Memo To: Doble & Doble LLP, Mark Dobl
File: No File Selected
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Jurisdiction: Saskatchewan, Canada
Date: July 22, 2020
Regarding: Limitation Period For Builder's Liens

Issue

What is the limitation period for the enforcement of a Builder's Lien?

Facts

A is contracted to complete a renovation. A has an agreement with the owner that the owner will pay a portion of the cost of the renovation when it was undertaken, and the balance upon sale of the property. A registers a lien following completion. 3 years later, the house is sold but the owner refuses to pay the balance. The owner claims the lien is past the limitation period.

Conclusion

Standard limitations periods are set out in *The Limitations Act*. Pursuant to section 5, no proceedings shall be commenced with respect to a claim after 2 years from the day on which the claim is discovered. Section 6 provides that a claim is discovered on the day on which the claimant first knew, or in the circumstances ought to have known:

> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed by an act or omission that is the subject of the claim;

(c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and,

(d) that, having regard to the nature of the injury, loss, or damage, a proceeding would be an appropriate means to seek to remedy it.

Subsection 6(2) provides that a claimant is presumed to have known of the matters mentioned previously on the day on which the act or omission on which the claim is based took place, unless the contrary is proved (*The Limitations Act*).

The Limitations Act applies to a builder's lien claim because *The Builders' Lien Act* envisions that an action to enforce a claim of lien is to be commenced by statement of claim. A builder is presumed to have known of or discovered its claim on the day that the act or omission on which the claim is based took place (*Syed v. 612565 Saskatchewan Ltd.*).

The limitation period applicable to a builder's action to enforce its claim of lien is fixed by s.5 of the limitations act, namely 2 years after the day on which the claim was discovered. The registration of a claim of lien may be relevant evidence in determining whether a claim has been discovered, but it does not necessarily mean that the limitation period has begun to run. The enquiry into whether a claim has been discovered is fact-driven (*West Dee Construction Ltd v T & B Electric Ltd*). On the facts, the Court in *West Dee* held that the limitations period began to run was when payment on certain invoices was overdue.

As the question of when a claim is discovered is one of fact, a cause of action does not arise automatically when a lien comes into existence by virtue of the provision of services or materials nor later by virtue of a lien being filed with the Registrar of Titles. Liens themselves arise immediately on the provision of services and materials, but depending on the applicable contractual arrangements, the obligation of the person receiving those services or materials to pay for them might not be coincident with their supply. There can sometimes be a lag time between the provision of materials or services and the right to demand payment for them. In other words, a lien can be filed before the price of relevant services or materials becomes due and payable, and hence before the provider of the services or materials has a basis for commencing an action to enforce its claim of lien. Actions aimed at enforcing a lien must be commenced within 2 years

from the day on which the claim is discovered. If an action to enforce a claim of lien is statute-barred then the lien itself, or more accurately the interest represented by the claim of lien, should be removed from title (*Artis Builders v Kehoe*). In *Artis*, the claim was found not to have been discovered more than 2 years after registration of the builder's lien due to the particular arrangement between the parties.

The expiration of the limitation period extinguishes the underlying claim for a builder's lien (*Nayeem Uddin v Tubello Stoneworks Ltd.*).

Law

Standard limitations periods are set out in *The Limitations Act*, SS 2004, c L-16.1. Pursuant to section 5, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered. Section 6 provides that a claim is discovered on the day on which the claimant first knew, or in the circumstances ought to have known: (a) that the injury, loss or damage had occurred; (b) that the injury, loss or damage appeared to have been caused by or contributed by an act or omission that is the subject of the claim; (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and (d) that, having regard to the nature of the injury, loss, or damage, a proceeding would be an appropriate means to seek to remedy it. Subsection 6(2) provides that a claimant is presumed to have known of the matters mentioned previously on the day on which the act or omission on which the claim is based took place, unless the contrary is proved:

> Limitation Periods
>
> Basic limitation period
>
> 5 Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.
>
> Discovery of claim
>
> 6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances

ought to have known:

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;

(c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and

(d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

(2) A claimant is presumed to have known of the matters mentioned in clauses (1) (a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

In *Syed v. 612565 Saskatchewan Ltd.*, 2009 SKQB 141 (CanLII) owners brought a motion for a declaration that a builder's lien was void and for return of the monies paid into court by the landowners. The landowners argued that if the lien claimant proceeded to commence an action in relation to their lien that the action would be statute-barred.

