

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Construction Lien Act, R.S.O. 1990, c. C.30, as
amended*

B E T W E E N:

KEN TULLOCH CONSTRUCTION LTD.

Plaintiff

and

**1684567 ONTARIO INC.,
ASTORIA ORGANIC MATTERS LTD,
ASTORIA ORGANIC MATTERS CANADA LP,
BANK OF MONTREAL,
TRENVAL BUSINESS DEVELOPMENT CORPORATION,
CASA-DEA FINANCE LIMITED and
BUSINESS DEVELOPMENT BANK OF CANADA**

Defendants

**FACTUM OF THE BUSINESS
DEVELOPMENT BANK OF CANADA
(MOTION RETURNABLE MARCH 16, 2018)**

March 12, 2018

FOGLER, RUBINOFF LLP

Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

W. Ross MacDougall (LSUC# 49840A)

rmacdougall@foglers.com
Tel: 416.864.7604
Fax: 416.941.8852

Lawyers for the Business Development Bank
of Canada

TO: **KENNALEY CONSTRUCTION LAW**

First Canadian Place
100 King Street West
Suite 5700
Toronto, ON M5X 1C7

Robert J. Kennaley

Tel: 416.886.7310
Fax: 416.700.8185

Lawyers for Ken Tulloch Construction Ltd.

AND TO: **DENTONS**

77 King Street West
Suite 400
Toronto, ON M5K 0A1

Karen Groulx

Tel: 416.863.4697

Sara-Ann Van Allen

Tel: 416.863.4402
Fax: 416 863 4592

Lawyers for 1684567 Ontario Inc.

AND TO: **AIRD & BERLIS LLP**

Barristers and Solicitors
Brookfield Place
181 Bay Street
Suite 1800, Box 754
Toronto, ON M5J 2T9

Courtney Raphael

Tel: 416.863.1500
Fax: 416.863.1515

Lawyers for BDO Canada Limited, in its capacity as the court appointed Receiver of
Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

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**FACTUM OF THE BUSINESS
DEVELOPMENT BANK OF CANADA
(MOTION RETURNABLE DECEMBER 12, 2017)**

PART I - INTRODUCTION

1. The Business Development Bank of Canada ("**BDC**") submits this factum in response to the motion for advice and directions of BDO Canada Limited ("**BDO**"), in its capacity as the Court-appointed receiver (in such capacity, the "**Receiver**") of Astoria Organic Matters Ltd. ("**Astoria Ltd.**") and Astoria Organic Matters Canada LP ("**Astoria Canada**"), as to whether the claim for lien of Ken Tulloch Construction Ltd. ("**Tulloch**") registered as instrument number HT206797 (the "**Tulloch Lien**") has been preserved in accordance with the *Construction Lien Act*, R.S.O., 1990, c. C.30, as amended (the "**CLA**").

2. BDC submits that the Tulloch Lien, registered on May 2, 2017, is out of time. By September of 2016, the facility constructed by Tulloch had been turned over and operational and Tulloch had invoiced on the basis that its contract with Astoria was 100% complete. The site attendances made by Tulloch less than 45 days before it registered its lien were limited to:

- (a) a small amount of work performed by Tulloch on certain doors to the facility in the late March of 2017, which was outside of the scope of the Tulloch's contract and was paid on a C.O.D. basis; and
- (b) tweaking/adjustments by Tulloch's subcontractor, Les Industries Harnois Inc. ("**Harnois**") to the biofilter air monitoring system (the "**Biofilter System**"), which had already been billed as 100% complete, turned over to Astoria and put in use by September of 2016.

3. BDC submits that such attendances do not extend Tulloch's lien rights, which expired by no later than mid-November, 2016.

4. As a result, BDC submits that an Order should be made discharging the Tulloch Lien and Certificate of Action and dismissing the within action, with costs.

PART II - SUMMARY OF FACTS

5. Pursuant to an order of the Ontario Superior Court of Justice dated April 13, 2017 (the "**Appointment Order**"), BDO was appointed as receiver to Astoria Ltd. and Astoria Canada (collectively, "**Astoria**").¹

¹ Appointment Order, Appendix A to the Second Report to the Court submitted by the Receiver dated September 27, 2017 ("**Receiver's 2nd Report**"), Motion Record, Tab 2A.

