SUPREME COURT OF NOVA SCOTIA

Citation: Sunny Corner Enterprises Inc v. Dustex Corporation, 2011 NSSC 172

Date: 2011 05 06
Docket: Hfx No. 326628
Registry: Halifax

Between:

Sunny Corner Enterprises Inc.

Plaintiff

v.

Dustex Corporation and Nova Scotia Power Incorporated

Defendants

Judge:	The Honourable Chief Justice Joseph P. Kennedy
Heard:	November 16 & 29, 2010, in Halifax, Nova Scotia
Counsel:	Michael S. Ryan, Q.C. for Sunny Corner Enterprises (Plaintiff) Geoffrey Saunders for Dustex Corporation (Defendant) David Henley for Nova Scotia Power (Defendant)

By the Court:

[1] The Defendant, Dustex Corporation (Dustex) by this motion seeks:

(1) a stay of the action pursuant to s. 9(1) of the *Commercial Arbitration Act,* and;

(2) an Order discharging a lien and notice of *Lis Pendens* under the *Builders' Lien Act*.

Background

[2] Dustex is a manufacturer and supplier of air pollution control equipment, including cold-fired boilers for electricity generation. On November 14, 2007 it was awarded a contract by Nova Scotia Power (NSPI), for the "design, fabrication, delivery, erection, commissioning and guarantee of a Pulse Jet Fabric Filter . . . for the removal of particulate from the flue gas stream of the coal fired utility boiler located at the Trenton Generating Station". This filter is also known as a "baghouse". Dustex manufactures, but does not install its equipment.

[3] Dustex subcontracted with the Plainiff, Sunny Corner Enterprises Inc. (Sunny Corner), for installation of the baghouse at the NSPI site, pursuant to purchase order number 1 (PO1), dated October 23rd, 2008, and revised March 23rd, 2009. PO1 provided that the "[s]cope of this work will be as defined in the contract between Nova Scotia Power Incorporated and Dustex effective November 14th, 2007(main contact). Subsequent purchase orders required Sunny Corner to, *inter alia*, fabricate ductwork (PO2) and to install installation and cladding on the ductwork (PO4).

[4] Sunny Corner constructed the baghouse in the fall of 2009 and received payment pursuant to PO1, minus the builders' lien holdback. According to Brian Kalata, the Senior Project Manager for Dustex, the substantial completion date was September 23rd and the baghouse was functional by mid-October. Jim Duffy, Sunny Corner's Project Manager, says that the baghouse became "consistently operational" on October 18.

[5] Dustex claims that after September 2009, the only work Sunny Corner had left to do was field insulation and cladding to ductwork under PO4, and the completion of punchlist and deficiency items under other purchase orders.

[6] On November 26th, 2009, Jon Cecchetto, NSPI's representative on the site, advised Mr. Kalata of Dustex that there were deficiencies in the cladding or ductwork, which (Dustex says) had been done under PO2 or PO4. Dustex advised Sunny Corner that it would not pay for the correction of work that had not been done properly. Sunny Corner repaired the cladding between late November and mid-December of 2009. Mr. Kalata said this was done without the approval of Dustex. Sunny Corner responds that this is incorrect and refers to an e-mail from Patrick Paul of Dustex on 26 November, indicating that Sunny Corner had been instructed to proceed with modifications to ductwork cladding and flashings on sections 5 and 10.

[7] According to Jim Duffy, of Sunny Corner, Dustex provided only verbal instructions (not design sketches) for installing the ductwork and cladding. He states, in his affidavit, that he became aware in late November 2009 that NSPI had concerns about water pooling on top of duct sections 9 and 10 and seeping into the ductwork, and about the appearance of the ductwork. In order to complete the ductwork to NSPI's specifications, he said, Sunny Corner modified the cladding to shed water.

[8] Sunny Corner's subcontractor for cladding installation, Pro Insul Limited, was on the site until December 17 and 18, 2009, installing the cladding and flashing for

the ductwork insulation and cladding. According to Duffy, their sub-contractor finished the ductwork on December 18, 2009.

[9] Additionally, Duffy states that Dustex did not provide Sunny Corner with drawings indicating the placement of ductwork access doors. Instead, Dustex's representative on the site gave verbal directions. Certain doors required access platforms, which Sunny Corner didn't construct. Duffy says Dustex did not provide design sketches for access platforms. The correspondence on this matter went on into January 2010.

[10] In January 2010 Sunny Corner invoiced Dustex. Dustex refused to pay the invoice. Sunny Corner filed a claim of lien on February 2, 2010, and a notice of *lis pendens* on March 30. An Amended Certificate of *Lis Pendens* was filed on April 1, 2010.

[11] In its Statement of Claim, Sunny Corner quantified its claim in negligence and breach of contract at $7,716,344.00, plus special damages, pre-judgment interest, a declaration in respect of the lien and an order for sale of the property pursuant to the *Builders' Lien Act* in the event of non-payment.

STAYING THE PROCEEDING UNDER THE *COMMERCIAL ARBITRATION ACT*

[12] Dustex seeks an order staying the action pursuant to the *Commercial Arbitration Act*, S.N.S. 1999, c. 5. It claims the subcontract with Sunny Corner incorporates the arbitration provisions of the main contract between Dustex and NSPI. Sunny Corner, in response, says the arbitration provisions do not apply because they were not expressly incorporated into the subcontract.