The Court held that The Limitations Act applied to the lien claim because the Builders' Lien Act envisioned that an action to enforce a claim of lien was to be commenced by statement of claim. The Court held that the builder was presumed to have known of or discovered its claim against the landowners on the day that the act or omission on which the claim is based took place. The Court held that the claim was beyond the 2-year limitation period, and thus statute-barred by s.5:

[15] The new Limitations Act, S.S. 2004, c. L-16.1, came into force on May 1, 2005, and pursuant to c. 28, it repealed The Limitation of Actions Act, R.S.S. 1978, c. L-15. Application of The Limitations Act is addressed in s. 3 and in particular ss. (1) and (4) which provide:

3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:

(a) are commenced by statement of claim; or

(b) are commenced by originating notice and are not proceedings in the nature of an application.

. . .

(4) This Act does not apply to a claim that is subject to a limitation provision in another Act or a regulation if that Act or regulation states that the limitation provision applies notwithstanding this Act.

[16] Pursuant to s. 3(1)(a), The Limitations Act applies because under s. 86(1) of The Builders' Lien Act, an action to enforce a claim of lien "is to be commenced by a statement of claim." Further, application of The Limitations Act is not precluded under s. 3(4) as the Court has already determined that The Builders' Lien Act does not prescribe a limitation period for the commencement of the action by the lien claimant in this case.

[17] Section 5 of The Limitations Act establishes a standard two-year limitation period which operates from the day on which a claim is discovered. Section 6 prescribes rules relating to the discovery of a claim.

[18] To determine whether the action contemplated by 612565 Saskatchewan Ltd. is statute barred, the Court must determine when the claim was discovered. Section 6 of the Act provides:

6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;

(c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and

(d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

(2) A claimant is presumed to have known of the matters mentioned in clauses (1) (a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[19] In *Stomp Pork Farm Ltd. v. Lombard General Insurance Company of Canada*, 2008 SKQB 405 (CanLII), Ottenbreit J. noted at para. 40 that:

40 . . . Section 6(2) of the Limitation Act says a claimant is presumed to know the indicia of discovery set out at s. 6(1)(a) - (d) on the day the act or omission on which the claim is based took place unless the contrary is proved. . . .

[20] Further, under s. 18 of The Limitations Act, the claimant bears the burden of proving that: "(a) the limitation period has not expired; or (b) there is no limitation period that applies to the claim."

[21] Pursuant to s. 6(2) of The Limitations Act, 612565 Saskatchewan Ltd. is presumed to have known of or discovered its claim against the landowners on the day that the act or omission on which the claim is based took place. That date is probably March 10, 2006, the date upon which the landowners' insurance company forwarded a cheque in the amount of $7,704.62 to the lien claimant. At the very latest, it was May 17, 2006, the date upon which 612565 Saskatchewan Ltd. registered the builders' lien against the landowners' property.

