

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

<b>BETWEEN:</b>	)	
	)	
DALREN LIMITED	)	
	)	
Applicant	)	Robert J. Kennaley and Joseph E. O’Hearn, for the Applicant
	)	
– and –	)	
	)	
LOADSTAR TRAILERS INC. and 1978327 ONTARIO LTD.	)	J. Christopher Russell, for the Respondents
	)	
Respondents	)	
	)	
	)	
	)	<b>HEARD:</b> December 4, 2024

2024 ONSC 7144 (CanLII)

**REASONS FOR DECISION**

**CHARNEY J.:**

- [1] The Applicant, Dalren Limited (“Dalren”), entered into a contract with the Respondent, 1978317 Ontario Ltd. (“197”), to build a Manufacturing Facility on lands located on Dodge Street in Cobourg, Ontario. Dalren seeks payment of its final invoice for \$44,673 under the Contract (the “Final Invoice”), as well as its construction lien holdback of \$433,885 (the “Holdback”) which had been withheld by Loadstar pursuant to the *Construction Act*, RSO 1990, c. C.30 (the “Act”).
  
- [2] This application turns on the interpretation of the transitional provisions in the Act, which was amended on October 1, 2019 to include provisions which are referred to as the “prompt payment provisions”. Dalren takes the position that the prompt payment provisions apply to this Contract and the final invoice and holdback must be paid immediately. Any disputes about the validity of the final invoice or deficiencies are to be resolved later.
  
- [3] 197 takes the position that the procurement process began prior to July 1, 2018, and therefore the prompt payment provisions of the Act do not apply. 197 has paid the principal amount of the holdback into its lawyer’s trust account, pending a resolution of the deficiency disputes.

**Facts**

- [4] Prior to December 11, 2017, the principal of Loadstar Trailers Inc. (“Loadstar”) and 197, Joseph Hopper (“Hopper”), requested a proposal from Dalren to construct a purpose-built manufacturing facility for the use of Loadstar on property to be purchased by 197. The procurement process related to the construction of a building on premises that were yet to be acquired. In December 2017, the anticipated location of the facility was on Thompson Street in Coburg.
- [5] There is no dispute that, at this point in time, 197 did not own the lands on Dodge Street where the facility was ultimately built. The Dodge Street property was not purchased by 197 until February 26, 2021.
- [6] On December 11, 2017, Dalren provided Hopper with a written “preliminary proposal” to build the manufacturing facility “on Thompson Street” in Cobourg. This was followed by negotiations over requested changes to the Proposal by 197, and corresponding price adjustments submitted by Dalren, until the execution of a formal construction contract.
- [7] On December 11, 2020, Dalren presented 197 with a “CCDC-14 Design-Build Stipulated Price Contract” to build a new manufacturing facility on Dodge Street, which was executed that same day (or possibly a few days later) by 197 (the “Contract”). 197 is identified in the Contract as the “Owner”.
- [8] The Contract specifically referenced the Dalren Proposal of December 11, 2017, as well as the clarification letters from December 19, 2017 and March 1, 2018, in addition to price adjustments and drawings from 2020. These were all included in the Contract under the heading “Dalren Limited Proposal Documents”. These documents all referenced the “new facility located on Thompson Street in Cobourg”. As far as I can determine, the December 2020 Contract was the first document to reference Dodge Street.
- [9] Dalren constructed the facility, and gave 197 thirteen Invoices under the Contract, of which eleven were for interim progress, one was the Final Invoice (\$44,673.74), and one was for the Holdback Invoice in the amount of \$433,885.17 which had been retained by Loadstar under the Act. The interim invoices have all been paid. The Final and Holdback invoices were both issued on October 31, 2022.
- [10] On November 17, 2022, the Payment Certifier issued Certificates of Payment in relation to the Final Invoice and the Holdback Invoice, certifying that the amounts were payable.
- [11] 197 has refused to pay the Final and Holdback invoices, taking the position that Dalren did not submit proper invoices under the Act, that the Payment Certifier acted in bad faith and knowingly disregarded its duty when it approved the invoices, and that the Certificate of Substantial Performance is invalid due to an irregularity that cannot be cured.
- [12] Dalren disputes these positions, and takes the position that under the prompt payment provisions of the Act, 197 must pay these invoices immediately, and that it can litigate these disputes after payment has been made.

- [13] 197 takes the position that the prompt payment provisions of the new Act do not apply because the procurement process began before July 1, 2018, and it is therefore entitled to refuse to pay until the dispute has been resolved. In the alternative, 197 argues that, due to the nature of the dispute, it can refuse to pay even if the prompt payment provisions do apply.