[13] Section 31 of the main contract, headed "dispute resolution," provides, in part, as follows:

> 31.1 In this Agreement, "dispute" or "disputes" means differences between the parties to the Contract as to the interpretation, application, or administration of the Contract or any failure to agree where agreement between the parties is called for, or any claim whatsoever arising out of any alleged breach of obligations under the Contract.
>
> . . .
>
> 31.3 The Contractor may by written notice to the Company request any dispute to be referred to arbitration. The Company, at its sole discretion, may refer such dispute, or any other dispute, to arbitration in accordance with this Section. Should the Company refer any dispute to arbitration, the parties shall be bound by such referral.
>
> 31.4 A claim or dispute which is referred to arbitration by the Company pursuant to Section 31 shall be conducted under the provisions of the *Commercial Arbitration Act*, S.N.S. 1999, c. 5 . . ..

[14] Subsection 9(1) of the *Commercial Arbitration Act* provides that where "a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding." Subsection 9(2) identifies situations where the court may refuse to grant a stay.

[15] The Ontario Court of Appeal considered a similar provision in *Mantini v. Smith Lyons LLP* (2003), 228 D.L.R. (4th) 214, [2003] O.J. No. 1831, app. for leave to appeal dismissed, [2003] S.C.C.A. No. 344. Feldman J.A. said, for the Court:

> In order to determine whether a claim should be stayed under s. 7(1) of the *Arbitration Act*, the court first interprets the arbitration provision, then analyzes the claims to determine whether they must be decided by an arbitrator under the terms of the agreement, as interpreted by the court. If so, then under s. 7(1), the court is required to stay the action and refer the claims to arbitration subject to the limited exceptions in s. 7(2) [*Mantini* at para. 17] . . ..

[16] Coady J., of this Court, cited this passage while considering s. 9 in *Black & MacDonald Ltd. v. Degrémont Ltée.*, 2009 NSSC 85, 2009 CarswellNS 134. He said:

> The intention of s. 9 is clear. In agreements governed by an arbitration clause, and where a party commences an action to resolve a dispute, the court must stay the action save in exceptional circumstances. The burden of allowing this action to continue rests with B&M, the party attempting to circumvent the arbitration clause.
>
> In *Self v. Abridean Inc.*, 2001 NSSC 191 (N.S. S.C. [In Chambers]) Robertson J. addressed decisions where a court will exercise its discretion and refuse to stay an action. These cases fall into two groups. One is where the matter in dispute was not anticipated by the arbitration agreement. The second is where the party resisting the

> stay demonstrates that one of the discretionary factors in s. 9(2) applies. The issue in this application is whether this dispute is caught by Article 27.03 of this Agreement [*Black & MacDonald* at paras. 13-14].

[17] Coady J. noted the preference evidenced in the caselaw that an arbitration clause should be interpreted, where possible, in such as way as to result in arbitration:

> Modern decisions have emphasized that policy considerations in encouraging arbitration may influence judicial interpretation of these clauses. In *Canadian National Railway v. Lovat Tunnel Equipment Inc.*, [1999] O.J. No. 2498 (Ont. C.A.) Finlayson J.A. addresses this shift at paragraph 20:
>
> > In any event, there has been a significant change since 1970 ... in the attitudes of the courts and legislature as to the desirability of encouraging the resolution of disputes between the parties other than by resort to the courts.
>
> At paragraph 21 Justice Finlayson endorses the following comments of Blair J. in *Onex Corp. v. Ball Corp.* (1994), 12 B.L.R. (2d) 151 (Ont. Gen. Div.):
>
> > At the very least, where the language of arbitration clauses is capable of bearing two interpretations, and on [sic] one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option, given the recent developments in the law in this regard which I have earlier referred [*Black & MacDonald* at paras. 21-22].

[18] Justice Coady concluded that the evidence did not permit an assessment of what the parties "subjectively intended" by the language they used, but held nevertheless that "an interpretation of these provisions must be derived from their plain meaning," which, in the circumstances, suggested that the parties intended arbitration. He added

that "[e]ven putting aside this conclusion …, *Lovat Tunnel Equipment* … dictates that where uncertain, the parties must pursue arbitration."

[19] Sunny Corner submits that *Black & MacDonald* is distinguishable, in that the issue before Coady J. was the scope of an arbitration clause, not whether it applied at all.

[20] *Black & MacDonald* effectively describes the policy preference for arbitration where possible; beyond that I agree that it is of limited relevance in this matter.

[21] Whether the arbitration provision of the head contract was incorporated into the subcontract will depend on the interpretation of the parties' intentions, in the context of the law governing the relationship between head contracts and subcontracts.

[22] The NSPI-Dustex contract, the main contract, identifies NSPI as the "Company" and Dustex as the "Contractor." Pursuant to s. 1.1.5, "Contract" means "this Contract between the Company and the Contractor, dated as of the date first noted above, including all Schedules attached hereto."

[23] Notwithstanding this definition, Dustex submits that "the only reasonable interpretation" of s. 31 (the arbitration provision) as it relates to Dustex and Sunny Corner, is for "Contract" to be read as PO1, "Company" as Dustex and "Contractor" as Sunny Corner. This interpretation assumes that the main contract, including s. 31, is incorporated into PO1. As a result, Dustex would be the "Company" under s. 31.3 for the purposes of PO1, with sole discretion to refer a dispute to arbitration.

[24] In support of its argument that PO1 incorporates s. 31 of the main contract, Dustex cites *Goldsmith on Canadian Building Contracts*, where the authors write:

> Since a subcontractor is, in substance, performing part of the work specified in the prime contract on behalf of the prime contractor, it is quite common for a subcontract to incorporate by reference so much of the prime contract as is applicable to the particular work in question. This does not have the effect of creating any contractual relationship between the subcontractor and the owner, but it does make the terms and conditions of the prime contract, to the extent that they are so incorporated, a part of the subcontract in the same way as if they had been separately written out again as part of the subcontract . . ..
>
> For the purpose of determining the respective rights and liabilities of the subcontractor and the prime contractor, they may, in general, be regarded as contractor and owner respectively, and many of the same considerations as to tender, performance, payment, breach of contract and remedies apply to them [I. Goldsmith and T.G. Heinztman, *Goldsmith on Canadian Building Contracts*, 4th edn. (looseleaf), at pp. 7/5-7/7] . . ..