[22] Although the lien claimant in his materials makes the point of his having no knowledge of the ex parte application that was made in November 2006, the court is of the view that his lack of knowledge of that application is of no significance whatsoever. The ex parte order does not influence the day on which the lien claimant first knew or ought to have known that the injury, loss or damage had

> occurred. For sure, 612565 Saskatchewan Ltd. knew that the injury, loss or damage had occurred on May 17, 2006, when it took steps to protect its interest by registering the builders' lien.
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> [23] Regardless of whether the claim was discoverable on March 10, 2006, or May 17, 2006, the claim is statute barred under s. 5 of The Limitations Act. Both dates are beyond the two-year limitation period as set out in s. 5. Further, both dates are subsequent to when the new Limitations Act came into force (i.e. May 1, 2005), and henceforth there are no concerns regarding the transitional provisions of s. 31 of The Limitations Act.
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> C. Conclusion
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> [24] For the reasons as outlined in this fiat the action contemplated by 612565 Saskatchewan Ltd. is statute barred pursuant to s. 5 of The Limitations Act by virtue of s. 3(1)(a) of the Act.

In *West Dee Construction Ltd v T & B Electric Ltd*, 2013 SKQB 260 (CanLII) the applicant brought an application for an order declaring that a claim of lien filed pursuant to the Builders' Lien Act be declared void, and that monies paid into court by the applicant be returned. Payment of outstanding amounts under the contract was due by March 2011. The builder commenced an action to enforce its claim for lien in May 2013. The applicant alleged that the applicable limitation period expired. The builder argued that its claim was not discovered until July 2011, when the court ordered that the liens be discharged on payment of the holdback into court, arguing that slow payment was the norm, and that a dispute was not anticipated.

The Court held that the limitation period applicable to the respondent's action to enforce its claim of lien is fixed by s.5 of the limitations act, namely 2 years after the day on which the claim was discovered. The registration of a claim of lien may be relevant evidence in determining whether a claim has been discovered, but it does not necessarily mean that the limitation period has begun to run. The enquiry into whether a claim has been discovered is fact-driven. On the facts, the Court held that the action to collect the debt and enforce the claim of lien was statute-barred, and that the date the limitations period began to run was when payment on the invoices was overdue:

[12] The limitation period applicable to the respondent's action to enforce its claim of lien, as both parties note, is fixed by s.5 of The Limitations Act: see *Syed v. 612565 Saskatchewan Ltd.*, 2009 SKQB 141, 335 Sask. R. 65. The issue, accordingly, is whether "the day on which the claim was discovered" within the meaning of s. 5 was more than two years prior to July 22, 2013, being the date the respondent commenced its action.

[13] In *Syed*, supra, the court found that the lien claimant must have known that injury, loss or damage had occurred not later than the date on which it registered its builders' lien. However, I do not take Syed to stand for the proposition that the registration of a claim of lien is invariably the last day on which a claim was discovered within the meaning of s. 5 of The Limitations Act. The Builders' Lien Act provides for a lien in favour of a person who provides services or materials "for as much of the price of the services or materials as remains owing to him". That lien exists regardless of whether any amount is then due and payable. Indeed, a claim of lien may be registered before an account has been issued at all. While registration of the claim of lien may be relevant evidence as in determining whether a claim has been "discovered", registration does not necessarily mean that the limitation clock has begun to tick.

[14] The respondent takes the position that the fact the respondent failed to pay the debt when it was due did not mean the applicant then knew or ought to have known that loss, injury or damage had occurred. It does not take the position that will always be so. Rather, it says that the enquiry into whether a claim has been discovered is "fact driven". In this case, there was a past history of slow payments, the promise to pay within 30 days, and the fact that payments had been made in the past only after condominium units were sold. Slow payment was the norm. It says that on these facts, the respondent "could not reasonably have anticipated a dispute with West Dee Construction which would cause it injury, loss or damage", and that this claim was accordingly not "discovered" within the meaning of s. 6 of The Limitations Act.

[15] I agree with the respondent that the issue of whether discovery has occurred

turns on the facts. That said, I reach a different conclusion as to the meaning of those facts in this case. The respondent was invoiced, and defaulted on its obligation to pay, not later than 30 days after the date of the various invoices that remained unpaid. All of those invoices were issued on or before February 2, 2011, and the latest of them was payable by March 4, 2011. That was the latest date on which the respondent could be said to have known that it could commence an action for these overdue accounts, or, stated differently, knew the material facts on which its cause of action was based. The fact that the respondent registered its claim of lien to "pressure" the applicant to pay its overdue accounts supports that characterization.

