

In civil fraud cases, the plaintiff only needs to make reasonable efforts to assess the quantum of the losses they suffered as a result of the alleged fraud, unless calculating the loss would be too complicated. However, the court found Mr. Duca did not sufficiently try to assess his loss despite having access to every single delivery slip, all stone tickets and the number of truckloads of soil which were taken off the property.

Issue #3: 181 Ontario and Mr. Mauti are entitled to full payment from 222 Ontario and Mr. Duca

The court stated that damages for breach of contract are intended to put a party in the position that it would have been in had the contract been properly performed, provided the loss being claimed flows “unavoidably” from the breach of contract. Meanwhile, damages for loss of profits will be based on what can fairly and reasonably be expected from the contract’s breach, as well as what the parties understood and anticipated at the time of the contract’s formation.

In this case, Mr. Duca alleged that 181 Ontario and Mr. Mauti fabricated extras, charged for work that was not done, and that their work which was done was grossly overcharged and fell below industry standards. None of these allegations were accepted by the court. It found that 181 Ontario completed all the work and supplied the materials for which it invoiced, and Mr. Duca did not dispute any of the invoices until after 181 Ontario registered its lien in accordance with the *Construction Act*. There was no evidence that 181 Ontario’s work was incorrect, contained errors or that it fell below industry standards.

In the end, the court ordered 222 Ontario and Mr. Duca to fully compensate 181 Ontario and Mr. Mauti the lien amount of over \$347,000, nearly \$30,000 for loss of profits, a \$22,000 invoice which was not included in the lien, and pre and post judgment interest.

CONCLUDING THOUGHTS

This lengthy decision underscores the importance of contemporaneous documentation to support claims on construction projects to avoid dismissals at trial. The relative strength or weakness of claims is best assessed on the documentary record, not contested oral evidence in the witness box.

Ontario Superior Court of Justice

1814219 Ontario Inc. v. 2225955 Ontario Ltd.

M.E. Vallee J.

August 16, 2023



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SUBCONTRACTOR LIEN RIGHTS EXPIRE BY SUPPLY TO THE IMPROVEMENT, NOT THE SUBCONTRACT

In the recent decision of *Prasher Steel Ltd. v. Pre-Eng Contracting Ltd.*, the Ontario Divisional Court decided a point of lien law that waited for more than 40 years for judicial consideration: whether the lien rights of a subcontractor who is supplying to one improvement under more than one subcontract expire when the supply on a subcontract-by-subcontract-basis when supply to a given *subcontract* ends, or whether those lien rights expire following the end of supply to the *improvement*.

The Divisional Court found on the basis of the plain language of the *Construction Lien Act* (which applied to the events at issue, but which is identical in all material aspects to the *Construction Act*) that expiry of a subcontractor’s lien rights is triggered

by the cessation of supply to the *improvement*, not the subcontract.

Notably, the Divisional Court distinguished the 1954 Supreme Court of Canada case of *Rocky Mountain School Division No. 15 v. Atlas Lumber Co.*, which was decided under different statutory provisions that, in Ontario, were repealed when the *Mechanics Lien Act* was replaced with the *Construction Lien Act* in 1983. The surprising aspect of the Divisional Court's decision is that it has taken this long for a reported case to be decided on this issue.

FACTS

Pre-Eng Contracting Ltd. was a general contractor for the construction of a school. Prasher Steel Ltd. had two subcontracts with Pre-Eng: a structural steel contract and a miscellaneous metals subcontract.

The supply of services and materials to the improvement was continuous between the two subcontracts. The structural steel work took place from November 25, 2011 to July 25, 2012. The miscellaneous metals work started between March 1 and April 20, 2012, and continued to August 21, 2012.

Prasher registered a single claim for lien against the school property on October 3, 2012 in the amount of \$255,954.70. This was more than 45 days after it completed its supply under the structural steel subcontract, but less than 45 days after it completed work on the miscellaneous metals subcontract.

Accordingly, one of the issues before the trial judge was whether Prasher's lien in respect of the structural steel supply had expired prior to the registration of the claim for lien.