[25] Sunny Corner says that a subcontract only incorporates an arbitral provision of a main contract if it does so expressly, which was not the case here. The authors of

Goldsmith make the following remarks about the incorporation of arbitration provisions:

> An arbitration clause in the prime contract may be incorporated by reference into the subcontract. However, such an incorporation must be specific. A general incorporation of the prime contract into the subcontract will not normally include the arbitration clause [*Goldsmith on Canadian Building Contracts* at p. 10/3] . . ..

[26] In a similar vein, *Halsbury's Laws of England* (1992) states:

> Where a sub-contractor agrees to be bound by the terms of a principal contract, which contains a clause referring disputes between the employer and the contractor to arbitration, this does not operate as a submission to arbitration of disputes between the contractor and the sub-contractor, *unless that term of the principal contract is expressly incorporated in the sub-contract*. [*Halsbury's Laws of England* 4th edn. Reissue, vol 4(2) (London: Butterworths, 2002) para. 493]
>
> [emphasis added]

[27] A leading Canadian case on the circumstances in which a subcontract will incorporate provisions of a head contract is *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.* (1996), 25 C.L.R. (2d) 259, 1996 CarswellOnt 16 (Ont. C.J. (Gen. Div.)). In that case, Chapnik J. held that "[i]ncorporation of an arbitration clause can only be accomplished by distinct and specific words . . ." (*Dynatic* at para. 11). She rejected the submission that an arbitration clause was incorporated by

inference in a subcontract by virtue of not appearing on a list of excluded provisions. She concluded that "the manifest intention of the parties, as reflected on the face of the subcontract document, was not to include the arbitration clause therein; in the alternative, the matter was overlooked and cannot now be imposed upon the parties in the absence of agreement between them" (*Dynatec* at paras. 9 and 15). *Dynatec* is the authority cited for the statement in *Goldsmith* respecting the need for "specific" words of incorporation.

[28] Dustex argues that the language of the contract in *Dynatec* has no equivalent in the present case. The *Dynatec* subcontract incorporated provisions of the head contract "insofar as applicable, generally or specifically, to the materials to be furnished and the work to be performed under this Subcontract." It added, "[w]ithout limiting the generality of the foregoing, the Subcontractor shall be entitled to rely on the provisions in the Prime Contact in favour of the Contractor in the performance of obligations under this Subcontract, to the extent applicable to the parties hereto, subject to the terms and conditions of this agreement" (*Dynatec* at para. 4). Dustex says these provisions are more limited than the equivalent provision in PO1, which expressly states that Dustex and Sunny Corner agree to be bound by all the terms and conditions of the principal contract with specific exceptions only.

[29] Certainly there is a distinction between the contract language in the present case and in *Dynatec*, but it does not follow from this that the principle requiring "specific" or "express" incorporation of an arbitration clause can be ignored.

[30] Sunny Corner agrees that PO1 provides that the head contract is among the documents that are "integral" to the purchase order, but again points out that there is no specific incorporation of the arbitration provision.

[31] Dustex alternatively suggests that *Dynatec* is no longer good law. The result in *Dynatec* rested in part on the language in *Halsbury's* (1992). Dustex offers a quotation from a more recent edition (2002) of *Halsbury's Laws of England*:

> Where a sub-contractor agrees to be bound by the terms of a principal contract, which contains a clause referring disputes between the employer and the contractor to arbitration, this does not necessarily operate as a submission to arbitration of disputes between the contractor and the sub-contractor, unless the language used by the parties to the sub-contract points plainly to an intention to incorporate the arbitration clause in the main contract. [*Halsbury's Laws of England* 4th edn. Reissue, vol. 4(3) (Butterworths/LexisNexis, 2002) para. 201]

[32] Dustex says the 2002 language is "fundamentally different" from that of 1992, in that the need to expressly incorporate the arbitration clause has disappeared.

[33] The fact that the language of *Halsbury's* changed after it was cited in *Dynatec* does not render *Dynatec* bad law, as Dustex suggests . Moreover, the still more recent *Halsbury's Laws of Canada* (2008), offers the following comment under the heading, "subcontractor's relationship with general contractor":

> Unless the terms of the general contract are somehow expressly incorporated into their subcontract, subcontractors are not bound by the terms of the general contract nor are they third party beneficiaries of the general contract. The degree of incorporation of general contract terms into subcontracts is a question of construction of the subcontract . . .. [*Halsbury's Laws of Canada*, "Construction", (Markham, Ont,: LexisNexis, 2008), p. 141]

[34] I conclude that *Dynatec* lives and remains relevant caselaw. I have also considered *Q.Q.R. Mechanical Contracting Ltd. v. Panther Controls Ltd.*, 2005 ABQB 58, 2005 CarswellAlta 118 (Alta. Q.B.), where the plaintiff contractor entered into a head contract with a town to upgrade a pumphouse, with a two-year guarantee of work and materials. Lee J. described the subcontract as follows:

> … Prior to submitting a bid for the subcontract, Panther had obtained a complete copy of the principal contract between Q.Q.R. and the Town.
>
> The subcontract consisted of two documents: 1) a quote for labour and materials prepared by Panther, dated January 4, 2002, which referenced a particular type of drive; and 2) a purchase order prepared by Q.Q.R, dated January 4, 2002. The purchase order read:
>
> > Authorization to supply the following materials and labour as per your quote … and as per plans and specifications and Addenda 1 through 1 incl. [*Q.Q.R.* at paras. 4-5]

