

CANADA / JUDGMENT

Hi-Tide Shoring & Foundations (2012) Ltd. v. Chandos Construction Ltd.

2025 BCCA 396

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 396 Hi-Tide Shoring & Foundations (2012) Ltd. v. Chandos Construction Ltd COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Hi-Tide Shoring & Foundations (2012) Ltd. v. Chandos Construction Ltd., 2025 BCCA 396 Date: 20251007 Docket: CA49921 Between: Hi-Tide Shoring & Foundations (2012) Ltd. Appellant (Plaintiff) And Chandos Construction Ltd. Respondent (Defendant) Before: The Honourable Justice Dickson (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated May 28, 2024 (Hi-Tide Shoring & Foundations (2012) Ltd. v. Chandos Construction Ltd., 2024 BCSC 903, Vancouver Docket S224902). Oral Reasons for Judgment Counsel for the Appellant: A. Beesley W. Tang Counsel for the Respondent: A.T. Maltas N. Korac Place and Date of Hearing: Vancouver, British Columbia September 17, 2025 Place and Date of Judgment: Vancouver, British Columbia October 7, 2025 Summary: The appellant filed a notice of appeal from an order dismissing an application for a declaration of builders lien on a summary trial. The parties disagreed over whether leave to appeal is required. The appellant seeks direction that leave to appeal is not required, or alternatively, if leave is required, seeks leave to appeal. Held: The order on appeal is a limited appeal order and leave to appeal is required. Since there was more than one possible source of authority for the order, one of which would not require leave to appeal, the notice of appeal is converted to a notice of application for leave to appeal. However, leave to appeal is refused. The proposed appeal is not of significance to the practice or the proceeding itself. The proposed grounds of appeal are without merit, and the appeal would add costs and unduly delay the proceeding below. DICKSON J.A.: Overview

- [1] This is an application for a direction that leave to appeal is not required in respect of an order dismissing the application of Hi-Tide Shoring & Foundations (2012) Ltd., for a declaration of builders lien on a summary trial. Alternatively, if leave is required, Hi-Tide seeks an order converting its notice of appeal to an application for leave to appeal and an order granting leave to appeal.

Background

- [2] The underlying action arises out of a 2020 development project with respect to an elementary school. The Board of Education of the School District in question was the owner of the Project. Chandos Construction Ltd. was the general contractor. Eagle Valley Excavating was a subcontractor to Chandos. Hi-Tide was a sub-subcontractor to Eagle Valley.
- [3] Chandos terminated Eagle Valley's subcontract on May 21, 2021, alleging various defects.
- [4] On May 28 and June 18, 2021, respectively, Eagle Valley and Hi-Tide filed claims of builders lien against the Project Lands.
- [5] On July 13, 2021, Chandos posted a \$1,494,432 lien bond to remove Eagle Valley and Hi-Tide's liens from title. It allocated \$1,056,444 as security to Eagle Valley and \$437,988 as security to Hi-Tide.
- [6] On June 20, 2022, Hi-Tide commenced the underlying action against Chandos and Eagle Valley. On August 11, 2023, it filed a notice of application for summary trial seeking judgment against Eagle Valley for \$437,988, which was the outstanding balance on its account. It also sought a declaration of builders lien against the lien bond. The summary trial
- [7] The summary trial was heard on August 30, 2023. As of that date, there were eight liens filed against the Project Lands, with five of the eight lien claimants having filed notices of civil claim.
- [8] Eagle Valley did not respond to the summary trial application. However, Hi-Tide's counsel advised the Court that Eagle Valley took no position because it did not contest the debt, but it was unable to pay because of its ongoing dispute with Chandos.
- [9] Hi-Tide contended that the issues on the application were legal and not factual in nature, so the matter was suitable for summary trial determination. It argued that the issues were the maximum amount of the lien and when the holdback monies were to be paid. Hi-Tide acknowledged that no certificate of completion had been issued for either the Project as a whole or its work on the Project, but asserted that its work was complete and argued that it should not have to wait for other lien claimants to come forward or for the dispute between Chandos and Eagle Valley to be resolved.
- [10] Chandos opposed the application for a declaration of builders lien on the basis that it had been brought prematurely and must be consolidated with lien claims made by other possible claimants. Accordingly, it contended the matter was not suitable for determination on summary trial. In support, Chandos emphasized that the Project was not yet complete, no certification of completion had been issued, the 55-day holdback period had not yet begun, and, until that period expired, no payments from the holdback could be made and other lien claimants could still come forward.