6. Prior to the Appointment Order, Astoria operated a new organic recycling facility and waste transfer station at 704 Phillipston Rd., Belleville, Ontario.² Construction of the facility, which was determined by Astoria to be substantially performed as at November 1, 2016³, was financed, in part, by construction financing provided by BDC in the amount of \$7,100,000, less a holdback in the amount of approximately \$675,000 which ultimately was never advanced.⁴

The Tulloch Contract

7. The Tulloch Lien, which was registered for \$347,717.93 on May 2, 2017 (after the Appointment Order) relates to work performed under a contract between Tulloch and Astoria Ltd. dated November 19, 2015 (the "**Tulloch Contract**").⁵

8. The Tulloch Contract provided for the supply and installation of four "Megadome"⁶ buildings equipped with air treatment functionality (the "**Facility**"), for the fixed price of \$2,829,408.30 plus H.S.T. (the "**Contract Price**"), broken down as follows:

Group A

6.1	Tipping building:	\$208,300
6.2	Biofilter building:	\$146,700
6.3	Composts building:	\$791,800

² Receiver's 2nd Report, para. 1.1.1, Motion Record, Tab 2.

³ CSP, Exhibit "E" to the cross-examination of Kenneth George Allan Hamilton ("**Al Hamilton**") dated November 17, 2017, Transcript, Exhibits and Undertakings Brief ("**Transcript Brief**"), Tab 3E.

⁴ Receiver's 2nd Report, para. 1.1.3, page 2, Motion Record, Tab 2.

⁵ Exhibit "A" to the Affidavit of Ken Tulloch sworn October 13, 2017 ("**1st Tulloch Affidavit**"), Responding Motion Record ("**Responding Record**"), Tab 1.

⁶ "Megadome" is a registered trademark of Harnois.

Group B

6.4	Tipping building equipment:	\$215,538.54
6.5	Biofilter building equipment	\$627,168.41
6.6	Composts (1 & 2) buildings equipment:	\$522,492.48
6.7	Stack	\$202,115.93
6.8	Leachate collection/guards	\$14,000.00
6.9	Irrigation system	\$12,287.29
6.10	Control system	\$51,405.65

Group C

6.11	Field Inspection – engineering	\$28,600.00 ⁷
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9. The Tulloch contract further provided for a billing and payment schedule, as follows:

Down payment:

Group A: 30% on placement of the order (items 6.1 to 6.3)

Group B: 50% on placement of the order (items 6.4 to 6.10)

Payment no. 2

Group A: 30% prior to shipping (items 6.1 to 6.3)

⁷ Tulloch Contract, section 6 (Contract Price Breakdown), pages 4-5, Exhibit A to the 1st Tulloch Affidavit, Responding Record, Tab 1.

Group B: 40% prior to shipping (items 6.4 to 6.10)

Balance Payment:

Group A: 30% at the time of completion of the foundation

Group B: 10% balance payable at the start-up of the equipment

Group A: 10% balance at the time of project completion

Group C: Services (6.11) payable according to the work progress.⁸

10. Although it does not appear there was a formal schedule prepared for the completion of Tulloch's work, the Tulloch Contract contemplated that the warranty period (1 year from the end of construction of the Project) would commence no later than 2 months following the last shipment of material to the site.⁹

11. The Tulloch Contract further provided that any changes to Tulloch's work would have to be incorporated in a written addendum signed by the parties.¹⁰

Tulloch Invoicing & Astoria Payments

12. Tulloch invoiced the Contract Price as follows:

- (a) Invoice 1465oc dated February 1, 2016, for the down payment (30% of Groups A & B), for \$1,166,544.05 plus HST;

⁸ Tulloch Contract, page 6, Exhibit A to the Tulloch Affidavit, Responding Record, Tab 1.

⁹ Tulloch Contract, section 9.1, page 9, Exhibit A to the Tulloch Affidavit, Responding Record, Tab 1.

¹⁰ Tulloch Contract, section 7.4, Exhibit A to the Tulloch Affidavit, Responding Record, Tab 1.