### **The Prompt Payment Provisions**

- [14] One of the fundamental changes to the *Construction Act* in 2019 was the inclusion of the prompt payment provisions in ss. 6.1 to 6.9. Prior to these amendments, the Act used permissive language to address the owner’s obligation to release the holdback at the end of the holdback period. This permitted the owner to set-off any debts or claims it had against the contractor and payment could be delayed until the litigation process ran its course.
- [15] Pursuant to the prompt payment provisions, the owner “shall” pay the amount payable under a proper invoice within 28 days unless the owner “gives to the contractor a notice of non-payment, in the prescribed form and manner, specifying the amount of the proper invoice that is not being paid and detailing all of the reasons for non-payment” within 14 days after receiving the proper invoice.
- [16] Where a notice of non-payment has been given, the dispute may be referred to an interim adjudication under Part II.1 of the Act (“Construction Dispute Interim Adjudication”, ss. 13.1 to 13.23).
- [17] The relevant statutory provision in this case is s. 6.4, which deals with payments from owners to contractors:

#### **Payment deadline, owner to contractor**

6.4 (1) Subject to the giving of a notice of non-payment under subsection (2), an owner shall pay the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the contractor. 2017, c. 24, s. 7.

#### **Exception, notice of non-payment if dispute**

(2) An owner who disputes a proper invoice may refuse to pay all or any portion of the amount payable under the proper invoice within the time specified in subsection (1) if, no later than 14 days after receiving the proper invoice from the contractor, the owner gives to the contractor a notice of non-payment, in the prescribed form and manner, specifying the amount of the proper invoice that is not being paid and detailing all of the reasons for non-payment. 2017, c. 24, s. 7.

#### **Requirement to pay remaining amount**

(3) Subsection (1) continues to apply to any amount payable under the proper invoice that is not the subject of a notice under subsection (2)

- [18] The purpose of the prompt payment provisions was discussed by the Divisional Court in *Jamrik v. 2688126 Ont. Inc.*, 2024 ONSC 2854, at para. 23:

The prompt payment provisions of the *Construction Act* are a recent innovation.... They are intended to address the problem of interruptions in the flow of funds on construction sites as a result of delays inevitable in the litigation process. They do not exist because construction contract claims are unworthy of a formal litigation process, or because payment claimants on construction sites are more worthy of prompt attention to their claims than are other contract payment claimants. They exist because payment delays on ongoing construction projects can, and do, cause cascading losses – by delay in construction, increased costs, and in some cases, avoidable insolvencies. They exist because of a recognition that money should continue to flow, and work continue to be done, pending final determination of claims through the litigation process... The principled basis for interim payment determinations through adjudication disappears once a contract is completed.

- [19] One of the important features of the prompt payment provisions is the requirement that an owner who disputes an invoice must, within 14 days after receiving the invoice, specify the amount of the invoice that is not being paid and detailing the reasons for the non-payment. This prevents the owner from making unsubstantiated and/or inflated claims for set-off which can go untested for a lengthy period of time. Prior to the 2019 amendments, this was seen as “an inviting strategy for a payer seeking bargaining leverage”: Bruce Reynolds and Sharon Vogel, *Striking the Balance: Expert Review of Ontario’s Construction Lien Act* (Report Prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, Delivered April 30, 2016).

- [20] Also relevant to this case is s. 26 of the Act, which provides for the payment of the basic holdback (s. 22) where all liens that may be claimed have expired or been satisfied. Section 26 provides:

Subject to section 27.1, each payer upon the contract or a subcontract shall make payment of the holdback the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

- [21] Like s. 6.4, s. 26 uses the mandatory “shall make payment”, subject to s. 27.1, which provides:

27.1 (1) An owner may refuse to pay some or all of the amount the owner is required to pay to a contractor under section 26 or 27, as the case may be, if,

(a) the owner publishes a notice in the prescribed form specifying the amount of the holdback that the owner refuses to pay, and the notice is published in the manner set out in the regulations no later than 40 days after the date on which,

(i) the applicable certification or declaration of substantial performance is published under section 32, or

(ii) if no certification or declaration of substantial performance is published, the date on which the contract is completed, abandoned or terminated; and

(b) the owner notifies, in accordance with the regulations, if any, the contractor of the publication of the notice.

[22] While ss. 26 and 27.1 do not fall under the “Prompt Payment” heading in the Act, I agree with the Applicant that they are part of the prompt payment scheme introduced in 2019. Prior to the 2019 amendments, s. 26 permitted the release of the basic holdback. Section 26 now uses the mandatory “shall make payment”. Similarly, the notice of non-payment requirement in s. 27.1 was introduced in 2019 and serves the same purpose as s. 6.4(2), but because it comes at the end of construction once the contract is completed, the timeline for publishing a notice of non-payment is extended.

[23] In the present case, 197 did not give Dalren a notice of non-payment as required by s. 6.4(2) or s. 27.1 of the Act. Dalren takes the position that, in the absence of such notice, 197 “shall” pay the invoices within 28 days for the Final Invoice and at the end of the lien expiry period (60 days) for the Holdback Invoice. There is no dispute that “shall” is mandatory. Any dispute regarding alleged irregularities in the invoice or Certificate of Substantial Performance, or the conduct of the Payment Certifier must, in the absence of notice of non-payment, be litigated after payment is made in the prescribed time.

[24] 197 takes the position that the prompt payment provisions do not apply because the procurement process was commenced before July 1, 2018.