- [11] Hi-Tide and Chandos disagreed on the proper interpretation of s. 34 of the Builders Lien Act, S.B.C. 1997, c. 45. After the summary trial
- [12] On October 30, 2023, substantial completion of the Project was achieved.
- [13] The holdback retention period expired on December 24, 2023. The summary trial decision
- [14] On May 28, 2024, the judge delivered his reasons. He granted Hi-Tide judgment against Eagle Valley in debt but dismissed its application for a declaration of builders lien.
- [15] The judge concluded that it was premature to "entertain Hi-Tide's application for a declaration of lien against the lien bond": at para. 32. In doing so, he noted that "[a]s at the date of hearing this application, the Project was not complete and no certificate of completion had been issued": at para. 32. He also noted that, while Hi-Tide had argued its work was complete, this was of no moment as s. 8 of the Builders Lien Act fixes the running of the holdback period to either a certificate of completion, or the completion, abandonment, or termination of the head contract, none of which had occurred: at para. 33. He noted further that Hi-Tide was seeking judgment against the lien bond in the full amount of its claim, which he said was "misconceived, as such a judgment would offend s. 24(5) of the BLA": at para. 37.
- [16] The judge addressed the parties' disagreement on whether Hi-Tide could claim against holdbacks retained farther up the construction chain. In doing so, he stated:
- [39] Although it is not necessary that I address this in light of my conclusion that Hi-Tide's application for a declaration is both premature and must be dealt with together with lien claims made by other parties, I accept that it may assist the parties if I do so.
- [17] Then, in obiter, he expressed the view that s. 4(9) of the Builders Lien Act provides for a lien claimant to seek recourse from any holdback retained up the construction chain: at para. 40.
- [18] Under the heading "Conclusion", the judge granted judgment against Eagle Valley in the amount of the debt, together with interest. As to Hi-Tide's application for a declaration of builders lien, he said this:
- [46] Hi-Tide's application for a declaration of builders lien against the lien bond posted in this case is dismissed because it is both premature and must be dealt with together with any lien claims made by other parties. The Appeal
- [19] On June 7, 2024, Hi-Tide filed a notice of appeal seeking to obtain a declaration of builders lien and indicating that leave to appeal was not required.
- [20] According to Hi-Tide, the judge erred in finding it was premature to make a declaration of builders lien in its favour until all third-party lien claimants had the opportunity to prove their liens.

- [21] After the notice of appeal was filed, a disagreement arose between the parties concerning whether leave to appeal is required.
- [22] According to *Hi-Tide*, there is an automatic right to appeal from the judge's order. According to *Chandos*, the order was made pursuant to R. 9-7(11) of the Supreme Court Civil Rules and is therefore a limited appeal order, which requires leave to appeal.

Issues

[23] The issues for determination are:

- a) Is leave to appeal required?
- b) If so, should the notice of appeal be converted into an application for leave to appeal?
- c) If the notice of appeal should be converted into an application for leave to appeal, should leave to appeal be granted? Law Whether leave is required

[24] Pursuant to s. 13(2)(a) of the Court of Appeal Act, S.B.C. 2021, c. 6, leave to appeal is required where the appeal is from a limited appeal order. Limited appeal orders are defined in R. 11 of the Court of Appeal Rules. Rule 11(a)(iv) provides that an order granting or refusing relief under R. 9-7(11) of the Supreme Court Civil Rules is a limited appeal order.

[25] Rule 9-7(11) provides:

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
- (a) adjourn the summary trial application, or
 - (b) dismiss the summary trial application on the ground that
 - (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or (ii) the summary trial application will not assist the efficient resolution of the proceeding.

