

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mazzei Electric Ltd. v. Aragon (English Inn) Development Corp.*,
2025 BCSC 1435

Date: 20250725
Docket: S259221
Registry: Victoria

Between:

Mazzei Electric Ltd.

Plaintiff

And:

Aragon (English Inn) Development Corp.

Defendant

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for Plaintiff:	C. Schuld
Counsel for Defendant:	G.E.H. Cadman, K.C.
Place and Date of Hearing:	Victoria, B.C. July 7, 2025
Place and Date of Judgment:	Victoria, B.C. July 25, 2025

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SUMMARY OF ORDERS MADE

Introduction

[1] The primary issue in this hearing is whether the plaintiff’s builder’s lien is an abuse of process within the meaning of s. 25 of the *Builders Lien Act*, S.B.C. c. 45 (the “*Act*”), or alternatively, whether the security required to remove the claim of lien should be reduced pursuant to s. 24 of the *Act*.

[2] The plaintiff filed a claim of lien on November 18, 2024 for the sum of \$2,924,711.66 which it claimed “is or will become due and owing to Mazzei Electric Ltd. on 2024-10-31”. The claim of lien was assigned registration number CB1717489 by the Victoria Land Title Office (the “Lien”).

[3] The defendant submits the Lien is abusive as it includes:

- a) invoices that were not due and payable on October 31, 2024 and/or have been paid;
- b) unsubstantiated delay claims that have not been agreed to by the defendant; and
- c) holdback funds that are not yet payable pursuant to the *Act*.

[4] The plaintiff concedes that the Lien includes amounts that have been paid and the security required should be reduced to reflect this. With respect to the delay claims, the plaintiff submits that the *Act* permits filing a claim of lien for such claims, even if they are future looking and not particularized. The plaintiff further acknowledges that the holdback funds may not be owing to the plaintiff; however, it submits it is entitled to file a claim of lien as those funds represent work and materials the plaintiff has put into the Project.

Facts

General Overview

[5] In October 2019, the defendant entered into a stipulated price contract with the plaintiff (the “Contract”). The plaintiff agreed to act as the electrical contractor for the redevelopment of a heritage hotel located in Victoria, British Columbia (the “Project”).

[6] Pursuant to the Contract, the plaintiff was to be paid the sum of \$3,538,880.00 exclusive of taxes and subject to change orders for its performance under the Contract. All defective work was to be rectified by the plaintiff, at the plaintiff’s sole expense.

Dispute between the parties

[7] The plaintiff has submitted four requests for a Change Directive/Change Order (“CD”) for a Contract extension which have been refused by the defendant:

- a) A CD to complete additional work regarding additional scheduling to the Project dated August 8, 2024;
- b) A CD for extra mobilizations dated November 12, 2024;
- c) A CD for added forces dated November 25, 2024; and
- d) A CD to reflect re-sequencing in relation to the Project dated April 16, 2025.

[8] On February 27, 2025, the plaintiff wrote to the defendant summarizing the nature of the dispute and what it was seeking. I have reproduced a portion of that correspondence here:

Mazzei has previously addressed Aragon’s unjustified refusal to issue a Change Directive under GC 6.3.1 and, ultimately, a Change Order under GC 6.2.2 to increase the Contract Price that would reasonably reflect Mazzei’s increased costs and expenses in labour and materials for its work in the Project as a result of the significant Project delays. Mazzei has also asserted that Aragon’s continued unjustified refusal to increase the Contract Price breached the Contract between the parties.

Aragon refused to either respond to Mazzei’s *Notice in Writing* dated 13 December 2024 or satisfactorily address Mazzei’s concerns arising from the Project’s delays, instead directing its counsel to force Mazzei to commence civil proceedings to enforce the lien that Mazzei was obliged to file to protect its claim and hopefully encourage Aragon to deal fairly under their contractual relationship.

[9] It is the defendant's position that the plaintiff seeks to change the Contract from a fixed price to a cost-plus contract.

[10] As of the date of this application, I was advised that the plaintiff continues to provide work and supply materials to the Project and that a certificate of completion has not been issued.

Invoices

[11] At paras. 8 and 9 of the notice of civil claim, the plaintiff pleads that the following invoices were issued to the defendant and that the defendant either failed or refused to pay: J004706, J005595, W29113, W29174, W29326, and W29327 (totalling \$308,611.38).