[35] The subcontractor installed a part with a one-year manufacturer's warranty. The part failed three months after the warranty expired. The contractor repaired the part and brought a successful action in Provincial Court against the subcontractor for the repair costs, relying on a two-year guarantee on work and materials required under the head contract. The appeal was allowed on the basis that there was no privity of contract between the subcontractor and the town. Lee J. said:

> The principal contract in this case was a lengthy document containing many terms which were of no concern to Panther.
>
> A subcontractor is only bound by the terms of the principal contract to the extent they are referenced by or incorporated into the subcontract: see Goldsmith at 7-4; *Dynatec* … at para. 10. To determine the extent to which the terms of a principal contract have been incorporated into a subcontract is a "question of construction of the subcontract": *Dynatec* at para. 10. [*Q.Q.R.* at paras. 16-17]

[36] The guarantee provision was not referenced in the subcontractor's quote, nor was it contained in the Addenda to the head contract (*Panther Controls* at para. 18). The word "specifications" in the subcontract "was not intended to refer to the whole of the principal contract," and the guarantee provision did not constitute a "specification" binding the subcontractor. As such, the subcontractor was not bound by the guarantee.

[37] Both *Goldsmith* and *Halsbury's Laws of Canada* suggest that an arbitration clause may only be incorporated by express language.

[38] The *Halsbury's* language might have been clearer – "somehow expressly incorporated" might be considered ambiguous – but the authors of *Goldsmith* make it clear that an incorporation must be specific.

Conclusion on the Stay Motion

[39] A general incorporation of the prime contract into the subcontract will not normally include the arbitration clause.

[40] On the strength of these authorities, it appears that something more than a declaration that the head contract is "an integral part" of the subcontract would be required to incorporate the arbitration provision.

[41] In this matter there is no express incorporation of the arbitration clauses in the main contract into the subcontract. Section 31 was clearly not drafted to accomplish such.

[42] I do not find Sunny Corner to be bound by the arbitration provision in the main contract and so will not be staying this action pursuant to the *Arbitration Act.*

VACATING A LIEN UNDER THE *BUILDERS' LIEN ACT*

[43] Dustex says Sunny Corner failed to commence the proceeding and register its *lis pendens* within the time required by the *Builders' Lien Act*, R.S.N.S. 1989, c. 277. Sunny Corner responds that the determination of the completion date and the other contractual issues are matters for trial, which should not be decided summarily. NSPI, while taking no position on the application under the *Commercial Arbitration Act*, supports Dustex's motion to discharge the lien.

[44] The parties have provided extensive argument on, inter alia, what is meant by "completion," and whether the December 2009 work was done under PO1.

[45] Sunny Corner's position, however, remains that the date on which the work was completed is not the real issue on the motion. Rather, the question is whether there is

a serious factual dispute that precludes the court from discharging the lien in a summary manner.

[46] Subsection 29(4) of the *Builders' Lien Act* permits the court to vacate a lien:

> (4) Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

Subsection 26(1) sets out the conditions for expiry of a registered lien:

> 26 (1) Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of one hundred and five days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for in subsection (5) of Section 24, on the expiration of thirty days from the registration of claim, unless in the meantime an action is commenced to realize the claim and a certificate thereof (Form E) is registered in the registry of deeds in which the claim for lien was registered.

[47] The *Interpretation Act*, R.S.N.S. 1989, c. 235, provides, at s. 19(l), that "where a period of time dating from a given day, act or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of that day or of the day of the act or event."

[48] The burden on an applicant seeking to summarily vacate a lien on the ground that there is no valid lien is a heavy one, which has been said to be analogous to summary judgment. The security provided by the Act "should not be taken away except on the clearest grounds": *McLanders Contractors Ltd. v. Eastern Flying Services Ltd.* (1982), 55 N.S.R. (2d) 449, 1982 CarswellNS 36 (Co. Ct.). Thus, in *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd.*, 2006 NSCA 120, 2006 CarswellNS 483, the Court of Appeal held that the chambers judge erred in vacating a lien "in the face of a serious dispute as to material facts … supported solely on the basis of affidavit evidence and upon which the affiants were not cross-examined….".

[49] Sunny Corner filed a Certificate of *Lis Pendens* and a Statement of Claim on 30 March 2010. An Amended *Lis Pendens* was filed on 1 April. Given the 105-day duration of a lien claim "after the work or service has been completed or materials have been furnished or placed," (s. 26(1)), Dustex says a filing date of 1 April 2010 required the work to be finished no earlier than 17 December 2009. The lien indicates that the last work was done on or about 18 December, 2009.

[50] Sunny Corner points to s. 19(l) of the *Interpretation Act*, which provides that "where a period of time dating from a given day, act or event is prescribed or allowed

for any purpose, the time shall be reckoned exclusively of that day or of the day of the act or event." Excluding 18 December, the 105th day would fall on 2 April 2010.

[51] The meaning of "completion" was considered in *Lambton (County) v. Canadian Comstock Co. Ltd.*, [1960] S.C.R. 86:

> . . . How does a tribunal decide when there has been substantial completion so as to start time running against a subcontractor? How would a sub-contractor be able to recognize his position if this doctrine were applied? The only certainty in the situation is the point of time when the subcontractor is able to sue for his contract price in full and he cannot do this until he has performed all that he is bound to do under his contract. This is the meaning that the Court of Appeal, in conformity with a long line of judicial decision, has attributed to the word "completion" under s. 21(1), and in my opinion it was correct in so doing. Indeed, unless whatever certainty the legislation has is to be lost there is no other alternative.
>
> We were pressed with the authority *Day v. Crown Grain*, to the effect that time begins to run when the contractor can sue "as for a completed contract", the submission being that this could be something short of completion. When the facts of the case are examined I do not think that this case lays down any rule different from that which has always been followed, namely, that time does not begin to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

[52] Dustex says Sunny Corner had completed its work before 17 December 2009. Its project manager, Brian Kalata, states in his affidavit that "[b]y the end of September, 2009, SCEI had fully invoiced the fixed price under PO-1 … and had been paid the same excepting builders' lien holdback." Jon Cecchetto of N.S.P.I. maintained a diary of the work being completed on the site. Mr. Cecchetto's opinion, as described in his affidavit, was that the work done by Sunny Corner between 10 and

18 December "was corrective in nature: work necessary to correct or repair cladding that SCEI had already installed." He signed Sunny Corner time sheets between 7 and 18 December with the notation "Deficiency Item Verified only by JC," by which he says he "meant that the work noted therein was corrective in nature: work necessary to correct or repair cladding that SCEI had already installed." Dustex submits that Mr. Cecchetto's diary shows that Sunny Corner's work between 10 and 17 December was corrective.

