking Q. 291, P. 90	To provide a copy of the contract with Wright Architect.
7.	Under Advisement (Refused on basis of relevance) Q. 96, P. 23	To provide copies of financing documents for this project in phase one and phase two and any other phases from La Caisse and between La Caisse and between 2359193 Ontario Inc.
8.	Under Advisement (Refused on basis of relevance) Q. 110, P. 27	To provide financing documents with respect to phase two of the project.

9.	Under Advisement (Refused on basis of relevance) Q. 263, P. 79	To provide tracing of all funds flowing through La Caisse to the project.
10.	Under Advisement (Refused on basis of relevance) Q. 270, P. 82	To provide tracing of all funds flowing through La Caisse for the project.