

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the Construction Lien Act, R.S.O. 1990, C.C30, 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 PLAINTIFF / LIEN CLAIMANT
ON TIMELINESS AND QUANTUM**

Kennaley Construction Law
a professional corporation
58 Peel Street
Simcoe, Ontario N3Y 1S2

Robert J. Kennaley
Tel: (519) 426-2577
Fax: (519) 426-3777
Email: rjk@kennaley.ca

Lawyers for the Plaintiff

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FACTUM

Overview

1. This is a motion to determine the timeliness and quantum of the claim for lien of the plaintiff Ken Tulloch Construction Ltd. ("KTC"). In this regard:
 - a) the moving party is the Court-Appointed Receiver of the assets of the defendants Astoria Organic Matters Ltd and Astoria Organic Matters Canada LP Astoria ("Astoria");
 - b) the Receiver submits that it merely seeks direction on the timeliness issue;
 - c) the Receiver has none-the-less formed and reported its opinion that KTCs lien is out of time;

- d) indeed, the Receiver has more categorically stated (in its Notice of Motion, ground 8) that “*Tulloch’s last day of work was in early 2016 and all work performed thereafter was warranty work*”;
- e) KTC is a responding party on this Motion;
- f) the Receiver has acknowledged that the quantum of KTCs lien is accurate;
- g) Astoria also acknowledged the quantum of KTC’s lien, in its communications to the Receiver; and
- h) BDC, the bank which appointed the Receiver and which is the first ranking secured creditor of Astoria, has cross-examined KTC on its Affidavits sworn in support of this Motion and has denied the lien’s validity.

2. As regards onus, we submit that as KTC is a responding party on this motion such that the motion should be dismissed and the matter(s) left to trial for determination if there is insufficient evidence to either prove or disprove the timeliness or quantum of the lien.

3. We submit, however, that the timeliness and quantum of the KTC is clearly proven on the evidence:

- a) it has been admitted that an approved extra to the subject contract, which was paid for by the owner, was performed by the lien claimant during the applicable lien period;
- b) the lien claimant also performed a substantial amount of commissioning work, which was part of its contract, during the applicable lien period; and
- c) the allegations that a valid certificate of substantial performance was published, that work done during the applicable lien period was deficiency work or that an invoice submitted by the lien claimant is determinative are incorrect and unsupportable on the evidence.

Timeliness (I) – A Certificate of Substantial Performance?

4. The Receiver has moved, in part, on the ground that the KTC lien was registered after the 45 day period following the publication of a certificate of substantial performance. The purported certificate, however, was unilaterally published by the owner, as both owner and contractor, in relation to a single improvement. Al Hamilton, the (former) principal of Astoria, advised on cross-examination that he had been told by Astoria's consultant that this was appropriate. It is trite to state, however, that it was not:

- a) there were multiple contracts for multiple improvements and, accordingly, there ought not to have been a single certificate issued or published in relation to the project; and
- b) a party cannot in such (or any) circumstance unilaterally declare itself to be both owner and contractor so as to publish a certificate. It has been held that any such certificate is invalid.

**Cross-Examination of A Hamilton, q 230-285, 292-303 and Exhibit E
570 South Service Road Inc. v. Lawrence-Paine & Associates Limited,
2010 ONSC 6978 (CanLII)**

5. Astoria's need to obtain the holdback in such circumstances would explain why Astoria unilaterally published a certificate. Astoria incurred a loss of \$1.4 million in each of 2015 and 2016 and had a cash flow problem in 2016.

Cross-examination of A Hamilton, q. 18-25

6. Inexplicably, the Receiver has not (in its factum or in its various Reports) set out the invalidity of the certificate. It has not commented on why the certificate might be invalid. The respondent BDC has also not conceded the invalidity of the certificate.

Timeliness (II) – The July Invoice

7. It has been suggested that KTCs work conducted in 2017 must have been deficiency work because KTC issued its final invoice for the work in July, 2017. Ken Tulloch's evidence is that he was asked to do so by Mr. Hamilton, so that Mr. Hamilton could "get things rolling" and get some money flowing. Mr. Tulloch agreed to do so. BDC did not challenge this evidence on cross-examination. More significantly, Mr. Hamilton has admitted in cross-examination that the contract was far from complete in July of 2016.