[53] Mr. Ryan counsel for Sunny Corner argued in oral submissions that, firstly, Mr. Kalata did not monitor the work being done by Sunny Corner in early December, and secondly, Mr. Cecchetto did not use the word "repair" in relation to Sunny Corner's work in December.

[54] Dustex responds that (i) Sunny Corner was doing work under various subcontracts, and that there was no reason why Mr. Kalata would be aware of the specifics of the work, and (ii) there is no substantive difference between "deficiency" and "repair."

[55] Mr. Ryan went on to submit that determining whether the work required "repair" or "completion" is a matter requiring opinion evidence; he noted that Mr. Cecchetto agreed on cross-examination that it was his opinion that the additional work was required to repair deficiencies.

[56] There is authority for the proposition that correction of defective work can extend the time within which a subcontractor may register a *lis pendens* in certain circumstances. The authors of *Construction Builders' and Mechanics' Liens in Canada* offer the following opinion:

> … [T]he Acts of some provinces provide that, in the case of contracts under the supervision of an architect, engineer or other person on whose certificate payments are to be made, the time for filing the lien may be extended to seven days after the giving of the certificate of completion. Where the architect requires that some additional work be done to complete the contract the contract, the time for registering the claim for lien will be extended, even though the work required is of a very minor nature.

[57] The relevant provision of the Nova Scotia *Builders' Lien Act* is s. 24(5), which provides: that

> In the case of a contract which is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made, the claim for lien by a contractor may be registered within the time mentioned in subsection (1) or within seven days after the architect, engineer or other person has given, or has, upon application to him by the contractor, refused to give a final certificate.

[58] However, more relevant in the present context is the general rule. In the words of the authors of *Construction Builders' and Mechanics' Liens*:

> Doing work or supplying materials to rectify defective or improper workmanship or material, or to satisfy the claimant's obligation under a guarantee, will not generally extend the time for filing the claim for lien. The principle that repair of deficiency work will not extend the time is a broad one, and repair or deficiency work is not generally included in the last provision of services or the completion of a contract for services. It does not matter whether the repairs are necessitated by faulty workmanship or external forces such as winter weather. As long as the work done is repair work, it will not extend the time.

[59] In *McLanders Contractors Ltd. v. Eastern Flying Services Ltd.* (1982), 55 N.S.R. (2d) 449, 1982 CarswellNS 36 (Co. Ct.), where a subcontractor had done repairs at the request of the property owner, O'Hearn Co. Ct. J. held that repairs do not serve to maintain a lien when the condition requiring repair arises after the work is complete. He said:

> I find … that the repairs done in May were true repairs but they were done at the instance of the owner and at its charge and were not part of the work that had to be completed by either the contractor or the subcontractor. In general, it has been held that repairs, even when the contractor or subcontractor is fully responsible for them, do not serve to maintain a lien when the condition calling for repairs arises subsequent to the completion of the work. There may be situations where other considerations could prevail, but this is not that kind of case. The repairs in the spring constituted, in fact, a kind of extra to which the subcontractor may have bound itself at its unit prices — that is not clear — but, if that is so, it is an extra that is quite severable and distinct from the work that it and the contractor contracted to do in the principal contract.

[60] O'Hearn Co. Ct. J. revisited the issue in *Municipal Spraying & Contracting Ltd. v. Halifax Petroleum Maintenance Ltd.* (1984), 64 N.S.R. (2d) 139, [1984] N.S.J. No.

58 (Co. Ct.), where he reviewed several cases dealing with the meaning of "completion," and concluded:

> In *Lambton (County of) v. Can. Comstock Co.*, [1960] S.C.R. 86 … the Supreme Court upheld the view of the Ontario Court of Appeal that the time for registering a lien under the [Ontario] *Mechanics' Lien Act* … does not commence until the work contracted for has been entirely completed and does not run from the time that it was substantially completed. It does not matter that the subsequent work was trivial compared to the work already completed, if it was done in good faith to complete the contract and without which the contractor could not have successfully sued for the balance of the contract price. It is otherwise with work done after completion in pursuance of warranty clauses . . ..
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> . . .
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> . . . [I]t is clear that the work done was required by the original contract and specifications, that it was omitted on the job at a lower level of operations by the agreement of the claimant's workman and the owner's engineer, and that it was reinstated on the insistence of the lessee-dealer and with the concurrence of the agents of the owner and prime contractor. Although trivial in amount it was an integral part of the contract although not essential to the operation of the structure but of sufficient importance to warrant insisting on. It was done in good faith as part of the lump sum contract without extra charge, and in time to preserve the lien. On this basis, I hold that the lien claimant is entitled to a lien for the entire amount of the contract.

[61] In *Micon Interiors General Contractors Inc. v. D'Abbondanza Enterprises Inc.* (2008), 76 C.L.R. (3d) 289, 2008 CarswellOnt 6156 (Ont. Sup. Ct. J.), the defendant had a contract for renovation work with the plaintiff and delivered an invoice on 3 August 2005, with several outstanding issues, described by the court as "repairs to a defective exhaust fan, the provision of an air balancing report and completion of sprinkler drawings and a hydraulic flow test in order to obtain the proper permits...."