### **The Act’s Transitional Provisions**

[25] The application of the prompt payment provisions to this case turns on transitional provisions in s. 87.3 of the Act, which provide:

(1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,

(a) a contract for the improvement was entered into before July 1, 2018;

(b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises;

...

(4) Parts I.1 and II.1 do not apply with respect to the following contracts and subcontracts:

1. A contract entered into before the day subsection 11(1) of the Construction Lien Amendment Act, 2017 came into force.

2. A contract entered into on or after the day subsection 11(1) of the Construction Lien Amendment Act, 2017 came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.

[26] Part I.1 is the “Prompt Payment” provisions of the Act. Part II.1 is the Construction Dispute Interim Adjudication provisions of the Act.

[27] The *Construction Lien Amendment Act*, 2017, s. 11(1), came into force on October 1, 2019.

[28] These transitional provisions establish three time periods: *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555, at para. 9:

(1) Where a “procurement process for the improvement” was commenced before July 1, 2018 by the owner of the premises”;

(2) Where a “procurement process for the improvement” was commenced on or after July 1, 2018 and before October 1, 2019; and

(3) Where a “procurement process for the improvement” was commenced on or after October 1, 2019 (emphasis added).

[29] Pursuant to s. 87.3 (4), s. 6.4 of the Act (which is part of Part I.1) does not apply to contracts entered into after October 1, 2019 (the day the Act came into force) “if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises”.

[30] Pursuant to s. 87.3(1), the amendments to ss. 26 and 27.1 of the Act (which are part of Part IV of the Act), do not apply to contracts with respect to improvements if “a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises”.

### Analysis

[31] 197 argues that although the Contract was not signed until December 11, 2020, the procurement process began by December 11, 2017, when Dalren provided Hopper with a written “preliminary proposal” to build the manufacturing facility on Thompson Street in Cobourg. Although the location of the facility was changed to Dodge Street, it is clear from the December 11, 2020 Contract that this was the same improvement because the Contract specifically references and includes the Dalren Proposal of December 11, 2017, as well as the clarification letters from December 19, 2017 and March 1, 2018. This was all one

improvement for a single manufacturing facility, even though the location of the manufacturing facility changed over the procurement process.

[32] An “improvement” is defined in the Act as follows:

in respect of any land,

(a) any alteration, addition or capital repair to the land,

(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

(c) the complete or partial demolition or removal of any building, structure or works on the land;

[33] Section 1(4) of the Act defines the commencement of a procurement process, which is commenced on the earliest of the making of,

(a) a request for qualifications;

(b) a request for quotation;

(c) a request for proposals; or

(d) a call for tenders.

[34] Reviewing the various documents appended to the December 11, 2020 Contract, I am satisfied that they relate to the same procurement process for one improvement, that being the manufacturing facility. The fact that the location of the proposed facility changed did not mean that there was more than one improvement. The location of the proposed improvement was inchoate until the final decision was made to build it on Dodge Street, but it was one process for one improvement.

[35] I am also satisfied that the procurement process for this improvement commenced by December 11, 2017.

[36] Dalren takes the position that, pursuant to s. 87.3, the procurement process can only be commenced “by the owner of the premises”, and that 197 did not become the “owner” of the Dodge Street property until February 26, 2021.

[37] The term “owner” is defined in s. 1(1) of the Act as:

“owner” means any person, including the Crown, having an interest in a premises at whose request and,

(a) upon whose credit, or

(b) on whose behalf, or

(c) with whose privity or consent, or

(d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer;

[38] The term “interest in the premises” means “an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any lands or premises”.

[39] The term “premises” includes,

(a) the improvement,

(b) all materials supplied to the improvement, and

(c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

[40] In my view, 197 qualifies as an “owner” under the Act, because the manufacturing facility (the improvement) was built at Dodge Street “at the request of” 197 and on its behalf and for its direct benefit. It does not matter that 197 was not the registered owner of the Dodge Street property when the procurement process began, or even when the Contract was signed on December 11, 2020. At the time the improvement was made, 197 had a lienable “interest in the premises” upon which the improvement was made and is an owner under the Act and for the purposes of s.87.3.

## **Conclusion**

[41] For these reasons, I conclude that the procurement process for the improvement began prior to July 1, 2018 (and also prior to October 1, 2019) by the owner of the premises, and the prompt payment provisions of the Act (including the amended s. 26 and s. 27.1) do not, therefore, apply.

[42] The application is, therefore, dismissed.

[43] If the parties cannot agree on costs, the Respondents may serve and file costs submission of no more than 3 pages plus costs outline and any offers to settle within 20 days of the release of this decision, and the Applicant may file reply submissions on the same terms within a further 15 days.



**Released:** December 18, 2024

**CITATION:** Dalren Limited v. Loadstar Trailers Inc., 2024 ONSC 7144

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

DALREN LIMITED

Applicant

– and –

LOADSTAR TRAILERS INC. and 1978327  
ONTARIO LTD.

Respondents

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**REASONS FOR DECISION**

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Justice R.E. Charney

**Released:** December 18, 2024

2024 ONSC 7144 (CanLII)