Tulloch Supplementary Affidavit, para 7

Cross-Examination of A Hamilton, q. 214-229

8. As above, Mr. Hamilton admitted that had a cash flow problem in July, 2016. This supports Mr. Tulloch's evidence on why the invoice was requested. Regardless, the work was not complete in July, the July invoice does not speak to when the applicable 45 day lien period commenced to run.

Cross-examination of A Hamilton, q. 18-25

Timeliness (II) – The Performance of an Approved Change

9. As will be detailed below, KTC was a contractor. Accordingly, and subject to the publication of a certificate of substantial performance, the applicable 45 day period accordingly commenced upon the completion or abandonment of the contract (as 'completion' is defined under the Act).

10. An approved change in the work, or extra, to a Contract becomes part of the Contract work for the purposes of determining the timeliness of a claim for lien.

The definition of “*Contract*”, of course, expressly includes an “amendment to that contract”.

Construction Lien Act, s.1(1)

***Ravell Investments Ltd. v. DCLC Developments Ltd.*, 1995 CarswellOnt 833, 23 C.L.R. (2d) 304, 24 O.R. (3d) 863**

11. In this circumstance,

a) Astoria had an interest in the subject Premises

Receiver’s Motion Record, page 11

b) Astoria retained KTC by way of written agreement to supply services and materials to the subject Premises, thereby requesting that supply;

Affidavit of Ken Tulloch sworn October 13, 2017 (Tulloch Affidavit), para 2 and Exhibit “B”

c) Astoria paid for a portion of KTCs supply under that Agreement and benefited from same, such that for the purposes of the *Construction Lien Act*, R.S.O. 190 c.C30 (the “*Act*”):

- i. Astoria is an *Owner*;
- ii. KTC is a *Contractor*;
- iii. the Agreement between Astoria and KTC is a *Contract*; and
- iv. KTC’s lien rights would expire if not preserved within 45 days after the *Contract* was either completed or abandoned (subject to the publication of a certificate of substantial performance).

Construction Lien Act, R.S.O. 1990, c.C30, s. 1(2), 2(3) and 31(2)

12. The Receiver has acknowledged that, if the certificate is invalid and as regards timeliness, “the decisive date” for determining if the lien is valid “would be 45 days prior to May 2, 2017 being March 18, 2017.” In other words, the Receiver acknowledges that the lien will be timely if lienable work was performed on after ***March 18, 2017***.

Notice of Motion, ground no. 8

13. KTCs uncontroverted evidence is that on ***March 28, 2017***, KTC attended at the Premises to install four 600 volt ¾ HP electric motors and four weather tec door switches ***as an extra to KTCs Contract***, and not as deficiency rectification (the “March 28 Change”).

Tulloch Affidavit, para 35 and 36 and Exhibit “H”

14. Al Hamilton, the (former) principal of Astoria, expressly admitted on cross-examination in relation to the Change in the Work:

- a) that he “***didn’t see that as warranty work***”;
- b) that Astoria paid for it; and
- c) that he understood that Astoria was paying for the Change as an extra.

Cross-Examination of A Hamilton, q. 322 – 331.

15. We recognize that a *Contract* is deemed complete when the price of completion, correction of a known defect or last supply is not more than the lesser of 1 per cent of the contract price and \$1,000.00 (as per s. 2(3) of the *Act*). However, in this circumstance Astoria paid \$2,873.09 for the Change.

16. The Receiver has offered ***no explanation whatsoever*** (in its Reports, in its Motion Record or in its Statement of Law), for how the approved and paid March

28, 2017 Change amounts to out of scope work, warranty work or deficiency rectification.

17. Counsel to BDC did not cross-examine Mr. Tulloch on the March 28, 2017 Change, beyond confirming that “this was extra work that you did pertaining to the doors” and “that this was done on a C.O.D. basis”.

Cross-Examination of Ken Tulloch, q. 162-163

18. The uncontroverted evidence, which has been admitted by Mr. Hamilton, is thus that the Contact was not complete until at least March 28, 2017, when the Change was performed. The uncontroverted evidence is, accordingly, that the lien is timely.

