



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *C.B. Metal Works Inc. v. Commandite Werkliv Inc.*, 2025 NLSC 120

Date: September 5, 2025

Docket: 202401G2964

BETWEEN:

C.B. METAL WORKS INC.

PLAINTIFF

AND:

COMMANDITE WERKLIV INC.

FIRST DEFENDANT

AND:

**GOODWERK CONSTRUCTION
NL INC.**

SECOND DEFENDANT

AND:

WERKLIV GP INC.

THIRD DEFENDANT

Before: Justice Justin S.C. Mellor

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

June 4, 2025

Summary:

Goodwerk Construction NL Inc. filed an Interlocutory Application seeking to have CB Metal Works Inc.'s lien declared invalid. It claimed the lien was for "materials" and was registered outside the 30-day time limit imposed under s. 22(2) of the *Mechanics' Lien Act*. C.B. Metal Works Inc. argued that this was a complex continuing contract involving the supply of both material and services and, as such, it fell under s. 22(1) as a "case not otherwise provided for" in the *Act*. The time limit under s. 22(1) is 30-days from the "abandonment of the contract". Goodwerk claimed that if s. 22(1) applied, then the lien was filed more than 30-days after abandonment.

Goodwerk also sought to have the lien invalidated on the grounds that it was grossly exaggerated.

Held: The Application is dismissed with costs. This was a hybrid contract combining both material and services. The services component was not incidental to the supply of materials. The evidence established that it formed a substantial part of the value of the contract. As a result, s. 22(1) of the *Mechanics' Lien Act* applies, and the time limit for registering the lien was 30-days from the "abandonment of the contract." The Parties did not enter into a new contract to abandon the initial contract. The lien was filed within the required time limit.

There is no evidence supporting Goodwerk's claim that the value of the lien is grossly exaggerated.

Appearances:

Kenneth J. Mahoney On behalf of C.B. Metal Works Inc.

Matthew N. Craig and
Christopher D. Goodridge On behalf of Goodwerk Construction NL Inc.

Authorities Cited:

CASES CONSIDERED: 1476335 *Ontario Inc. v. Frezza*, 2021 ONCA 822; *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814; *JK Engineering v. Red Quest*, 2019 ABCA 263; *Fairview Investments Ltd. v. J.D.*

Irving Ltd. (1999), 187 Nfld. & P.E.I.R. 175, 566 A.P.R. 175 (Nfld. S.C. (T.D.)); *Terra Services Inc. v. Her Majesty the Queen*, 2018 NLSC 221; *Sam Design Inc. v. Environmental Applications Group Inc.*, 2024 NLSC 174; *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd.*, 2006 NSCA 120; *Seabord Construction Ltd. v. Central Realities Ltd.* (1977), 14 Nfld. & P.E.I.R. 135, 33 A.P.R. 135 (Nfld. S.C. (C.A.)); *Weir's Construction Ltd. v. D.A.R. Enterprises Ltd.*, 2005 NLTD 16; *Saint John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614; *Menzies & Herbert Ltd. v. Rocky Mountain House School District No. 2590*, [1954] S.C.R. 589; *Blue Range Resource Corp., Re*, 1999 ABQB 873; *Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas Co.* (1991), 117 A.R. 143, 28 A.C.W.S. (3d) 159 (Alta. C.A.); *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167; *Allterrain Contracting Inc. v. Rockwork Construction Ltd.*, 2011 NSSC 212; *R. v. Proulx*, 2000 SCC 5; *The Moorcock*, (1889) 14 PD 64; *Bank of Montreal v. 100875 P.E.I. Inc.*, 2014 PECA 12; *Dieleman Planer Co. v. Elizabeth Townhouses Ltd.*, 1973 CarswellBC 5 BCCA; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55; *Pearce v. Pearce*, 2023 NLSC 42; *Quinlan Brothers Ltd. v. Coady*, 2013 NLCA 31; *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111

STATUTES CONSIDERED: *Mechanics' Lien Act*, R.S.N.L. 1990, c. M-3; *Builders' Lien Act*, R.S.N.S. 1989, c. 277

TEXTS CONSIDERED: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Canada: Butterworths Canada Ltd., 2002); A. Swan, J. Adamski, & A. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis Canada, 2018)

REASONS FOR JUDGMENT

MELLOR, J.:

FACTS

[1] Goodwerk Construction NL Inc. (“Goodwerk”) seeks a declaration that C.B. Metal Works Inc.’s (“C.B. Metal”) lien claim is invalid, and a release of the lien funds.