- (b) Invoice 1466oc dated April 4, 2016 for 30% Group A prior to shipping and 30% at the time of completion of the foundation, for \$688,080.00 plus HST;
- (c) Invoice 1469oc dated May 2, 2016 for Group B (40% of Group B) for \$265,486.73 plus HST;
- (d) Invoice 1476oc dated July 5, 2016 for Group B (40% of Group B) for \$392,516.51 plus HST; and
- (e) Invoice 1473oc dated July 18, 2016 for Groups A & B balance payment (10%) and Group C (100%) for \$347,792.37 plus HST.¹¹

13. Astoria paid all of the above noted invoices other than the final invoice (1473oc) dated July 18, 2016. No further invoices were issued in respect of the Contract Price. While Tulloch did deliver certain invoices in respect of additional work and/or work contemplated under the earlier purchase orders during the same period of time, all such invoices were paid in full.¹²

Facility Commences Operation

14. The Facility was put into operation and began accepting waste in September, 2016. Les Harnois Industries Ltd. ("**Harnois**"), who designed, supplied and installed the Biofilter System, provided training and handed over secured access to the Biofilter System to representatives Astoria in the Fall of 2016.¹³

¹¹ Invoices, Exhibit L to the Tulloch Affidavit, Responding Record, Tab 1.

¹² Statement, Exhibit K to the Tulloch Affidavit, Responding Record, Tab 1.

¹³ Transcript of the cross-examination of Al Hamilton held November 17, 2017 ("**Hamilton Transcript**") at pgs. 83-86 qq.395-408, Transcript Brief, Tab 3.

15. Shortly after the facility became operational, Harnois arranged for the Facility to be featured in the November/December 2016 edition of the "*Recycling Product News*".¹⁴

16. The article confirms that the Facility "*began full-scale composting operations*" in September of 2016. Al Hamilton, President and CEO of Astoria Ltd., is quoted in the article as saying (among other things) that the Facility took about five months for the complete build after the Ministry of Environment ("MOE") gave their approval, and that the "*Harnois control system is incredible [...the MOE] has visited us several times since September, and have been very impressed with the air we capture and treat with respect to odour. We have had absolutely no odour complaints from residents, from points off-site*".¹⁵

17. Patrice Harnois is quoted in the same article as saying the following about the Biofilter System designed by his firm: "*Each second, the system evaluates all parameters and reacts accordingly to meet or exceed MOE requirements [...] It maintains and monitors the mechanical components and minimizes oxidation factors that may affect the structural components.*"¹⁶

Tulloch Demands Holdback Release

18. On March 17, 2017, Ken Tulloch sent an email to Al Hamilton with the reference line "Final Payment", saying that "*it has been some time since we received payment for the construction of Astoria*" and asking for details of payment of the holdback and whether Astoria

¹⁴ Transcript of the examination of Patrice Harnois held November 17, 2017 ("**Harnois Transcript**") at pg. 104, qq. 474-477, Transcript Brief, Tab 2. See also email from Patrice Harnois to Al Hamilton dated October 4, 2016, Exhibit B to the examination of Patrice Harnois, Transcript Brief, Tab 2B.

¹⁵ Article: "*Virtually Odour-Free Composting*" by Keith Barker, Editor, Recycling Product News, November/December 2016, Answer to Under Advisement contained at q. 748 of the Harnois Transcript, Transcript Brief, Tab 5.

¹⁶ Ibid.

would provide a mortgage or charge prior until the holdback was released or the account was settled.¹⁷

19. In response, Al Hamilton forwarded the final draw recommendation report of BTY Group (the independent quantity surveyor appointed by BDC) dated January 4, 2017 to Ken Tulloch, which noted that *"the project has achieved substantial performance on November 21, 2016"*. Mr. Hamilton further advised that Astoria was *"working with BDC to get a partial release of the holdback money."*¹⁸

The March 28 Work

20. Tulloch subsequently attended the premises on or about March 28, 2017 to install motors and switches for doors that had been previously been installed (the "**March 28 Work**"). The March 28 Work was outside of the scope of the Tulloch Contract and had a total value of \$2,542.56 excluding HST. Tulloch insisted to be paid, and was paid in advance for this work. Ken Tulloch confirmed on cross-examination that he insisted to be paid in this fashion because Tulloch was not prepared to do any further work for Astoria until Tulloch was paid the balance owing under the Tulloch Contract.¹⁹

¹⁷ Email from Ken Tulloch to Al Hamilton sent March 17, 2017 at 8:48am, Answers to Undertakings of Ken Tulloch (answer to q. 131), Transcript Brief, Tab 4.