GOVERNING LEGISLATIVE PROVISIONS

Section 31(3) of the Act provides:

- (3) Subject to subsection (4), the lien of any other person,
 - (a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-

five-day period next following the occurrence of the earliest of,

- (i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

- (ii) the date on which the person last supplies services or materials **to the improvement**, and [*emphasis added*]

- (iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

- (b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the

- (i) the date on which the person last supplied services or materials **to the improvement**, and [*emphasis added*]

- (ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. R.S.O. 1990, c. C.30, s. 31(3). [*emphasis added*]

TRIAL DECISION

The trial judge found that Prasher's lien for structural steel was out of time. The ratio of his decision was found at para. 99 of his judgment:

In my view, s. 31(1), strictly construed, provides for the expiration of lien rights on a contract-by-contract basis. Such an interpretation is consistent with the Supreme Court's ruling in Rocky Mountain. A lien claimant cannot enlarge the time limit for filing a claim for lien by artificially merging separate contracts performed on the same improvement.

He found that the portion of the lien in respect of the supply to the miscellaneous metals subcontract was in time and validly preserved.

He granted a lien judgment of \$15,942.33 for the miscellaneous metals and a personal judgment of \$83,404.50 for the structural steel contract. In total, after 18 days of trial, Prasher obtained a judgment of \$99,346.83.

APPEAL

Pre-Eng appealed on numerous grounds, and Prasher cross-appealed on the sole ground that the trial judge erred in finding that Prasher's lien rights in respect of the structural steel subcontract had expired 45 days after the cessation of supply to the subcontract, rather than the improvement.

Justice Corbett, writing for the Divisional Court panel, accepted Prasher's argument on the cross-appeal, and made the following comments:

[33] Pre-Eng argues that Prasher's lien rights expired 45 days after the last date of subcontract work or the date of subcontract completion or abandonment, on a subcontract-by-subcontract basis. That argument is in error: that is the test for expiry of a "contractor's" lien rights under s. 31(2) of the Act; Prasher was a subcontractor and its lien rights are governed by s. 31(3) and not s. 31(2).

[34] Subcontractor lien claims do not expire on a subcontract-by-subcontract basis under s. 31(3)(ii) of the Act: a subcontractor's lien claims persist until 45 days after last supply "to the improvement" under s. 31(3)(iii). Any owner or contractor wishing to terminate a subcontractor's lien rights in respect to one of several subcontracts may have recourse to s. 31(3)(iii) of the Act, which would require certification of completion of the subcontract pursuant to s. 33. That was not done in this case.

[35] The Supreme Court of Canada's decision in Rocky Mountain was based on the language of The Mechanics Lien Act, RSA 1942, c. 236, s.22, which expressly provided for termination of lien rights 35 days after "completion or abandonment of the... subcontract." The Legislature of Ontario chose to change this language when the CLA was enacted in 1983, and no Ontario court has followed Rocky Mountain to find expiry of subcontracts on a subcontract-by-subcontract basis since that time.

The Divisional Court dismissed Pre-Eng's appeal and allowed Prasher's cross-appeal.

The Divisional Court's decision simply applies the plain language of the Act, but it is noteworthy as a first reported appellate decision to consider this point of law since the Act was introduced in 1983.

The decision clarifies that the "last supply" which triggers the expiry of a subcontractor's lien rights to a single improvement, where the subcontractor is supplying under more than one subcontract, is the supply to the improvement itself, not to each subcontract.

A NOTE OF CAUTION

Subcontractors and their counsel should, however, take care to observe that there remain other triggers for the expiry of a subcontractor's lien rights under the *Construction Act*, including certification of substantial performance, completion, termination or abandonment of the *contract* between an owner and contractor, and the certification of completion of the subcontract.

In addition, while the Divisional Court arrived at the right result, the road was fraught for Prasher, which had to contend with multiple technical arguments regarding lien preservation at trial. It may be simpler in practice for subcontractors to simply preserve liens on a subcontract-by-subcontract basis, even if that is not a requirement in law.

Finally, this case stands as a cautionary tale about our dysfunctional civil justice system. It is frankly appalling that 18 days of trial were consumed over a claim and counterclaim which collectively amounted to less than \$500,000, and to arrive at a judgment of less than \$100,000. This is no way to run a railroad. Both counsel and judges simply must do better at managing the timing of trials so that justice can be done without imposing costs on the parties which far exceed the value of the case.

Pre-Eng has sought leave to appeal to the Court of Appeal; a decision on that motion is pending.

Ontario Superior Court of Justice

Prasher Steel Ltd. v. Pre-Eng Contracting Ltd.
D.L. Corbett, H.A. McGee and R.M.R. Bell JJ.
August 30, 2024