[26] After hearing a summary trial application, the judge is left with three alternatives: adjourn, dismiss, or grant judgment in favour of either party. If the judge dismisses or adjourns a summary trial application, they do so pursuant to R. 9-7(11); if judgment is granted by way of a summary trial, it is done pursuant to R. 9-7(15): *Michael Wilson & Partners, Ltd. v. Desirée Resources Inc.*, 2016 BCCA 296 at para. 26 (Chambers), *aff'd* 2017 BCCA 139; 696591 B.C. Ltd. v. Madden, 2014 BCCA 517 at paras. 5-6 (Chambers).

[27] Only orders actually granting judgment in favour of a party after summary trial proceedings are properly characterized as being made under R. 9-7(15): *Michael Wilson* at para. 30; *Madden* at paras. 5-6. Whether the notice of appeal should be converted

- [28] Where the requirement for leave is uncertain, the proper procedure is to submit an application for leave to appeal. The presiding justice may order that the notice of application for leave to appeal stand instead of a notice of appeal, along with any necessary extensions of time: *Kasian Estate v. Kasian*, 2021 BCCA 273 at para. 18 (Chambers) citing *Commencing an Appeal When Uncertain if Leave to Appeal is Required* (Civil Practice Directive, 8 May 2017).
- [29] In *Liu v. Du*, 2021 BCCA 221 (Chambers), Justice Griffin commented, in ordering that a notice of appeal be converted to an application for leave to appeal, that she was inclined towards leniency with an applicant "where there was more than one possible source of authority for the order " : at para. 41. Test for leave to appeal
- [30] The well-established test for leave to appeal was articulated by Justice Saunders in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers):
- (1) whether the point on appeal is of significance to the practice;
 - (2) whether the point raised is of significance to the action itself;
 - (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - (4) whether the appeal will unduly hinder the progress of the action.
- [31] All four criteria are considered under the rubric of the interests of justice, which is the overarching consideration: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2 (Chambers); *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).
- [32] The merits threshold is generally low: *Saran v. Cartonio, Inc.*, 2020 BCCA 252 at para. 17 (Chambers).
- [33] Where leave to appeal is sought from a discretionary order, the analysis of whether the appeal is prima facie meritorious takes into account the standard of review from the exercise of judicial discretion: *Saran* at para. 18 citing *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 (Chambers). This means that where the order sought to be appealed is a discretionary order, the court will only grant leave if there is an arguable case that the judge erred in principle, made an order not supported by the evidence, or that the order will result in an injustice: *Saran* at para. 19.

Analysis

Whether leave is required

- [34] Hi-Tide submits the judge did not dismiss the summary trial application under R. 9-7(11). It contends that he did not find its application for a declaration of builders lien against the lien bond unsuitable for determination under R. 9-7(11)(b)(i) or inefficient for resolving the proceeding under R. 9-7(11)(b)(ii). Rather, he assessed the substance of the application,

determined the application was premature, and formed the view that the declaration could only be made at a consolidated hearing with all other lien claims. In these circumstances, Hi-Tide submits, the order falls outside of R. 9-7(11) and it has an automatic right of appeal.