¹⁸ Email from Al Hamilton to Ken Tulloch sent March 20, 2017 at 10:18am with attached BTY report dated January 4, 2017, email from Al Hamilton to Ken Tulloch sent March 22, 2017 at 11:07am, Answers to Undertakings of Ken Tulloch (answer to q. 131), Transcript Brief, Tab 4.

¹⁹ See paragraphs 35 and 36 to the First Tulloch Affidavit and the March 28, 2017 Invoice (#1500cc) attached as Exhibit G to the First Tulloch Affidavit, Responding Record, Tab 1. See also Tulloch Transcript, p. 31, qq. 162 to 165, Transcript Brief, Tab 1.

"Tweaks" to the Biofilter System

21. After the Biofilter System designed by Harnois was turned over to Astoria and put in use in September of 2016, Harnois made intermittent visits to the site to perform "tweaks" to the Biofilter System to optimize its operation. Patrice Harnois' calendar reflects that he attended the site for a total of 11 days between October and April, 2017, the last site visit being on April 13 and 14, 2017.²⁰

22. Tulloch never billed any additional amounts to Astoria on account of these site attendances by its subcontractor, Harnois. While Tulloch now claims that these site attendances were part of its scope of work under the Tulloch Contract (specifically the "Field Inspection – Engineering" work described in Group C, Item 6.11) and not in the nature of deficiency corrections²¹, Tulloch admits that it billed Astoria for this work in July of 2016.²²

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

23. BDC relies upon and adopts the legal principles set out in the Statement of Law and Brief of Authorities of the Receiver dated November 29, 2017.

24. BDC submits that the Tulloch Lien registered on May 2, 2017 was registered outside of the prescribed time period for Tulloch to preserve its lien under s. 31(2)(a) of the CLA, based on the following uncontroverted facts:

- (a) Tulloch delivered its final progress invoice under the Tulloch Contract in July of 2016, approximately 10 months prior the registration of the Tulloch Lien. This is the only unpaid invoice and forms the basis of Tulloch's lien claim.

²⁰ Outlook Agenda, Exhibit N to the Tulloch Affidavit, Responding Record, Tab 1.

²¹ See paragraph 40 to the First Tulloch Affidavit, Responding Record, Tab 1.

²² Tulloch Transcript, p. 31, q. 162, Transcript Brief, Tab 1.

- (b) Tulloch turned over the Facility (including the Biofilter System designed and installed by its subcontractor Harnois) by September, 2016, approximately 8 months prior to the registration of the Tulloch Lien; and
- (c) Tulloch made formal demand for payment of the balance of the Tulloch Contract on March 17, 2017, more than 45 days before the registration of the Tulloch Lien.

25. The site attendances by Tulloch and Harnois in the 45 day period prior to the registration of the Tulloch Lien do not revive Tulloch's lien rights.

26. With respect to the March 28 Work, Ken Tulloch admitted in cross-examination that there were no written amendments to the Tulloch Contract (as required under section 7.4), that extra work was treated separately from the Tulloch Contract, was paid in full and did not form part of Tulloch's claim:

30. Q. Okay. Thank you. And over -- over the course of that project there were no written amendments to -- to the contract?

A. None at all.

31. Q. Okay. And I also understand that any -- any extras -- any extra work that you did wasn't done on a formal Change Order basis, it -- it -- it was just, I take it, verbally agreed to and then -- and then you -- you --

A. It was verbally agreed to and then I invoiced him and

he paid it.

32. Q. Yeah. Yeah. And -- and really extras aren't part of your claim right now, you're talk -- It -- it -- The -- the claim --

A. It's totally separate.

33. Q. That's right. The -- There's -- there's a claim -- The claim is based on one unpaid invoice of -- of -- of yours, right --

A. Yes.

34. Q. -- from -- from July of 20'16? That's the invoice?

A. That's the invoice.²³

27. Similarly, the intermittent site visits by Harnois to perform "tweak" to the Biofilter System (the last such visits being on April 13 and 14, 2017) do not extend Tulloch's lien rights.

28. The Biofilter System was turned over to Astoria and put into operation in the Fall of 2016. Representatives of Astoria were given secured access and training at that time. Neither Tulloch or Harnois have provided any documentation (such as conformity reports, testing or certification reports) which would suggest that Harnois' subsequent site visits represented new work, or that the Tulloch Contract would not be considered complete until the Biofilter System was optimized to some unknown standard.