19. We respectfully submit that the above should be the end of the analysis as regards timeliness.

Timeliness III – The Inspection and Commissioning Work

20. The work under the Contract was for the construction of a sophisticated and proprietary bio-composting facility in Belleville (the “Facility”). Al Hamilton has admitted that:

- (a) the Contract included for a “proprietary air control system to meet Ontario’s strict regulations for air quality and odour control” (the “Air Control System”); and
- (b) the System had never been constructed before and was designed and installed by KTC, through its subcontractor, Les Harnois Industries Ltd. (“Harnois”).

Cross-examination of Al Hamilton, q. 125 - 132

21. Ken Tulloch's uncontroverted evidence on the System was that:
- a) it was a completely new state of the System designed to manage the environmental conditions within the Facility;
 - b) the mechanical, electrical and computer systems that KTC installed in that regard had not been constructed or put into use before;
 - c) there were accordingly "no specifications to follow"; and that
 - d) in particular, a "fogger" system in the bio-filter building, complete with air and temperature adjustment controls, had never been created before. It had to be designed, from the ground up, by Harnois.

Tulloch Affidavit, paras 16 – 17

22. The uncontroverted evidence is that, in addition to being brand new, the System was very sophisticated and complicated. In addition to sophisticated and complicated operating functions, the Systems also had to have sophisticated monitoring and reporting functions, to ensure odour control and environmental and MOE compliance. A summary of this uncontroverted evidence is attached as Schedule "A" to this Factum.

Affidavit of K Tulloch as described in Schedule "A"

23. As will be set out below, KTCs evidence is that:
- a) because of its sophisticated and complicated nature and due to the monitoring and reporting requirements, the System and the Contract could not be completed until a testing, engineering and commissioning phase was completed;
 - b) this "Commissioning Work" was itemized in the Contract as the "Group C Field Inspection – Engineering", at paragraph 6 of the Contract, with a value of \$28,600.00, plus HST;

- c) this work was performed by KTCs subcontractor, Harnois;
- d) KTC and Harnois had agreed that Harnois would not be paid for same until it was completed; and
- e) this work was performed, and needed to be performed, in April of 2017 (well within the applicable lien period).

24. In this regard, KTC's evidence is more particularly (and chronologically) set out as follows:

- a) with the exception of the Commissioning Work, the work under the Contract was complete, and the System operational, by the beginning of September, 2016; **Tulloch Affidavit, para 27**
- b) the Commissioning Work was then started; **para 27-28**
- c) the Commissioning Work was challenging because:
 - i. it was the first such System that KTC/Harnois had installed;
 - ii. the System was very high tech and very complicated;
 - iii. KTC/Harnois had to tweak the System without knowing what type of organic waste was going to be introduced into the System – be it swine, city waste, food table waste, etc.;
 - iv. from week to week, KTC/Harnois had deal with a new compost source with a different odour emission rate;
 - v. there were a lot of parameters that needed to be factored into the Commissioning process; and
 - vi. in that context it was a real challenge for them to achieve what they needed to achieve;

Cross-examination of Patrice Harnois, q. 158-162

- d) on November 7, 2016, Mr. Harnois advised Mr. Hamilton that the “installation of frost protection devices on water supplies” would occur the following day; **Tulloch Affidavit, para 28 and Exhibit “C”**
- e) the frost protection was required to allow the System to be started in winter conditions; and **Tulloch Affidavit, para 28**
- f) upon start-up in such conditions, the tweaking/commissioning would have to be completed before the System could be turned over; **Tulloch Affidavit, para 28**
- g) in December of 2016, however, the temperatures dropped to well below freezing and the fogging system had to be shut down completely until the spring; **Tulloch Affidavit, para 29.**
- h) the Commissioning Work therefore had to be suspended until the System could be started up again in the spring; **Tulloch Affidavit, para 29**
- i) Mr. Hamilton acknowledged in an email sent February 7, 2017 that the MOE was looking for confirmation that data extraction from the computer system, to track negative air pressures; **Tulloch Affidavit, para 31 and Exhibit “D”**
- j) it was accordingly understood that the System was not complete as at February 7, 2017; **Tulloch Affidavit, para 31**
- k) Mr. Hamilton acknowledged in an email exchange of February 28, 2017 that the System had to be altered to provide “a more excel friendly format” for date export; **Tulloch Affidavit, para 32 and Exhibit “E”**
- l) this part of the tweaking/commissioning work was necessary in part because the System was new and meeting the MOE requirements was therefore a bit of a moving target: the MOE was deciding, on the fly, what kind of information they wanted the system to be able to export, and in what format; **Tulloch Affidavit, para 32**
- m) at times, the testing, engineering and commissioning phase would require software or hardware changes, or “Upgrades”, to avoid failures and to meet the MOE requirements. **Tulloch Affidavit, para 34**