The architect did not certify the work. The Defendants terminated the contract in February 2006, and the plaintiff registered a claim for lien on March 9. The court said at para. 6:

> Counsel for the Defendants argues that repair work cannot operate to extend the date of completion. Counsel relies on *Canadian Rogers Eastern Ltd. v. Canadian Glass*, [1993] O.J. No. 2985 (Ont. Master)…. This case was also a motion under s. 47(1) of the *Construction Lien Act* to discharge a lien on the ground that it was registered too late. The defendants in that case also argued that repair work done by the plaintiff could not operate to extend the time to claim the lien. The court agreed. In that case, the plaintiff disputed that there were "deficiencies" that it was responsible for repairing, but ultimately agreed to do the repair. In the case at hand, the Plaintiff does not dispute that there were deficiencies that required repair….
>
> The Plaintiff's counsel strenuously argued that I cannot rely on this case as it does not apply the proper test. The lien in the *Canadian Rogers* case fell under s. 31(3)(b)(i)…. This subsection relates to liens of "other persons" and not contractors. It is usually meant to encompass subcontractors. Subsection 31(3)(b) specifies that this type of lien for services or materials supplied to the improvement "expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of, (i) the date on which the person last supplied services or materials to the improvement, 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 the subcontract."
>
> With respect, I disagree that this distinction between s. 31(3)(b)(i) and 31(2)(b)(i) is determinative. Subsection 31(3)(b)(i) refers to the date on which the person *last supplied services or materials to the improvement*. Subsection 31(2)(b)(i) refers to the date the contract was *completed*. Subsection 2(3) specifies that a contract shall be deemed to be *complete* and *services or materials shall be deemed to be last supplied to the improvement* when the price of completion, correction of a known defect or last supply is not more than a specified amount.
>
> I also refer to David I. Bristow et al., *Construction Builders' and Mechanics' Liens in Canada*, 7th ed., … vol. 1 at pages 6-62 and 6-63. The authors also cite the *Canadian Rogers* case for the proposition that the performance of work or supply of materials to rectify defective or improper workmanship does not extend the time for filing the claim for a lien. There is no mention that this proposition is restricted to cases falling under s. 31(3) of the *Construction Lien Act*.

> Thus, in my view, the principle that repair or deficiency work will not extend the forty-five day period is a broad one. Repair or deficiency work is not included in the last provision of services or the completion of a contract for services.

[62] The court allowed the motion to vacate the lien. In that case completion of the air balancing report was required to complete contract, and it cost more than $1,000. The report was completed on 17 November 2005, which was therefore the completion date (not the date of delivery). The lien was registered outside the 45-day period. The outstanding sprinkler drawings and hydraulic flow calculations were deficiencies that were not known about as of 3 August 2005, and would therefore not have extended the completion date. As such, the lien had expired.

[63] Dustex says the work done by Sunny Corner between 10 and 17 (or 18) December 2009, being repairs to work already completed, does not constitute "completion" work that would allow the lien period to be extended. Dustex also says the work was done without its authorization, when Sunny Corner's work under PO1 had been completed.

[64] Sunny Corner disputes the allegation that it was not authorized to do the work, pointing to an e-mail chain that Mr. Kalata of Dustex agreed on cross-examination appeared to show that there was such instruction given, or at least that Patrick Paul,

a superior of Mr. Kalata, had represented to Mr. Cecchetto of CBCL that such authorization had been given, and that Mr. Cecchetto had apparently forwarded this message to Sunny Corner.

[65] Sunny Corner maintains that it was still performing work under the contract with Dustex in January 2010. According to Sunny Corner, the modifications to the ductwork were not repairs, but were contractual work that was required because the original Dustex instructions were inadequate. In addition, Sunny Corner was still providing Dustex with as-built design drawings respecting the ductwork access doors in January 2010. Sunny Corner says, it did not finalize the Quality Assurance package required by the head contract until January 2010.

[66] According to Mr. Kalata's second affidavit, the Quality Assurance package supplied in January 2010 contained "materials completed by SCEI while the work was being completed during the preceding months, and "[t]he only contents … that were completed in January, 2010, that I found, were SCEI forms signed by its representative confirming final review and turnover to Dustex."

[67] As to the “as-built” drawings referred to in Mr. Duffy’s affidavit, Mr. Kalata said these were prepared by Sunny Corner as the work was completed, and that their delivery was required by Dustex in January 2010. He says “Dustex had received copies of the fabrication drawings for the ductwork from SCEI earlier but they failed to note thereon the location of the access doors.”

[68] Dustex argues that “[t]he plans in question had previously been provided to Dustex but SCEI had improperly completed the same by failing to include the access doors.” On cross-examination, Mr. Kalata could not say whether there were as-built drawings provided in January that he had not previously received.

[69] In relation to the provision of documents in January 2010, I am mindful of the remark of O’Hearn Co. Ct. J., as quoted in *Halifax Petroleum*, that “[i]t does not matter that the subsequent work was trivial compared to the work already completed, if it was done in good faith to complete the contract and without which the contractor could not have successfully sued for the balance of the contract price.” On the strength of this evidence, and *Micon*, Dustex submits that a contractor “cannot merely hold on to completed documentation to extend its lien period.”

[70] NSPI takes a similar position, arguing in oral argument that delivering drawings after substantial completion of the work should not be a protective mechanism permitting subcontractors to extend lien times.

[71] Not surprisingly, Sunny Corner disputes that this was the situation, and insists that substantive, if minor, work was required to complete the documents in January. It is not disputed that provision of the documents was a requirement of the head contract and the subcontracts.