- [35] I do not accept this submission. The judge did not determine the merits of the summary trial application. He dismissed it because he found it was unsuitable for determination on the basis that it was premature and should be heard alongside other parties' lien claims. He also noted expressly that his obiter comments were unnecessary given the discretionary unsuitability determination, however, he offered them for the assistance of the parties.
- [36] Given that the judge did not engage with the merits of the application or grant judgment in favor of a party, his order was made under R. 9-7(11). It follows that leave to appeal is required. Whether the notice of appeal should be converted
- [37] Hi-Tide submits that I should exercise my discretion to convert the notice of appeal into an application for leave to appeal given that the source of authority for the judge's order did not clearly fit within R. 9-7(11). In particular, it says, the judge both assessed the substance of the application and found it to be premature. In these circumstances, it contends that the interests of justice would be served by the notice of appeal being converted to a notice of application for leave to appeal.
- [38] In dismissing Hi-Tide's application for summary trial, the judge did not explicitly use the language of suitability found in subrule (11). Although I am satisfied his order was made under that subrule, I accept that there may have been some room for confusion regarding the source of his authority for the dismissal order. That being so, an application for leave to appeal should have been filed. However, I nevertheless exercise my discretion to convert the notice of appeal to a notice of application for leave to appeal. Test for leave to appeal
- Importance to the Practice
- [39] Both parties agree that the issues raised by Hi-Tide are important to the practice, particularly regarding the interpretation of s. 34 of the Builders Lien Act. However, Chandos submits that the order concerning which leave to appeal is sought does not engage these issues. I agree. The judge's comments relating to the interpretation of the Builders Lien Act and Hi-Tide's potential claim against holdbacks are not part of the operative order and cannot form the basis for a viable appeal. Appeals are brought from the formal order entered in the court appealed from, not from the reasons for judgment that gave rise to the order: *Diabate v. Campbell*, 2022 BCCA 54 at para. 15 (Chambers). Importance to the Action
- [40] Hi-Tide submits that the proposed appeal raises the central issue of whether it is entitled to a builders lien at this stage of the proceeding, which goes directly to whether it can secure and enforce its claimed lien rights. Chandos submits that the appeal is of no significance to the action, because the order does not make any determination on the law or facts going to the merits of the proceeding. According to Chandos, those matters should be determined in the first instance in the trial court. Chandos advises that it has agreed the matter can go back before the trial court for summary trial: *Jiang v. Peoples Trust Company*, 2022 BCCA 40

at para. 46 citing *Saran* at para. 23.

- [41] In these circumstances, I do not accept that the proposed appeal is significant to the action. Even if Hi-Tide were to succeed on appeal, the matter would likely be remitted back to the trial court with directions as to the suitability of a summary trial application, which, as I understand it, is no longer in dispute: *North Root Cannabis Ltd. v. 663466 B.C. Ltd.*, 2024 BCCA 105 at para. 56. Whether the Appeal is Prima Facie Meritorious
- [42] Whether the builders lien application should be determined on a summary trial is a discretionary determination. Accordingly, it will be afforded considerable appellate deference: *Creyke v. Creyke*, 2016 BCCA 499 at para. 46.
- [43] Hi-Tide contends that the appeal has strong merit. In its submission, once the judge granted judgment in its favour against Eagle Valley, a declaration of builders lien should have followed as a matter of course. It says the proper course of action was to grant the declaration of lien and order a stay of execution on the declaration until the Project's completion.
- [44] I am not persuaded by this submission. In my view, Hi-Tide has not demonstrated a "good arguable case of sufficient merit to warrant scrutiny by a division of this Court": *North Root Cannabis Ltd.* at para. 44. The judge made a highly discretionary determination in concluding that the matter was unsuitable for summary trial on the basis that the application was premature and must be dealt with together with lien claims made by other parties: *North Root Cannabis Ltd.* at para. 50. That there may have been another possible course of action does not render the exercise of that discretion erroneous. Whether the Appeal Will Unduly Hinder the Action
- [45] Historically, this factor has been characterized as the most important of the four: *Hockin v. Bank of B.C.* (1989), 37 B.C.L.R. (2d) 139 at para. 20, 1989 CanLII 2751 (C.A.). Relevant considerations include concerns as to timing and the sufficiency of the factual matrix, time-sensitive aspects of the litigation, or the possibility of settlement negotiations: *Jiang* at para. 56.
- [46] Hi-Tide submits that the proposed appeal will not unduly hinder the progress of the action because the proceedings are stalled pending the determination of the rights of all third-party lien claimants. Chandos submits that allowing this appeal to proceed will likely prolong litigation and add cost unnecessarily since these issues can and should be determined at the first instance in the Supreme Court.
- [47] As I have noted, even if Hi-Tide were to succeed on appeal, the most likely result would be that the matter would be remitted back to the trial court for a determination on the merits. In the circumstances, I am inclined to agree with Chandos that granting leave to appeal could prolong the litigation and add unnecessary cost.

Conclusion

[48] Given all of the foregoing, I conclude that it is not in the interests of justice to grant leave to appeal. The application for leave to appeal is dismissed. "The Honourable Justice Dickson"

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