29. Furthermore, Patrice Harnois repeatedly referred to this work as "tweaks", "tweaking", "tweaking period" or a "tweaking process" during his cross-examination.²⁴ Performing tweaks to

²³ Tulloch Transcript, p. 7, qq. 30-34, Transcript Brief, Tab 1.

²⁴ See for instance, p. 22-q. 97, p. 33-q. 150, p. 35-q. 161, p. 52-q. 222, p. 53-q. 230, p. 58 - q. 262, p. 59-q. 268, p. 62-q. 277, p. 68-q. 304, p. 69-q. 306, p. 71-q. 311, p. 78-q. 353 and p. 99-q. 455 of the Harnois Transcript, Transcript Brief, Tab 2.

a system already turned over and in operation by an end user, as in this case, is not consistent with the concept of "new" work.

30. Also, while Tulloch/Harnois claim that the work was part of "Field inspection – Engineering" services described in Group "C" to the Tulloch Contract, Group "C" was billed in full by Tulloch in July of 2016. The Tulloch contract, which was prepared by Tulloch with Harnois' assistance, and never changed by Astoria, provided that Group "C" would be "*payable according to the work progress.*"²⁵

31. Nor is there any credible evidence in the record to support the assertion that the Tulloch that the Tulloch Contract could not be considered complete until the "tweaking" process brought the Biofilter System to 100% optimization. If this assertion were true, Tulloch would not have insisted on payment of its holdback in March of 2017. The argument is also at odds with section 9.1 of the Tulloch Contract, which provides that the end of the project shall be no later than two months following the last shipment of Material to the site. Tulloch billed for the Material just prior to shipping (in accordance with the Tulloch Contract) on April 4, 2016 (Invoice #1466oc) and May 2, 2016 (Invoice #1469oc), and delivered its final progress invoice in respect of the Contract Price approximately two months later.

PART IV - ORDER REQUESTED

32. BDC therefore requests:

- (a) an Order under s. 47(1)(a) of the CLA discharging the Tulloch Lien on the basis that it has expired;

²⁵ Harnois Transcript, pgs. 5-6, qq. 22-30, Tulloch Contract, Exhibit A to the 1st Tulloch Affidavit, Responding Record, Tab 1.

- (b) an Order dismissing this action; and
- (c) BDC's costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of March, 2018.



W. Ross MacDougall

FOGLER, RUBINOFF LLP

Lawyers

77 King Street West

Suite 3000, P.O. Box 95

TD Centre North Tower

Toronto, ON M5K 1G8

W. Ross MacDougall (LSUC# 49840A)

rmacdougall@foglers.com

Tel: 416.864.7604

Fax: 416.941.8852

Lawyers for Business Development Bank of
Canada

SCHEDULE "A"

LIST OF AUTHORITIES

1. None

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Construction Lien Act, RSO 1990, c C.30

Expiry of liens

31 (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1); 2017, c. 24, s. 67.

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor,

- (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 earlier of,

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (2) (a) of the Act is amended by striking out "forty-five" in the portion before subclause (i) and substituting "60". (See: 2017, c. 24, s. 26 (1))

- (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 the contract is completed or abandoned; and

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subclause 31 (2) (a) (ii) of the Act is amended by striking out "completed or abandoned" and substituting "completed, abandoned or terminated". (See: 2017, c. 24, s. 26 (2))

- (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 substantial performance, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (2) (b) of the Act is amended by striking out "forty-five" in the portion before subclause (i) and substituting "60". (See: 2017, c. 24, s. 26 (3))

- (i) the date the contract is completed, and
- (ii) the date the contract is abandoned. R.S.O. 1990, c. C.30, s. 31 (2); 2017, c. 24, s. 26 (4), 66.

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subclause 31 (2) (b) (ii) of the Act is amended by adding “or terminated” at the end. (See: 2017, c. 24, s. 26 (5))

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, section 31 of the Act is amended by adding the following subsection: (See: 2017, c. 24, s. 26 (6))

Workers’ trust fund lien

(2.1) Subject to subsection (4), the lien of the trustee of a workers’ trust fund on behalf of a worker or workers,

(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 60-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,
- (ii) the date on which the final worker who is a beneficiary of the workers’ trust fund last supplies services or materials to the improvement,
- (iii) the date the contract is completed, abandoned or terminated, and
- (iv) 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 conclusion of the 60-day period next following the occurrence of the earlier of,

- (i) the date on which the final worker who is a beneficiary of the workers’ trust fund last supplied services or materials to the improvement,
- (ii) the date the contract is completed, abandoned or terminated, and
- (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. 2017, c. 24, s. 26 (6).