[16] This conclusion is consistent with the decision in *Big Sky Farms inc. (Re)*, 2010 SKQB 255 (CanLII), which was cited by counsel for the applicant. That case dealt with an appeal from a decision by a claims officer who, among other things, decided that Alberts Construction's claim against Big Sky for construction services was barred by s. 5 of The Limitations Act. Alberts, like the respondent, took the position that it did not discover its claim until it was told by Big Sky that it would not pay the contractor any more money. Gabrielson J., in dismissing the appeal on this issue, held as follows:

44 The parties agree that s. 6 of The Limitations Act is merely a codification of the existing case law, which was set out by the Supreme Court of Canada in the cases of *Kamloops v. Nielsen, [1984] 2 SCR 2*, 1984 CanLII 21 (SCC) , [1984] 2 S.C.R. 2, and *Central Trust Co. v. Rafuse, [1986] 2 SCR 147*, 1986 CanLII 29 (SCC). In discussing this codification, in the case of *Placzek v. Green*, 2009 ONCA 83 (CanLII) , the Ontario Court of Appeal stated at paragraph 52:

52 Whether under the former limitations regime or under the new Act, in the context of limitations law, "discovered" refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period: see *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, at p. 224; and see s. 5 of the new Act.

> 45 The Claims Officer made findings of fact that Alberts was aware of the work it had done and could have pursued a claim but chose not to do so. At paragraphs 49-51 of his decision, the Claims Officer refers to evidence on which he based this determination. Alberts' position that the limitation period would not commence until they were told by Mr. Possberg in the spring of 2009 that they would not be paid any more money, even if accepted as factual, would not be the date for discovery of the claim as required by the Act but, rather, only discovery of the non-payment of its claim. To take the submission of counsel for Alberts to its logical conclusion, if Alberts had not heard from Big Sky for 20 years, it could still claim the limitation period did not start to run. To say that no money is owed is not an acknowledgment of a debt but, rather, an affirmation that there is no debt. I have reviewed the evidence referred to by the Claims Officer at paragraphs 49 to 51 of his decision and, in my opinion, the Claims Officer did not make a palpable and overriding error in this regard and deference must be given to his determination.
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> It is important to note that the Ontario legislation at issue in *Placzek v. Green*, 2009 ONCA 83, 307 D.L.R. (4th) 441, which was relied upon by Gabrielson J. in Big Sky, supra, was identical in substance to s. 6 of The Limitations Act.
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> ...
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> [18] In the result, I find that the respondent's action to collect this debt and enforce its claim of lien is barred by The Limitations Act. The sum of $13,635.37, plus interest, paid into court on July 25, 2011 shall accordingly be paid to the applicant.

In *Artis Builders v Kehoe*, 2019 SKCA 14 (CanLII) the Court of Appeal considered when or if a builders' lien can be vacated if the lien claimant fails to commence an action to enforce the lien. In *Artis*, the builder registered a lien but failed to commence an action to enforce it. The builder provided materials and services to the landowner in connection with renovations made to a property, and had provided similar services in the past to the appellant when she had 'flipped' other houses. The appellant would make partial payment, typically for materials, then cover the balance of her account when the house was sold. The builder understood that the landowner would be delayed in selling the property because of an issue in her personal life, and registered a

lien to give notice of the agreement and that he had not yet been paid. The landowner denied any indebtedness to the builder. More than 2 years passed since the registration of the lien, and the lien was declared void by a Queen's Bench Chambers judge, who applied the standard 2-year limitation period.