[12] The defendant takes the following position concerning the invoices:

- a) Invoice No. J004706: for release of the phase 1 lien holdback and was paid in full on October 1, 2023 before the Lien was filed.
- b) Invoice No. J005595: for work completed to the end of October 2024 and not due for payment until November 25, 2024. This invoice was reversed and replaced with Invoice No. J005655 for \$204,875.59 and was paid in full on December 16, 2024.
- c) Invoice No. W29113: the invoice was dated September 30, 2024 and was not due until October 25, 2024. The invoice was paid in full on December 2, 2024.
- d) Invoice No. W29174: the invoice was never received by the defendant and is a duplicate of Invoice No. W29114 which was paid in full on December 2, 2024.
- e) Invoice No. W29326: the invoice is dated October 31, 2024 and was not due until November 25, 2024. The invoice was paid on January 6, 2025.
- f) Invoice No. W29327: the invoice was dated October 31, 2024 and was not due until November 25, 2024. The invoice was paid on January 6, 2025.

[13] In response, the plaintiff takes the following position concerning the invoices:

- a) Invoice No. J004706: the invoice was not included in the calculation of the Lien.
- b) Invoice No. J005595: \$292,105.40 was owing on November 18, 2024 and after the Lien was filed, the defendant requested a revised invoice, which was issued on November 25, 2024 and paid on December 19, 2024.
- c) Invoice No. W29113: the invoice was due on October 25, 2024 and the sum of \$4,883.79 was paid on December 5, 2024.
- d) Invoice No. W29174: this invoice was due on October 25, 2024 and paid on December 5, 2024.
- e) Invoice No. W29326: this invoice was due on November 25, 2024 and paid on January 8, 2025.
- f) Invoice No. W29327: this invoice was due on November 25, 2024 and paid on January 8, 2025.

[14] The plaintiff agrees that payment has been made by the defendant in the sum of \$308,611.38 and the Lien should be reduced by that amount.

The Delay Claim

[15] Four invoices were delivered to the defendant concerning the delay claim:

Invoice No.	Invoice Date	Invoice Amount
J005144	January 26, 2024	\$826,816.07
J005249	February 29, 2024	\$102,080.55
J005251	March 31, 2024	\$24,679.20
J005394	June 24, 2024	\$1,308,494.18
Total:		\$2,298,070.00

[16] These invoices contain an entry code of “09042 delay claim” and an allocated amount. No further detail is provided.

[17] The defendant has filed in support of its lien, an affidavit deposed by Jonathan Hale, construction manager. Mr. Hale deposes at para. 26 that the delay costs total \$2,618,820.63 (plus GST) currently assessed as the following:

- a) Project Management & Supervision: \$466,951.26
- b) Labour: \$1,689,626.70
- c) General expenses: \$31,771.82
- d) Financing: \$34,701,10
- e) Estimated Markup: \$395,769.75

Mr. Hale says that the defendant removed the financing costs and discounted the claim by 15% to account for anticipated work and potential deficiencies arriving at the \$2,188,638.09 plus GST of \$109,431.90 for the \$2,298,070 which is included in the Lien.

[18] The plaintiff admits that the delay claim is an estimated amount. It submits that the actual costs are continuously fluctuating and precision at this time is not possible.

[19] The plaintiff has not put before the court a summary of the actual work and material costs as of the filing date of the Lien. The plaintiff referred me to a document it prepared entitled “Mazzei Electric Delay Claim – Project: English Inn, 429 Lampson Street” with a date of September 27, 2024. The first page of the document contains the following:

... our updated estimation of the value of the delay claim, assuming a thirty-eight month project extension in accordance with the most recent 3 week look-ahead and October 2023 schedule, is \$2,647,705.12. That valuation is explained in the content appended to this letter. We will prepare a final valuation that we will submit shortly following our final account at the conclusion of the project, and intend to continue to submit progress invoices for the remaining duration of the project.

[Emphasis added]

[20] A further review of this document includes an analysis of “productivity impact”, “increased labour costs”, “financing costs”, and “mark-up” for the purpose of establishing the estimated delay claim.