Liens of other persons

(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,

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (3) (a) of the Act is amended by striking out “forty-five” in the portion before subclause (i) and substituting “60”. (See: 2017, c. 24, s. 26 (7))

- (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

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (3) (a) of the Act is amended by striking out “and” at the end of subclauses (i) and (ii) and by adding the following subclause: (See: 2017, c. 24, s. 26 (8))

- (ii.1) the date the contract is completed, abandoned or terminated, and

- (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 conclusion of the forty-five-day period next following the occurrence of the earlier of,

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (3) (b) of the Act is amended by striking out “forty-five” in the portion before subclause (i) and substituting “60”. (See: 2017, c. 24, s. 26 (9))

- (i) the date on which the person last supplied services or materials to the improvement, and

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (3) (b) of the Act is amended by striking out “and” at the end of subclause (i) and by adding the following subclause: (See: 2017, c. 24, s. 26 (10))

- (i.1) the date the contract is completed, abandoned or terminated, and

- (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).

Separate liens when ongoing supply

(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date. R.S.O. 1990, c. C.30, s. 31 (4); 2017, c. 24, s. 67.

Declaration of last supply

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,

- (a) the date on which the person last supplied services or materials under that contract or subcontract; and
- (b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration. R.S.O. 1990, c. C.30, s. 31 (5); 2017, c. 24, s. 65, 66.

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, section 31 of the Act is amended by adding the following subsections: (See: 2017, c. 24, s. 26 (11))

Notice of termination

(6) If a contract is terminated, either the owner or the contractor or other person whose lien is subject to expiry shall publish, in the manner set out in the regulations, a notice of the termination in the prescribed form and, for the purposes of this section, the date on which the contract is terminated is the termination date specified in the notice for the contract. 2017, c. 24, s. 26 (11).

Validity of termination

(7) Subsection (6) does not prevent a person from contesting the validity of a termination. 2017, c. 24, s. 26 (11).

General power to discharge lien

47 (1) Upon motion, the court may,

- (a) order the discharge of a lien;

(b) order that the registration of,

(i) a claim for lien, or

(ii) a certificate of action,

or both, be vacated;

(c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or

(d) dismiss an action,

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 47 (1); 2017, c. 24, s. 63.

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subsection 47 (1) of the Act is repealed and the following substituted: (See: 2017, c. 24, s. 37 (1))

General powers of the court

Power to discharge

(1) The court may, on motion, order the discharge of a lien,

(a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or

(b) on any other proper ground. 2017, c. 24, s. 37 (1).

Power to vacate, etc.

(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.

2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.

3. An order dismissing an action. 2017, c. 24, s. 37 (1).

Conditions

(1.2) An order under subsection (1) or (1.1) may include any terms or conditions that the court considers appropriate in the circumstances. 2017, c. 24, s. 37 (1).

Direction by court

(2) Where a certificate of action is vacated under subsection (1), and there remain liens which may be enforced in the action to which that certificate relates, the court shall give any directions that are necessary in the circumstances in respect of the continuation of that action subject to paragraph 4 of subsection 44 (9). R.S.O. 1990, c. C.30, s. 47 (2); 2010, c. 16, Sched. 2, s. 2 (13).

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subsection 47 (2) of the Act is amended by striking out “subsection (1)” and substituting “paragraph 1 of subsection (1.1)”. (See: 2017, c. 24, s. 37 (2))

KEN TULLOCH CONSTRUCTION LTD.
Plaintiff

-and- 1684567 ONTARIO INC. et al
Defendants

Court File No. CV-17-0242-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE BUSINESS DEVELOPMENT BANK
OF CANADA**

FOGLER, RUBINOFF LLP

Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

W. Ross MacDougall (LSUC# 49840A)

rmacdougall@foglers.com
Tel: 416.864.7604
Fax: 416.941.8852

Lawyers for Business Development Bank of Canada