

CITATION: Trans Power Utility Contractors Inc. v. Promark-Telecon Inc., 2025 ONSC 3375
COURT FILE NO.: CV-23-704280
MOTION HEARD: 20250305
REASONS RELEASED: 20250606

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

TRANS POWER UTILITY CONTRACTORS INC.

Plaintiff

- and -

PROMARK-TELECON INC.

Defendant

BEFORE: ASSOCIATE JUSTICE McGRAW

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REASONS RELEASED: June 6, 2025

Reasons For Endorsement

I. Background

[1] This is a motion by the Plaintiff Trans Power Utility Contractors Inc. (“TP”) to extend the time for service and validate service of its Statement of Claim on the Defendant Promark-Telecon Inc. (“Promark”).

[2] TP is a corporation which provides utility installation services. TP was contracted to relocate underground hydro assets for a project related to the Metrolinx Go Lakeshore West expansion in Mississauga (the “Project”). In order to facilitate excavation, TP contracted Promark to provide underground utility locate reports. On August 11, 2021, a TP equipment operator ruptured an active water main during excavation causing flooding to the roadway and surrounding area (the “Utility Strike”). The water main was not shown on Promark’s locate report. TP and its counsel sent letters to Promark in October and November 2021 advising that TP held Promark responsible for the Utility Strike and demanding that Promark pay for repair costs.

[3] On March 23, 2023, Metrolinx commenced an action (the “Metrolinx Action”) against

TP and Alectra Utilities Corporation (“Alectra”) claiming damages of \$5,000,000 alleging that the Utility Strike damaged the railway right-of-way. Alectra commenced a Third Party Claim against Promark for contribution and indemnity on July 17, 2023. TP is in the process of commencing a Third Party Claim.

[4] TP issued its Notice of Action on August 11, 2023 and its Statement of Claim on September 8, 2023. TP claims damages of \$250,000 for breach of contract and negligence. Through the inadvertence of TP’s counsel, the Notice of Action and Statement of Claim were not served on Promark until September 26, 2024, seven (7) months and 15 days after the deadline under the Rules.

II. The Law and Analysis

[5] For the reasons that follow, TP’s motion is granted.

[6] Rule 14.08(2) provides that where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued. Rules 3.01(1) and (2) provide the court may extend or abridge any time prescribed by the Rules or grant an order on such terms as are just on a motion which may be brought before or after the expiration of the time prescribed. Rule 2.01 further provides that a failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute.

[7] The basic consideration on this motion is whether an extension to the time for service of the Notice of Action and the Statement of Claim will advance the just resolution of the dispute without prejudice to the parties (*Chiarelli v. Wiens*, (2000) 46 O.R. (3d) 780 (C.A.) at para. 12). Prejudice is the key issue on an extension motion and the court should not extend the time for service if to do so would prejudice the defendant (*Chiarelli* at para. 20). The plaintiff bears the onus to demonstrate that the defendant will not be prejudiced by an extension (*Chiarelli* at para. 10). If a defendant claims that it will be prejudiced by an extension then it has at least an evidentiary burden to provide some details (*Chiarelli* at para. 14).

[8] The court has also developed the following non-exhaustive list of factors for consideration on an extension motion:

- (i) whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against him;
- (ii) whether or not the plaintiff moved promptly for an extension of time after the period expired;
- (iii) whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned its claim;

- (iv) whether or not the delay in serving the claim resulted from the direction, participation or involvement of the plaintiff personally in the service of the claim; and,
- (v) prejudice to the defendant (*Howe v. Solart LLL Corp.*, 2018 ONSC 3169 at para. 91; *Tarsitano v. Drutz*, 2013 ONSC 5605 at para. 22).

[9] Each case should be decided on its own facts using a contextual approach and the court should ultimately exercise its discretion upon consideration of all the relevant factors to balance the parties' interests to arrive at a fair and just result (*Chiarelli* at para. 17; *Howe* at para. 92).

[10] Starting with the primary consideration, I conclude that TP has satisfied its onus to show that Promark would not suffer any prejudice if an extension is granted. By letter dated October 15, 2021, TP advised Promark that the Utility Strike occurred due to Promark's inaccurate utility locates and provided a damage investigation report and a repair invoice in the amount of \$101,111.09. By letter to Promark dated November 12, 2021, TP's counsel demanded payment of the invoice or a commitment to indemnify, requested that Promark put its insurer on notice and invited Promark to attend the site to observe repair work the following week.

[11] In November 2022, independent adjusters for Promark and TP made arrangements with Metrolinx to further investigate the Utility Strike and inspect additional remediation work. On August 11, 2023, TP commenced an application against Royal and Sun Alliance ("RSA") seeking indemnification for out-of-pocket expenses from Promark or RSA, which also insures Promark.

[12] The record demonstrates that Promark was aware that TP was asserting a claim against it as of October 2021, before the service deadline, receiving an invoice for repair costs which now form a significant amount of TP's damage claim and an investigation report. Counsel's letter also states that TP would take further steps to protect its interests if payment or indemnity were not provided. As a result, TP had sufficient opportunity to review and investigate the claim on a timely basis which it did by advising its insurer who appointed an adjuster. The adjuster investigated the claim, had access to the site and repair work and communicated with Metrolinx and TP. This is in addition to the notice and access which Promark had due to the Metrolinx Action.

[13] Promark has not filed any evidence to support its assertion that it would be prejudiced by an extension. Promark submits that it would suffer prejudice because the applicable insurance policy has a limit of \$2,000,000 with an aggregate limit of \$4,000,000 while the claims by Metrolinx and Promark total \$5,250,000. Promark claims that as a result, it developed a litigation strategy based on knowing the exact amount in one claim, the Metrolinx Action, so that it could put parties on notice and allocate resources. In my view, this does not constitute prejudice. As Promark concedes, its insurance coverage did not change due to the delay associated with service and it would have had insufficient coverage even if it had been served on time. I also reject Promark's submissions regarding its litigation strategy given the possibility that the actions will be tried together, the fact that \$5,000,000 of the \$5,250,000 of the aggregate claim is being

advanced in the Metrolinx Action, the timely notice it had of TP's claim and TP's forthcoming Third Party Claim. Further, given the time periods involved, the lack of any evidence from Promark about the availability of witnesses and Promark's timely investigations I cannot conclude that Promark has lost any opportunities in the litigation or that trial fairness is at issue.

[14] I am also satisfied that TP moved promptly once it realized that the Notice of Action and Statement of Claim were not served within the prescribed time period. TP's counsel immediately requested Promark's consent to extend the time for service in September 2024. When Promark's counsel confirmed that it would not consent on November 25, 2024, TP took immediate steps to bring this motion. There is also no basis for Promark to have concluded that TP had abandoned its claim and there is no evidence that the delay in serving the claim was intentional, strategic or at the direction of TP itself.

[15] Balancing the parties' interests, I conclude that an extension of the time for service will advance the just resolution of this action and it is fair and just in all of the circumstances to exercise the court's discretion to extend the time for service. This result is also consistent with a liberal interpretation of the Rules as required by Rule 1.04(1) and the principle that the court should facilitate the determination of claims on their merits where no prejudice would result (*Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 (O.C.A.) at para. 34).

III. Disposition and Costs

[16] Order to go extending the time for service of TP's Notice of Action and Statement of Claim to September 27, 2024 and validating service as of that date, *nunc pro tunc*. The parties should attempt to resolve the costs of the motion. If they cannot, they may file written costs submissions not to exceed 3 pages (excluding Costs Outlines) with me on a timetable to be agreed upon by counsel.

Released: June 6, 2025

Associate Justice McGraw