[2] In May 2023, Goodwerk issued a Request for Bid for structural steel related to the construction of three multi-story student apartment buildings (“Project”) at 6 Lambe’s Lane in St. John’s.

[3] On 11 July 2023, Goodwerk issued a Letter of Intent (“LOI”) advising C.B. Metal that it was the successful bidder with its lump sum bid price of \$7,349,900, plus HST. The LOI contained a deadline. It specified that, “Material delivered to site to allow the erection of Building C to start on September 25, 2023.” The LOI also stated that a contract would follow once C.B. Metal signed the LOI and provided proof of insurance, safety documentation, and proof of good standing with WorkplaceNL.

[4] On 13 July 2023, Stacey Gushue, the owner of C.B. Metal, signed the LOI. Goodwerk did not sign it, and the Parties did not conclude a written contract.

[5] C.B. Metal immediately began work on the Project. Throughout July and August of 2023, C.B. Metal engaged with Goodwerk, Goodwerk’s architectural firm and Goodwerk’s design and engineering firm, Pinto Engineering Ltd.

[6] Goodwerk demanded that C.B. Metal keep the Project on schedule. On 1 September 2023, Goodwerk’s Director of Construction, Garry Smith, wrote to C.B. Metal’s Keith Oates, expressing concern about the amount of time needed to get through the “shop drawing phase.” He stated that, “Having the steel delayed by four weeks is not acceptable and I expect all parties involved to do whatever is necessary to hold the original start date.” C.B. Metal proceeded to order steel and continued working on the first phase of the Project.

[7] On 14 September 2023, Mr. Smith notified C.B. Metal that development on 6 Lambe’s Lane was paused. This was followed on 5 October 2023, by a letter from Goodwerk’s Senior Project Manager, Trevor Thorne, informing C.B. Metal that Goodwerk was “in the process of redesigning Lambe’s Lane project.” The email asked C.B. Metal to stop work, “whether on site or internally,” and to remove its equipment from the job site.

[8] On 23 October 2023, C.B. Metal issued an invoice to Goodwerk for \$482,181.48, plus HST. The invoice set out the costs incurred so far. Later that month, Goodwerk reviewed the invoice and had questions about some of the costs, including those related to engineering drawings and project management. Goodwerk's Mr. Thorne stated that, "I will be sending you a contract shortly for review which would allow the payment of invoices to date." No contract was sent. No payment was made.

[9] On 21 November 2023, Goodwerk sent a new LOI. In the covering email, Goodwerk's Senior Project Manager stated "The purpose of this document is to state we are under negotiation of a contract based on the original bid process. Once signed Goodwerk would be able to release funds after we finalize the invoice." The recitals of the LOI provided "limited authorization to perform certain of the work" and provided for the attachment of the related invoices.

[10] C.B. Metal changed the Contract Price in the LOI, signed it, and returned it to Goodwerk. Goodwerk did not sign the amended LOI, and no subsequent contract was negotiated.

[11] In December 2023, Goodwerk sought to validate the work completed by C.B. Metal. The evidence establishes that Goodwerk intended to pay C.B. Metal for that work and to have it continue with the revised project. As Shawn Lennox wrote in his email of December 12, 2023, "... it's been a long time coming, but I'm now on the file and my goal is to settle this so you guys can be paid and we can all move on to the next phase."

[12] In January 2024, Goodwerk asked that C.B. Metal review the final structural plans of the revised project and provide it with "... a list of issues/concerns that can arise during final coordination ...". Goodwerk also indicated that it would send a template contract for C.B. Metal review. Again, the contract was not sent.

[13] In February 2024, C.B. Metal continued to engage with Goodwerk’s engineers and designers on column sizes for the new design, while pressing for a new contract. On 6 February 2024, Goodwerk issued another Request for Pricing to multiple firms, with the target awarding contracts identified by 1 March 2024, with construction beginning on 6 March 2024. C.B. Metal submitted a bid of \$9,695,000.

[14] On 6 March 2024, Goodwerk’s CEO emailed C.B. Metal thanking it for providing a comprehensive update and detailed schedule for construction. He indicated that Goodwerk had yet to select a civil contractor and did not want to have a false start. He stated that Goodwerk would provide an update early next week, stating “We are committed to working closely with you and your team to navigate these preliminary stages and set the foundation for a successful project.”