The Court of Appeal allowed the appeal. The Court held that a lien may be vacated if no action to enforce it is commenced within 2 years of when the claim is discovered. However discoverability is a question of fact, and the date on which the limitation clock can begin to run is not necessarily the date on which the lien was filed:

> [3] I conclude this appeal should be allowed. A lien may be vacated if no action to enforce it is commenced within two years of when the claim is discovered. However, discoverability is a question of fact. As explained below, the latest date on which the limitation clock can begin to run with respect to matters of this kind is not necessarily the date on which the lien was filed. Given the conflicting affidavits that have been filed, this matter must be returned to the Court of Queen’s Bench so the factual questions relating to the limitation period can be sorted out.

The Court held that a land owner facing a registered lien and troubled by the fact that no action has been commenced has 3 options under the act. First, the landowner can vacate the lien by paying into court the full amount claimed as owing. Second, the owner could apply to lapse the lien. With respect to the second option, the Court noted that there are legislative drafting errors contained in the Builders' Act which suggest, but do not provide, that the legislature intended to create provisions that would allow a court to make an order extending the time for commencing an action to enforce a claim of lien. However, the Court held it was not necessary to decide the matter in the case before it, and that it could wait for another day when the Court could have the benefit of full submissions of counsel on the matter. The third option is to bring an application to have the lien declared void:

> [19] As a result, a Saskatchewan land owner faced with a registered lien, and troubled by a circumstance where no action has been commenced, would seem to have three options under the Act. First, as contemplated by s. 56, the land owner could vacate the lien by paying into court the full amount claimed as owing in the

claim of lien.

[20] Second, and pursuant to s. 58 of the Act, the owner could apply to lapse the lien in accordance with The Land Titles Act, 2000. As per the combined effect of s. 58(2) of the Act and s. 46 of The Land Titles Regulations, 2001, RRS c L-5.1 Reg 1, the Registrar would be required to lapse if, within 30 days of notifying the lien claimant of the application, the claimant failed to register a "certificate of action" generated pursuant to s. 86(5) of the Act to establish that an action was proceeding.

[21] As an aside, this second option engages two drafting errors, which have been described in the Court of Queen's Bench as "completely unexplainable". See: Syed at para 13. The first is found in s. 58(2)(b), which provides that a lien may not be lapsed on the application of a land owner if the lien claimant has registered an interest extending the time for commencing an action "mentioned in subsection 55(4)". Section 58 reads as follows:

58(1) Subject to subsection (2), a registered interest based on a claim of lien may be lapsed in accordance with The Land Titles Act, 2000.

(2) A registered interest based on a claim of lien may not be lapsed where any of the following interests have been registered:

(a) an interest based on a certificate of action issued pursuant to subsection 86(5);

(b) an interest based on a court order extending the time for commencing an action mentioned in subsection 55(4).

(Emphasis added)

The problem is that the Act has no s. 55(4).

[22] The second problem is in s. 55(2.1). This subsection provides that an order to extend the time for commencing an action may be registered as an interest. For ease of reference, the relevant parts of s. 55 are reproduced below:

55(1) Subject to subsection (2), a lien, for which an action has been commenced, expires where an action in which that lien may be realized is not set down for trial within two years of the day the action was commenced.

(2) The court may extend the time mentioned in subsection (1).

(2.1) An order pursuant to subsection (2) extending the time for commencing an action may be registered as an interest in the Land Titles Registry.

(Emphasis added)

The error here is that s. 55(2.1) refers to s. 55(2) as if s. 55(2) deals with extending the time for commencing an action. However, s. 55(2) deals with something different – the time for setting an action down for trial.