[21] It should be noted that the defendant denies any responsibility for the delay claim being advanced by the plaintiff. My role on this application is not to determine the underlying issues alleged in the notice of civil claim and these reasons should not be read as doing so.

Holdback Account

[22] The plaintiff submits that the Lien also includes the sum of \$318,030.28 representing 10% of 75 invoices delivered to the defendant (after credits have been considered). The plaintiff acknowledges that the correct amount should be \$285,717.88 (representing the adjustment to Invoice J005595) and the Lien should be reduced by an additional \$32,312.40.

[23] The holdback account has been maintained by the defendant pursuant to s. 5 of the *Act*. It is undisputed that the holdback period as prescribed by the *Act* has not expired and the payment cannot be made to the plaintiff until that period has expired assuming there are no competing claims to the holdback account.

Discussion

[24] The objective of the *Act* is to prevent the owners of land from obtaining the benefit of improvements and work done on their land without paying for them by giving security to lien claimants. The *Act* balances this policy against the rights of owners by providing a mechanism to discharge a lien upon the payment of sufficient security (s. 24), or to cancel a claim of lien where the claim is defective, vexatious, frivolous or an abuse of process (s. 25): *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172 at para. 10.

“Work, Labour or Services”

[25] Pursuant to s. 2 of the *Act*, a lien can be filed for the “price of work and material” and “work” is defined in the *Act* to mean “work, labour or services”.

[26] Claims for overhead costs, financing costs and performance bonds have been found to be outside the scope of the *Act*: *Q West Van Homes Inc. v. Fran-*

Car Aluminum Inc., 2008 BCCA 366 at para. 53.

Section 25(2)(b) of the Act

[27] Section 25(2)(b) of the *Act* provides that an owner, contractor, subcontractor, lien claimant or agent or any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that the claim of lien is vexatious, frivolous or an abuse of process.

[28] Pursuant to s. 25(2)(b), the court is to determine whether the lien claimant has raised arguable claims, in the sense of raising a question fit to be tried, or whether the claims are vexatious, frivolous, or an abuse of process: *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2012 BCCA 89 at para. 25.

[29] The threshold for maintaining a claim of lien in the face of a s. 25(2)(b) challenge is low and the court is not to decide the case on the merits: *West Fraser* at para. 28.

[30] The question is to be decided based on a review of the affidavit evidence filed by the parties: *West Fraser* at para. 25.

Is the claim an abuse of process?

[31] It is clear on the evidence that the Lien is exaggerated. The plaintiff rightly concedes that the Lien can be reduced by a total of \$340,923.78 representing the paid invoices and adjusted portion of the holdback account.

[32] The plaintiff admits that a portion of the Lien represents anticipated claims it had on the lien filing date. The plaintiff submits that delay claims are complicated and it simply cannot determine the amount on a rolling basis or as of the date the Lien was filed and that it is permitted to file a lien for the whole amount of the delay claim. Whether difficult or not, that is an unacceptable explanation when utilizing the protections afforded under the *Act*. The statement of Justice Macintosh (as he then was) in *Atlas Painting & Restorations Ltd. v. 501 Robson Residential Partnership*, 2016 BCSC 2472 is apt here:

[1] A builder's lien is a powerful pre-judgment weapon. Used properly, it protects a contractor against being unpaid for its work, often by an owner incorporated for only the project in question, and who is thus without assets to pay the contractor when the project is complete. Used improperly, a builder's lien can be employed to extract overpayment from an owner who

often must discharge all liens before they can be properly contested in order, for example, to maintain project financing.

[33] Although the plaintiff asserted a right to file the Lien for the whole of the delay claim, including unparticularized and anticipated amounts, it did not provide me with authority supporting that argument. That is because the *Act*, read as a whole, does not permit the filing of a lien for anticipated damages arising from a delay claim. As noted by Mr. Justice Burnyeat (as he then was) in *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253, s. 2(1) of the *Act* is clear that a lien can only be claimed for “the price of the work and material to the extent that the price remains unpaid”. Section 2 does not grant a lien for the price of work not yet performed or materials not yet supplied. A party can have a claim for damages without having a claim of lien: *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*, 2002 BCSC 1460.