[72] As alternative argument, Dustex and NSPI say that any work Sunny Corner did between 10 and 17 December was not done under PO1, although that is the contract referred to in the statement of claim. According to Mr. Kalata, the December repair work was done under PO2 or PO4. The Sunny Corner invoice of January 18, 2010, cites PO4.

[73] There is evidence from William Schenkels, Sunny Corner's Vice President, that Sunny Corner did not consider each purchase order to be a separate contract, in view of the facts that PO1 set out the scope of the project as defined in the main contract; that PO1 was based on preliminary information, to be refined during

performance; that the “Division of Responsibility” portion of PO1 set out Sunny Corner’s installation tasks (including ductwork), which were priced in later purchase orders; and that Sunny Corner understood that PO1 continued to apply in relation to work priced under subsequent purchase orders.

[74] Dustex claims essentially, that the separate purchase orders were separately bid upon and invoiced. Mr. Kalata did agree on cross-examination that there was little difference between the subsequent purchase orders and change orders; Dustex submits that this is a legal distinction with little relevance to the dealings between the parties.

[75] Sunny Corner says the terms and conditions governing each purchase order were found in PO1, advancing the following arguments in support of the view that there was a single contract: (a) PO1 indicates that the scope of the subcontract was as defined in the Head Contract; (b) PO1 stated that the parties did not have full information at the time of its execution, and that more specific details would be shared later; (c) PO1 said that insulation of ductwork would be an adder to the contract and that siding of ductwork would be a change order; (d) the Division of Responsibilities stated that Sunny Corner was responsible for installation of various ductwork-related tasks, to be priced in subsequent purchase orders; and (e) the purchase order for

"support, penthouse, and access steel" stated that the terms and conditions of that order were as previously agreed between Dustex and Sunny Corner in PO1.

[76] Sunny Corner claims the modifications to the ductwork cladding and insulation were made on the instructions of Dustex because the original work, done pursuant to Dustex's verbal instructions, did not satisfy Dustex's contractual obligation to NSPI. By this reasoning, Sunny Corner was carrying out work required by the subcontract, not correcting its own work.

[77] There is authority for the proposition that where labour or materials are provided under several contracts between the same parties and relating to the same property, the contracts cannot be combined in order to extend the time for registering a lien.

[78] In *Rocky Mountain v. Atlas Lumber Co.*, [1954] S.C.R. 589, materials were furnished for constructing a school. The contractor (Matatall) died, and his estate abandoned the contract with the school board. Further materials were supplied on the school board's order. The issue was whether the two contracts could be combined so

as to enlarge the time under the Alberta *Mechanics' Lien Act* for registering a lien for materials furnished under the first contract. Locke J. said (at pages 604-605):

> I am unable, with respect, to agree with the statement contained in the judgment of the Appellate Division that the delivery of November 22nd was not made under a separate contract but was a delivery under the contract between the owner and the contractor. The evidence, in my opinion, clearly demonstrates the contrary. While it was by virtue of the fact that the School Division had entered into the contract for the erection of the school building with Matatall that the respondent might, by furnishing material at Matatall's request, acquire the statutory right of lien upon the property of the School Division, that fact does not mean that deliveries made under the arrangement made between the respondent and Matatall were deliveries under the contract between the School Division and the latter. To that contract the respondent was a complete stranger. To the agreement made between the School Division and the respondent for the supply of material after Matatall's death, the estate of Matatall was equally a stranger. That the right to a lien which arose by virtue of the supply of material after Matatall's death under these circumstances is distinct from that which was vested in the estate of Matatall appears to me to be clear from a consideration of ss. 6, 13 and 14 of *The Mechanics' Lien Act*.
>
> Further support for the view which I have expressed is to be found in the statement of the law adopted by Lamont J. in [*Whitlock v. Loney* (1917) 3 W.W.R. 971, 10 Sask. L.R. 377], to which reference is made in the reasons for judgment of the Appellate Division. In that case Lamont J. adopted the following statement taken from 27 Cyc. 114:
>
> > Where labour or materials are furnished under separate contracts, even though such contracts are between the same persons and relate to the same building or improvement, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either, but a lien must be filed for what was done or furnished under each contract within the statutory period after its compliance. Where, however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items; and in order that the contract may be a continuing one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon, or the time of payment fixed; but a mere general arrangement to furnish labour or materials for a particular

> building or improvement is sufficient, if complied with, even though the original arrangement was not legally binding.
>
> In effect, what has been attempted in the present case is to tack the right of lien acquired by the respondent under its arrangement with Matatall to that which subsequently arose under its arrangements with the School Division . . ..

[79] In *Bermingham Construction Ltd. v. Moir Construction Co.*, [1959] O.R. 355, 1959 CarswellOnt 126 (Ont. C.A.), the plaintiff subcontractor claimed against the contractor and registered a lien on the land of the owner in relation to work on a water purification plant. The contractor claimed indemnity over against the owner. The trial Judge held that the plaintiff was entitled to a lien and that the contractor was liable, but gave judgment against the owner in favour of the contractor in respect of the amounts owed to the plaintiff. The owner's appeal was allowed, on the ground that a lien action did not permit the contractor to assert a claim against a co-defendant in the manner in which it had done. The plaintiff had also made a claim of delay. According to the Court of Appeal (at para. 3):

> . . . The contemplated work was divided into two parts and separate tenders were asked for each. The first part was the base for the diesel generator plant and the second was for the rest of the work. Both parts called for pile driving; only eight piles were required for the first part but a great many more for the second. In December, contractors in order to prepare tenders on these two projects asked for tenders on the piling. The plaintiff, after examining the piling specifications and after being assured by the board's architects that used pipe would be acceptable, made a tender by letter dated 18th December 1956, addressed to Moir. This tender covered the piling required on both projects . . ..