[23] In considering these errors, it is important to note that, prior to the amendments by which they were introduced into the Act, s. 58 of the Act did have a mechanism for addressing the situation where an application to lapse was made before an action to enforce the underlying claim of lien had been commenced. More specifically, that version of the Act contemplated the prospect of a court order extending the time for commencing an action and provided that the registration of such an order operated to fend off an application to lapse. This allowed a lien holder who did not yet have a debt due and owing from the land owner, and hence no cause of action and no ability to commence proceedings and thereby obtain a certificate of action, to maintain its lien. The provisions of the Act to which I refer read as follows:

58(1) At any time after registration of a claim of lien, and before a certificate of action issued under subsection 86(5) is registered, any person claiming a mortgage on, or claiming any estate or interest in the land in respect of which a claim of lien is registered, may by request, in the prescribed form, require the registrar to send a notice to the lien claimant pursuant to subsection (2).

(2) On receipt of a request mentioned in subsection (1), the registrar shall send to the lien claimant at his address for service, by registered mail, notice in the

prescribed form.

(3) Where no certificate of action or order extending the time for commencing an action is registered against the land in respect of which the claim of lien is registered within 30 days of the mailing of the notice pursuant to subsection (2), the lien ceases to exist and the registrar shall vacate the registration of the claim of lien.

(Emphasis added)

[24] Courts have a very limited authority to correct drafting mistakes where it is clear that the statutory language does not reflect legislative intention. Justice Lamer (as he then was) put it this way in *R v Paul,* 1982 CanLII 179 (SCC), [1982] 1 SCR 621 at 662:

Courts have always been reluctant to giving statutes exceptional construction. This is well illustrated in the reported cases on the subject. But this reluctance did not stop courts from departing from the ordinary rules of construction if through their application the law were to become what Dickens' Mr. Bumble said it sometimes could be, "a ass, a idiot" (Dickens, Oliver Twist).

[25] It is not strictly necessary to decide, in this case, whether ss. 55 and 58 of the Act should be interpreted in a remedial way to overcome their obvious problems. That can wait for another day when the Court has the benefit of the full submissions of counsel on the matter. For present purposes, I tentatively note only that there is some arguable attraction in the idea of reading those two provisions as meaning that (i) a court may make an order extending the time for commencing an action to enforce a claim of lien, (ii) such an order may be registered as an interest in the Land Titles Registry, and (iii) if so registered, the court order would mean a registered interest based on the claim of lien in issue could not be lapsed. (See also: *Axcess Capital Partners Inc v Allsteel Builders(2) Limite*, 2015 SKCA 33 (CanLII))

[26] These observations having been made, I return to the main track of my analysis to note that the third option for a land owner faced with a lien and a failure by the lien claimant to commence an action is the one pursued by Ms. Kehoe in this case.

She brought an application in Chambers to have the lien declared void in apparent reliance on s. 60 of the Act. It sets out a general authority of the Court of Queen's Bench to vacate the registration of a claim of lien:

60 The court may, on application:

(a) order that the registration of:

(i) a claim of lien; or

(ii) a certificate of action;

or both, be vacated;

(b) declare that a written notice of a lien no longer binds the person to whom it was given; or

(c) dismiss an action;

on any terms and conditions that the court may order.

The Court went on to hold that where no statement of claim is filed, a lien will terminate 2 years after the date when the cause of action in respect of an action to enforce the claim was discovered. This 2 year limitation period can sometimes begin to run after the date a lien is registered. Actions aimed at enforcing a lien must be commenced within 2 years from the day on which the claim is discovered. If an action to enforce a claim of lien is statute-barred then the lien itself, or more accurately the interest represented by the claim of lien, should be removed from title:

[27] The analysis of the issue in this case begins with the reality that, where no statement of claim is filed, a lien will terminate two years after the date when the cause of action in respect of an action to enforce the claim of lien was discovered. Significantly, this two-year limitation period can sometimes begin to run after the date a lien is registered.

[28] Sections 3(1)(a), 5 and 6 of The Limitations Act provide as follows:

3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:

(a) are commenced by statement of claim; …

5 Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.