[34] Madam Justice Griffin writing for the Court of Appeal in *Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.*, 2023 BCCA 436 explained that a lien claimant has to be prepared to support an arguable case to both the right to the lien and the amount of the lien:

[109] When the party subjected to the lien claim has filed an application seeking to cancel the lien, the lien claimant has to be prepared to support an arguable case as to both the right to the lien and the amount of the lien. The threshold to establish an arguable claim is not high and is less than what would be required to support a conclusion in the lien claimant’s favour at trial, but more than thin air is required.

[35] With respect to the delay claim, there is a lack of evidence supporting actual work performed or materials supplied. A large portion of the Lien consists of projections concerning the plaintiff’s delay claim.

[36] The plaintiff submits that it should be entitled to the whole of the Lien, less the \$340,923.78 it admits should be reduced, as it has demonstrated it has a *prima facie* case to a delay claim, and that I am not to undertake an analysis to determine what amounts are “future looking”. While I am not to undertake a detailed analysis, accepting the entire amount of an inflated lien would undermine the purpose of the *Act* and create a situation cautioned against in *Atlas*.

[37] The plaintiff had a duty to put the evidence before the court to explain the basis for its Lien. It has failed to do so.

[38] The remainder of the Lien consists of the holdback account. This amount represents 10% of the work and materials the plaintiff has performed on the Project and does constitute a proper lien claim. These funds are being held in a holdback account pursuant to the *Act* by the defendant.

[39] While I have serious misgivings concerning the inflated Lien and the approach taken by the plaintiff, portions of the Lien give rise to an arguable case. Any misgivings I have with respect to the inflated Lien can properly be dealt with by considering the appropriate amount of security pursuant to s. 24 of the *Act*.

[40] I decline to cancel the Lien pursuant to s. 25(2)(b) of the *Act*.

Section 24 of the Act

[41] Section 24 of the *Act* reads as follows:

- 24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.
- (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
- (3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
- (4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.
- (5) the giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

[42] Under s. 24 of the *Act*, a judge must first consider what claims should be considered when fixing security and second determine what amount of security is appropriate. The following summary from *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366 at para. 56 is instructive:

- a) the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;

- b) any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
- c) looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate;
- d) that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
- e) the amount of security may be less than the amount claimed under the lien.

[43] Where cases are “readily seen” as inflated, the court will be justified in ordering a lesser amount of security: *Centura* at para. 24.

[44] To summarize, the Lien of \$2,924,711.66 consists of the following: \$308,611.38 for the invoices, \$2,298,070 for the delay claim, and \$318,030.28 for the holdback account. The plaintiff acknowledges that the Lien should be reduced as follows: \$0.00 for the invoices, \$2,298,070 for the delay claim and \$285,717.88 for the holdback account. Based on this adjusted amount, the plaintiff seeks to have security set at \$2,583,787.88.

[45] There is little doubt that the claim for amounts representing anticipated but not incurred work and labour, along with those for interest, general expenses and markup would fail. If the Lien contains amounts representing work incurred and material provided, it would pass the very low threshold for sustaining the Lien pending a trial on the merits. However, I am not in a position, with the lack of evidence, to find that any of the delay claim constitutes a proper lien claim. The plaintiff has not deposed in his affidavit what amount of the \$2,298,070 is for work it has performed but has not been paid for, or material provided and not paid for. The plaintiff is required to provide at least some evidence of the monies that it is owed: *Tylon Steepe* at para. 56.

[46] The prejudice to the defendant is clear. If the security required contains amounts not contemplated by the *Act*, it will be required to post security for sums beyond the purview of the *Act*.

[47] Considering the evidence as a whole and exercising the discretion afforded to me, I find it appropriate to order a discharge of the Lien upon security being posted in the sum of \$285,717.88. As the amount of the security represents the holdback account which has been maintained by the defendant and cannot be released to the plaintiff at this time, I find no need to increase the security amount for an amount representing security for costs.

[48] As the plaintiff continues to work on the Project, this order does not prejudice the plaintiff from filing further liens in accordance with the *Act*.

Summary of Orders Made

[49] In summary, I make the following orders:

- a) The relief sought in paragraphs 1 and 2 of the notice of application is hereby dismissed.
- b) Pursuant to s. 24 of the *Act*, sufficient security to be paid into court for a discharge of the Lien shall be the sum of \$285,717.88.
- c) The defendant was primarily successful on this application and shall have its costs in the cause.

“Justice LeBlanc”