[80] The contractor submitted two tenders with the same date, one for the diesel generator base and the second for the main project. There was an issue as to whether there was one or two contracts (at para. 7):

> Counsel for Moir submitted that there were two separate contracts for the piling and therefore the delay provision in the plaintiff's tender could not apply to any period between the completion of the pile driving on the diesel generator base and the commencement date mentioned in the second purchase order. I do not agree with this submission. In December, Moir asked for and obtained the plaintiff's tender for work on both projects. Upon the basis of this tender and tenders from other trades, Moir submitted to the board on 3rd January two tenders together covering both parts and both tenders were accepted by the board the following day. From that time on, Moir rightly considered that it had contracts for both projects and on 21st January advised the plaintiff that its tender was accepted and to proceed with the piling on the generator base. In my opinion, this was an acceptance of the plaintiff's tender for all the piling and this is supported by the price named in the first purchase order and by the discussion between the parties that there would be a three-week delay before the plaintiff could begin the second part, for which delay the plaintiff at this time waived any right to compensation. If counsel's contention that there were two contracts for piling is correct, then the contractual provision for delay in these circumstances would not have been a subject for discussion and the waiver by the plaintiff of the contemplated three-week delay would have been meaningless. The fact that as between Moir and the board there were two tenders followed eventually by two contracts does not compel or require the conclusion that there were also two contracts between Moir and the plaintiff. In form there was a request by Moir for one tender for the piling and one tender was submitted by the plaintiff, true worded alternatively, which was accepted by Moir in January. The purchase orders were confirmations of the acceptance and served the important purpose of giving the plaintiff the dates for beginning and completing its work on each project so that it would have its equipment and the required pipe on the site in due time.

[81] *Bermingham* suggests that where a subcontractor has no certainty of being awarded the contract under each of several purchase orders, the purchase orders should not be treated as a single contract. In this case there was a competitive bid process for each aspect of the work.

[82] The point of completion, as described in *Lambton*, is "when the sub-contractor is able to sue for his contract price in full," which he cannot do "until he has performed all that he is bound to do under his contract" (at para. 12).

[83] In accordance with its position that the court should not discharge summarily, Sunny Corner submits that there is a material issue as to whether the purchase orders constituted a single contract or multiple contracts. It says that a trial judge could find that Sunny Corner completed its work in January 2010 and the question of the number of contracts is not one for this Court on this motion.

[84] Dustex responds that Sunny Corner's view that the subsequent purchase orders were not separate contracts is supported only by its interpretation of PO1. Dustex says the court can address the interpretation of the written documents in a summary fashion, and submits:

> SCEI tries to confuse the issue by lumping together various portions of the Division of Responsibility ("DOR") which forms part of PO-1. The ductwork is found in section 4 of the DOR. That section, as do all sections of the DOR, sets out who is to supply and who is to install the various pieces of work. With respect to the duct work, the DOR states that Dustex was to supply all of the material and SCEI was to install the same except for items 4.10 and 4.11 which were to be both supplied and installed by NSPI. Page 3 … of PO-1 modifies or changes a number of the items contained in

> the DOR including items 4.06 and 4.07. These are the installations of the insulation and siding of the duct work, which are excluded. While PO-1 does state that this work would be an adder to the contract or a change order to the contract, the parties obviously later agreed otherwise and entered into a separate Purchase Order.
>
> Contrary to SCEI's submissions, the other subsequent Purchase Orders were never anticipated by PO-1 to be completed by SCEI. PO-2 was for the fabrication and supply of the duct work. That was clearly Dustex's responsibility under sections 4.02, 4.03 and 4.04 of the DOR. PO-3 was for the supply of duct work support steel. That was Dustex's responsibility under section 4.05 of the DOR. Finally, PO-5 was for the supply of support steel for the baghouse which was Dustex's responsibility under sections 2.06, 2.07 and 2.08 of the DOR. [Dustex reply brief, pp. 3-4]

[85] Dustex emphasizes that in each case, it was entitled to subcontract items that were its responsibility to other companies; it merely happened that Sunny Corner was the successful bidder in each case.

[86] Mr. Ryan for Sunny Corner led evidence from Mr. Kalata on cross-examination that, while there was a separate purchase order issued for the insulation referred to as an "adder" (at s. 4.06), there was never any amendment to PO1 to delete the references to adders and change orders. Similarly, Mr. Kalata agreed that other purchase orders were, in substance, no different from change orders that would increase or decrease the scope of the original contract.

Conclusion on the Motion to Discharge

[87] There is a good deal of confusion surrounding the scope of the various purchase orders, and the relationship of the subsequent purchase orders to PO1. There appears to be a real issue as to the parties' intentions and as to the actual relationship between the various subcontracts.

[88] Dustex relies on the formal status of the purchase orders as separate contracts, however this does not necessarily dictate the substance of the situation.

[89] I conclude that there is a good deal of dispute as to material facts, both in respect of whether the December work constituted "completion" or "correction," and as to whether the subsequent purchase orders were, in substance, change orders or add-ons to PO1. I am of the view that the facts on both issues are not so clear as to preclude reasonable argument.

[90] That being the case, mindful of the heavy burden resting on the party seeking to vacate a lien as well set out in *McLanders Contractors Ltd. v. Eastern Flying Services Ltd., supra,* and *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd., supra,* I determine that the lien will be allowed to stand.

Bottom line:

[91] In response to this motion I will not stay the action pursuant to the *Commercial Arbitration Act* and I will not be discharging the lien and notice of *Lis Pendens* under the *Builders' Lien Act*.

COSTS

[92] If the Plaintiff succeeds in this action it will have costs on this motion of $2,000.00.

Joseph P. Kennedy
Chief Justice