6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;

(c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and

(d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

(2) A claimant is presumed to have known of the matters mentioned in clauses (1) (a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[29] There is nothing in the Act speaking to when an action to enforce a claim of lien must be commenced. As a result, a two-year limitation period set out in The Limitations Act applies to actions aimed at enforcing a lien. In other words, such actions must be commenced within two years from the day on which the claim is discovered. It also follows that, if an action to enforce a claim of lien is statute-barred, the lien itself, or more accurately the interest represented by the claim of lien, should be removed from the title. I understand all of this to be common ground

between Artis Builders and Ms. Kehoe.

The question of when a claim is discovered is one of fact. A cause of action does not arise automatically when a lien comes into existence by virtue of the provision of services or materials or later by virtue of a lien being filed with the Registrar of Titles. Liens themselves arise immediately on the provision of services and materials, but depending on the applicable contractual arrangements, the obligation of the person receiving those services or materials to pay for them might not be coincident with their supply. There can sometimes be a lag time between the provision of materials or services and the right to demand payment for them. In other words, a lien can be filed before the price of relevant services or materials becomes due and payable, and hence before the provider of the services or materials has a basis for commencing an action to enforce its claim of lien:

> [30] The question of when a claim is discovered is one of fact. This is significant because a cause of action does not arise automatically when a lien comes into existence by virtue of the provision of services or materials or later by virtue of a lien being filed with the Registrar of Titles. As noted above, liens themselves arise immediately on the provision of services or materials. But, depending on the applicable contractual arrangements, the obligation of the person receiving those services or materials to pay for them might not be coincident with their supply. There can sometimes be a lag time between the provision of materials or services and the right to demand payment for them. This means, simply put, that a lien can be filed before the price of the relevant services or materials becomes due and payable and hence before the provider of the services or materials has a basis for commencing an action to enforce its claim of lien.
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> [31] In this regard, I agree with Justice Barrington-Foote when, as a Queen's Bench judge, he wrote as follows in *West Dee Construction Ltd. v T & B Electric Ltd.*, 2013 SKQB 260, 425 Sask R 87:
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> [13] … The Builders' Lien Act provides for a lien in favour of a person who provides services or materials "for as much of the price of the services or materials as remains owing to him". That lien exists regardless of whether any amount is then

> due and payable. Indeed, a claim of lien may be registered before an account has been issued at all. While registration of the claim of lien may be relevant evidence as in determining whether a claim has been "discovered", registration does not necessarily mean that the limitation clock has begun to tick.

The Court allowed the appeal and remitted the matter to the Queen's Bench to decide in accordance with the framework it laid out due to unresolved evidentiary conflict which was not addressed by the Chambers judge.

In *Nayeem Uddin v Tubello Stoneworks Ltd.*, 2018 SKQB 301 (CanLII) the landowner and a contractor applied for payment out of court of funds paid in to vacate a builder's lien. The lien was registered in April 2016. In June 2018, the landowner applies for payment out of court. The builder had not applied for payment out of court prior to that, nor had it commenced an action to enforce its lien.

The Court held that the builder's claim was subject to the 2-year basic limitation period provided in s.5 of the Limitations Act. Accordingly, the limitation period relating to the commencement of an action expired before either party applied for payment out of court. The Court went on to hold that the expiration of the limitation period extinguished the underlying claim for lien:

> [6] Tubello's claim against Lifestyles was subject to the two-year basic limitation period provided by s. 5 of The Limitations Act, SS 2004, c L-16.1: *Syed v 612565 Saskatchewan Ltd.*, 2009 SKQB 141, [2009] 7 WWR 682 and *West Dee Construction Ltd. v T & B Electric Ltd.*, 2013 SKQB 260, 425 Sask R 87. Accordingly, the limitation period relating to the commencement of an action as provided by s. 86(1) of the Act expired before either of the parties applied for payment out.
>
> [7] Mr. Uddin submitted that the expiration of the limitation period did not affect his right to apply for payment out pursuant to s. 56(4) of the Act or the court's authority to make an order to facilitate the resolution of all claims pursuant to s. 57(5). He noted that in *Axcess Capital Partners Inc. v Allsteel Builders (2) Ltd.*, 2015 SKCA 33 at paras 29-33, [2015] 5 WWR 105, Jackson J.A. indicated it was an open question as to whether the expiration of the limitation period extinguishes not

only the right to enforce a claim by way of a statement of claim but the underlying claim itself.
As she noted, the commencement of an action is not the only tool available to the parties to resolve a construction dispute. Section 56(4) applications and s. 57(5) orders are also an option when money has been paid in.

