LEGAL FILE

Lienable Off-Site Supply

By Soizic Reynal de St Michel

Subsection 14(1) of the Construction Lien Act creates "a lien upon the interest of the owner in the premises improved" for "a person who supplies services or materials to an improvement for an owner, contractor or subcontractor."

Since the supply of services and materials to an improvement gives rise to lien rights attached to the premises improved, it is logical to expect these services and materials are supplied on the actual site where the construction takes place. In some circumstances, however, courts have stretched the limits of the construction site to the point where services supplied off-site may give rise to lien rights.

A little more than 10 years ago, the Ontario divisional court clearly stated (for the first time) a claimant can have a lien for services performed off a project site.

In *Benny Haulage Ltd. v. Carosi Construction Ltd.*, the contractor, Carosi, entered into a contract with the Hamilton-Wentworth Catholic Separate School Board for the construction of a new school. Carosi also entered into two agreements with Benny Haulage; the first for the excavation of the site and the second for the haulage and disposal of the excavated material off-site.

Carosi wanted to avoid the cost of disposing of the fill and made the excavated fill available to anyone who needed it. The contractor could not get rid of the fill and subcontracted with Benny Haulage to supply dump trucks and operators for the removal of the excavated fill from the construction site. The dump site where the fill was disposed required Benny Haulage to place a bulldozer on the landfill and spread the fill.

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One of the issues in the case was whether Benny Haulage had a valid lien.

According to Sec. 1 of the Construction Lien Act, supply of services refers to "any work done or service performed upon or in respect of an improvement."

The last supply of services (loading trucks with the fill) on-site occurred more than 45 days prior to the registration of the lien by Benny Haulage, which meant Benny Haulage did not have a valid lien; that is, unless the definition of "supply" encompassed off-site work done at the landfill, which occurred within the 45 day period prior to the registration of the lien. It was therefore critical to determine whether the off-site work could give rise to lien rights.

The court considered two essential factors in concluding Benny Haulage was entitled to lien rights for the services supplied off-site. First, the prime contract required Carosi to remove all excavated material from the site and dispose of it. Second, Carosi knew Benny Haulage had to level and compact the soil as a condition of dumping it at the landfill site; in other words, it was a "package."

The court held that off-site work can give rise to lien rights if the claimant shows the work "physically contributed in a direct and essential way to the construction of an improvement on the site and comes within the definition of 'supply of services' and 'in respect of' as defined in Sec. 1(1) of the Act."

The Ontario courts had the opportunity to consider the issue of off-site work two years later in *Desourdy 1949 Paving Inc. v. Teperman and Sons Inc. (2000)*. In that case, the subcontractor, Desourdy, was required to crush concrete rubbish from the construction site so it could remove the rebar and then dispose of both. Desourdy did not haul the rubbish from the site and performed the work entirely off-site. The court applied the "direct and essential" test from *Benny Haulage* and found Desourdy's work was a lienable supply because it was part of the scope of work in the prime contract.

Where will the court set the limits of the application of the test in *Benny Haulage*?

Consider this: If the company that made its landfill site available to *Benny Haulage* was not paid, would the company have lien rights on the project site?

There is no doubt the answer would be no.

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