- n) on April 6, 2017 Mr. Harnois provided Mr. Hamilton with a “to do” list of the Commissioning Work which Harnois was planning to perform on April 13 and 14, 2017 (the “To Do List”). The To Do List included for, among other things, updating software, installing new components and inspecting (or checking) various components of the work. **Tulloch Affidavit, para 37 and Exhibit “I”**
- o) the installation of new parts was not the replacement of deficient parts. Rather, it was part of the tweaking necessary to fully commission the System; **Tulloch Affidavit, para 37**
- p) Harnois attended at the Premises on April 13 and 14, 2017 to start up the water systems and complete the inspection, commissioning and engineering work; **Affidavit, para 38**
- q) in addition to completing the To-Do List items, Harnois performed computer engineering which involved both updating and then adjusting the computer systems to ensure that they would meet the MOEs high standards at that time; **Tulloch Affidavit, para 38**
- r) Harnois and KTC had agreed that Harnois would not be paid for the Commissioning Work until it was complete and that, because that work was not completed until April 13 and 14, 2017, Harnois invoiced KTC for that Work, in the sum of \$28,600.00 plus HST, on April 21, 2017; **Tulloch Affidavit, para 39 and Exhibit “J”**
- s) the work performed by Harnois on April 13 and 14 was part of KTCs scope of work and part of the Part C field inspection and engineering work under KTCs Contract (the Commissioning Work) and not deficiency correction; and **Tulloch Affidavit, para 40**
- t) Harnois’ attendance on site on April 13 and 14, 2017 is evidenced by calendar records and disbursement receipts (which were not challenged in evidence or cross-examination). **Tulloch Affidavit, para 45 and Exhibit “N”**

25. Mr. Hamilton's evidence in relation to Commissioning is that:
- a) he has built plants before. He is familiar with mechanical systems, electrical systems, sophisticated building automation systems and the contracts for the installation of same. He has also been involved in new construction projects for the construction and installation of such systems; **(Cross-examination of Al Hamilton, q. 33-44)**
 - b) he understands that the typical practice is that, once such a system goes in, it will need to be commissioned before the owner will accept it. Commissioning, he agrees, occurs when the system is turned over to, and accepted by, the owner; **(q. 45)**
 - c) he understands and agrees that commissioning will continue, after the system is turned on, until the system is turned over to the owner; **(q. 46-58)**
 - d) he accordingly knew, "going in", that there was going to be a commissioning phase after KTC started the System, at which time KTC would make sure it was working properly, in part because KTC had "never fired one of these things up before" and because commissioning was required "as per the contract"; **(q. 135)**
 - e) he also understood that there would be a formal "sign-off" event at the end of the commissioning phase, whereby the owner would confirm that its requirements were met and the system would then be turned over to the owner; **(q. 59-68)**
 - f) this sign-off of the commissioning work occurred sometime between September 12th and October 4th, 2016; **(q. 72-100)**
 - g) while he believes there is "a document out there when it was signed-off" (being a training document or manual), this has not been produced "and so far we haven't got to it"; **(q. 100 and 105-108)**
 - h) he cannot point to any document where KTC or Harnois said to Astoria, "We're confirming that your requirements have been met and commissioning has passed"; **(q. 109-112)** and
 - i) to the best of his knowledge Astoria complied with the Court Order requiring it to provide the receiver with all of the relevant documents in its possession and control. **(q. 8-9)**

26. Mr. Hamilton further admits that on October 4, 2016 (the latest date upon which he says the commissioning work was complete) Harnois wrote him by email and said:

“We did a nice upgrade on the user interface this morning. Don’t worry if the parameters does change once in a while. I’m doing a daily investigation and do little changes one step at the time.