[8] This extinguishment issue has not been dealt with further by the Court of Appeal. However, it was considered in *P.J.D. Holdings (1989) Ltd. v. Kasa Construction Ltd.*, 2016 SKQB 103 [*Kasa*]. *Kasa* also dealt with competing applications pursuant to s. 56(4) of the Act for payment out of funds paid in to vacate a lien. Chicoine J. concluded (at para. 29) that the lien filed by Kasa Construction Ltd. was void, as the two-year limitation period applicable to its claim against P.J.D. Holdings Ltd. had expired. As he put the matter (at para. 27), "an application under s. 56(4) for a determination who is entitled to the funds in court does not revive the right to commence a proceeding in respect of a claim that is already statute barred". He commented that he was not prepared to permit Kasa Construction Ltd. to "circumvent the requirement" in s. 86(1) of the Act to commence an action to enforce a claim of lien by statement of claim: see para. 28.

[9] I agree with the result in *Kasa*. I note that *Kasa* is also consistent with *Waldo Dyck v Selmeyer*, 2012 SKQB 463 (CanLII) and *Chalupiak & Associates Accounting Services Inc. v Piapot First Nation*, 2018 SKQB 131 (CanLII), both of which considered the effect of the expiration of the limitation period fixed by s. 5 of The Limitations Act on the underlying right. In both of those cases, the court – citing *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 SCR 1022*, 1994 CanLII 44 (SCC), M*Markevich v. Canada*, 2003 SCC 9 at para 41, [2003] 1 SCR 94 and *Castillo v. Castillo*, [2005] 3 SCR 870, 2005 SCC 83 (CanLII) at para 7, [2005] 3 SCR 870 – concluded that the expiration of the limitation period extinguished the underlying claim.

Authorities

The Limitations Act, SS 2004, c L-16.1

The Builders' Lien Act, SS 1984-85-86, c B-7.1

Syed v. 612565 Saskatchewan Ltd., 2009 SKQB 141 (CanLII)

Stomp Pork Farm Ltd. v. Lombard General Insurance Company of Canada, 2008 SKQB 405 (CanLII)

West Dee Construction Ltd v T & B Electric Ltd, 2013 SKQB 260 (CanLII)

Big Sky Farms inc. (Re), 2010 SKQB 255 (CanLII)

Kamloops v. Nielsen, [1984] 2 SCR 2, 1984 CanLII 21 (SCC)

Central Trust Co. v. Rafuse, [1986] 2 SCR 147, 1986 CanLII 29 (SCC)

Placzek v. Green, 2009 ONCA 83 (CanLII)

Artis Builders v Kehoe, 2019 SKCA 14 (CanLII)

Axcess Capital Partners Inc v Allsteel Builders(2) Limite, 2015 SKCA 33 (CanLII)

Nayeem Uddin v Tubello Stoneworks Ltd., 2018 SKQB 301 (CanLII)

P.J.D. Holdings (1989) Ltd. v. Kasa Construction Ltd., 2016 SKQB 103

Waldo Dyck v Selmeyer, 2012 SKQB 463 (CanLII)

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Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 SCR 1022, 1994 CanLII 44 (SCC)

Markevich v. Canada, 2003 SCC 9 (CanLII), [2003] 1 SCR 94

Castillo v. Castillo, [2005] 3 SCR 870, 2005 SCC 83 (CanLII)