

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BUSINESS DEVELOPMENT BANK OF CANADA

**Applicant**

-and-

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS  
CANADA LP

**Respondents**

**FACTUM OF THE LIEN CLAIMANT  
KEN TULLOCH CONSTRUCTION LTD.  
(Returnable August 24<sup>th</sup>, 2017)**

Date: August 23<sup>rd</sup>, 2017

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**Lawyer for Ken Tulloch  
Construction Ltd.**

1. The Receiver acknowledges that if the owner in fee simple of the lands, is an “*Owner*” for the purposes of the *Construction Lien Act*, R.S.O. 1990, c. C30 (the “*CLA*”), then whether or not the lien claimant(s) delivered a s. 19 request is moot.

**Receiver’s Factum, paragraph 64**

***1276761 Ontario Ltd. v. 2748355 Canada Inc.*, 2006 Carswell 5392, [2006] O.J. No. 4740 (Ont. S.C.J. (Div. Ct)).**

2. The Receiver correctly submits that a “threshold question is whether the improvements made by the Construction Lien Claimants were made ‘at the request’ of the landlord of the Premises”, although we submit, for clarity, that 1684567 Ontario Inc.’s status as a ‘Landlord’ is entirely moot to the analysis.

**Receiver’s Factum, paragraph 64**

3. As regards whether or not 1684567 Ontario Inc. made a request for the purposes of the definition of “*Owner*” under the *CLA*, the Receiver’s sole submission is as follows:

“The landlord was not a party to any contract for the service and/or supply resulting in such improvements, and the lease to the Premises did not contemplate such improvements, let alone require that they be done. We are not aware of any case where a landlord has been found to be an owner under such circumstances.”

**Receiver’s Factum, paragraph 64**

4. Respectfully, whether or not a Lease contemplates or requires an improvement is not at all determinative of whether or not a person or entity “requests” an improvement or meets the definition of statutory “Owner” under the *CLA*.

5. It is well established that whether or not a person or entity meets the definition of “*Owner*” for the purposes of the *CLA* is a question of fact to be determined in all of the circumstances. It is also well established that a “request”, for the purposes of that definition, can be made by implication, based on the conduct and/or communications of the parties. In this regard, a recent decision of the Ontario Superior Court of Justice in dealing with the issues sets out the basis and operation of the test and was upheld by the Ontario Divisional Court.

***Roni Excavating Ltd. v. Sedona Development Group (Lorne Park) Inc.*, 2015 ONSC 389, 43 C.L.R. (4<sup>th</sup>) 278 (Ont. S.C.J), upheld 2015 ONSC 6576, 55 C.L.R (4<sup>th</sup>) 63 (Ont. Div. Ct)**

6. In our respectful submissions, when read in the context of the above referenced case law, Mr. DiMille’s evidence:

- a) that the principal of 1684567 Ontario Inc. expressly and publicly gave Notice that it had partnered with Astoria Organic Matters Ltd. (“Astoria”) to develop the improvement;
- b) that the principal of 1684567 Ontario Inc. expressly and publicly gave Notice that the company would be the primary operator of elements of the over-all project;
- c) that the principal of 1684567 Ontario Inc. reportedly advised the press that it was a “partner” of Astoria to build the project; and

d) that 1684567 Ontario Inc. were involved in taking out the ECA approvals for the construction of the project,

all support the proposition that 1684567 Ontario Inc. meets the definition of *Owner* for the purposes of the *CLA*.

7. We respectfully submit that while Astoria may be in Receivership, 1684567 Ontario Inc. is not. We submit that it would unequitable to allow 1684567 Ontario Inc. to avoid its potential statutory obligations under the *CLA* by setting up its affairs to merely avoid any reference to an improvement in a lease. Indeed, we submit that it is precisely this type of potential mischief which the *CLA* seeks to avoid in establishing a broad and comprehensive definition of “Owner”.

8. We respectfully submit that the lien claimant(s)’ charge against the subject premises, and against the interest of 1684567 Ontario Inc in same, ought not be forever discharged without a proper trial of the issue of whether or not 1684567 Ontario Inc. meets the definition of “Owner” for the purposes of the *CLA*.

All of Which is Respectfully Submitted,



Robert J. Kennaley  
**Kennaley Construction Law**  
a professional corporation  
Lawyers for Ken Tulloch Construction Ltd.

**KEN TULLOCH CONSTRUCTION LTD.**

- and -

**1684567 ONTARIO INC., et al.**

Plaintiff

Defendants

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

In the Matter of the *Construction Lien Act*,  
R.S.O. 1990, c. C.30, as amended

Proceedings commenced at  
Belleville, Ontario

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**FACTUM**

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