The goal is to find the perfect balance between odor control – dew point control vs. energy consumption” (emphasis and typos original)

Cross-examination of A Hamilton, q. 103 and Exhibit “B”

27. Mr. Hamilton also admits that KTC/Harnois did “tweaking” work on the System after sending the October 4, 2016 email, which includes the work performed on the To-Do list items in April 2017. He further admits that this was done to help Astoria meet its “ultimate” goal. He alleges, however, that Harnois must have been travelling the 5 hours from Joliette, Quebec to do this work voluntarily and for free. His evidence is, more particularly:

- a) that he was aware that Harnois was travelling 5 hours each way from Joiliette, Quebec to perform this work;
- b) that while finding the perfect balance between odor/dew point control and energy consumption was in fact “always the ultimate goal”, it was not part of KTCs contract;
- c) that he was happy to have the work done, towards meeting the “ultimate goal”. When Mr. Harnois told him he would be tweaking the system or adding a new part, Mr. Hamilton would say “”sure, its going to reduce the energy, why not?” ... “I would just sit back and say ‘Perfect’” ... “Sure, go ahead”. “I’m going to take everything free I can get, if you will”;
- d) that he was agreeable to Harnois’ performing the work on the To-Do list in April (“the job list that he came back in – in the spring for”), so long as it was done “at no cost”: and

- e) that, "Don't bet me wrong, its great that [Harnois} thinks this way, but, you know .. they're all nice little things to have. 'Good for you. Thank you very much, Patrice'."

Cross-examination of A Hamilton, q. 143 - 154

28. Mr. Hamilton denies that the post-October 3, 2016 work was part of the \$28,600.00 amount set aside in the Contract for field inspection, engineering commissioning work. He does not recall getting a breakdown of that work and did not ask what was included in same, however.

Cross-examination of A Hamilton, q. 159 – 165

29. Significantly, we submit, Mr. Hamilton admits that KTC/Harnois "were tweaking the system all along". He cannot point us to any document that shows when their tweaking of the system stopped being contract work and became free, gratuitous work.

Cross-examination of A Hamilton, q. 167– 173.

30. We submit that, on the evidence, the commissioning work performed in April of 2017 was part of the \$28,600.00 line item of work entitled 'field inspection and engineering' which KTC/Harnois was required to perform as part of the contract and which Harnois was not paid for until following its completion. It makes no sense to suggest that Harnois was doing this for free. On the evidence, Harnois was doing it to complete the contract, and get paid.

On Quantum

31. KTCs Statement of Account was attached to the Affidavit of Ken Tulloch as Exhibit "K". The Statement shows the invoices which KTC claims as outstanding and the payments made by Astoria to date. The Invoices are collectively attached as Exhibit "L". The Statement shows the sum of \$347,717.93 is due and owing to KTC. This is also the amount of KTCs claim for lien.


32. The Receiver confirmed that "the amount owed by" Astoria to KTC was, in fact, \$347,792.00. that amount I believe that Astoria has advised the Receiver that the sum of is due and owing to KTC.

Tulloch Affidavit, Exhibit "M"

33. Neither Al Hamilton, Astoria nor anyone has ever suggested that KTC is not owed the sum of (at least) \$347,717.93. The Receiver does not oppose quantum on this motion. We submit that quantum in the sum of \$347,717.93 has been proven.

34. We submit that the lien claimant's lien has been proven as to timeliness and quantum and ask that its costs be paid, by BDC and the Receiver, jointly and severally, on the substantial indemnity scale.

All of Which is Respectfully Submitted



Robert J. Kennaley
Kennaley Construction Law
Lawyers for the Plaintiff/Lien Claimant

Schedule "A"

570 South Service Road Inc. v. Lawrence-Paine & Associates Limited,
2010 ONSC 6978 (CanLII)

Ravell Investments Ltd. v. DCLC Developments Ltd., 1995 CarswellOnt
833, 23 C.L.R. (2d) 304, 24 O.R. (3d) 863

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**Kennaley Construction Law
a construction law practice**

58 Peel Street
Simcoe, Ontario N3Y 1S2

Robert J. Kennaley
(LSUC #40892B)
Telephone: (519) 426-2577
Facsimile: (519) 426-3777

Lawyers for the Plaintiff,
Ken Tulloch Construction Ltd