[15] There was further correspondence between C.B. Metal and Goodwerk between March 19-20, 2024. After that date there was no further communication from Goodwerk. On 25 April 2024, C.B. Metal was informed by a third party that Goodwerk had contracted with another company to do the fabrication work on 6 Lambe’s Lane.

[16] On 29 April 2024, C.B. Metal filed a lien against the Lambe’s Lane property in the amount of \$563,446.04.

[17] On 25 July 2024, this Court ordered that the Claim for Lien and related Certificate of Action be vacated, with Goodwerk paying an amount equivalent to the lien into Court.

ISSUES

1. Was there a contract between the Parties?
2. Did C.B. Metal file the lien within the applicable time limit under the *Mechanics’ Lien Act*, R.S.N.L. 1990, c. M-3?

3. Was the contract abandoned by the Parties?
4. Is the value of the lien grossly exaggerated and therefore invalid?

ANALYSIS

[18] This is an interlocutory application to vacate a lien. Deciding this matter requires that I make findings regarding the contractual relationship between the Parties, including whether a contract exists. These determinations are based on limited evidentiary record submitted by the Parties. This being an interlocutory application, my preliminary findings do "... not finally determine the litigation ..." or "... any issue in the litigation, which remains ongoing." 1476335 *Ontario Inc. v. Frezza*, 2021 ONCA 822, at para. 9; *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, at paras. 50-57. *JK Engineering v. Red Quest*, 2019 ABCA 263, at para. 16. When the merits of this case are heard, the trial judge may come to different findings based on a more complete evidentiary record.

[19] Mechanics' liens provide security for those who work in the construction industry. For this reason, courts have consistently held that lien claims should only be vacated before trial in the clearest of cases. *Fairview Investments Ltd. v. J.D. Irving Ltd.* (1999), 187 Nfld. & P.E.I.R. 175, 566 A.P.R. 175 (Nfld. S.C. (T.D.)), at para. 13; *Terra Services Inc. v. Her Majesty the Queen*, 2018 NLSC 221, at para. 24; *Sam Design Inc. v. Environmental Applications Group Inc.*, 2024 NLSC 174, at para. 18.

[20] The standard for invalidating a lien was described in *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd.*, 2006 NSCA 120, at para. 10, as follows:

... it is plain to see that the party seeking to vacate a lien faces a significant evidentiary hurdle. There is a "heavy burden" on the applicant to demonstrate that the remedy is "clearly" deserved. Those who seek the effective and immediate protection which a lien affords, must not be deprived of that important security "except on the clearest" of grounds. Those prerequisites - as Judge O Hearn explained - must inform a judge's determination as to whether or not the claim can be "safely . . . disposed of on a summary application."

[21] While an applicant seeking to vacate a lien faces a heavy burden, it should also be pointed out that a party who registers a lien must strictly comply with the statute. *Seabord Construction Ltd. v. Central Realties Ltd.* (1977), 14 Nfld. & P.E.I.R. 135, 33 A.P.R. 135 (Nfld. S.C. (C.A.)); at para. 11. As this Court stated in *Weir's Construction v. D.A.R. Enterprises Ltd.*, 2005 NLTD 16, at para. 24:

The exercise and enforcement of a mechanics lien depends on strict compliance with the statutory provisions. In essence, the lien lives and breathes and dies according to the statute.

[22] Keeping these principles in mind, I will now analyze the issues raised by the Parties.

1. Was there a contract between the Parties?

[23] Goodwerk claims it is unnecessary for me to determine the existence of a contract to resolve this Application. It argues that C.B. Metal was instructed to cease all work in October 2023, therefore the lien was registered many months after the expiration of the time limit in s. 22(2).

[24] Goodwerk's assertion is incorrect. C.B. Metal's defence to this Application is premised on s. 22(1) of the *Act*. That section states that in cases "... not otherwise provided for ...", a lien "... may be registered before or during the performance of the contract or of the subcontract or within 30 days after the completion or abandonment of the contract ..." [emphasis added]. To rule on the validity of C.B. Metal's response, I must determine if a contract exists, and if so, whether it was in fact "abandoned" by the Parties. Again, this is an interlocutory application, so these findings do not bind the trial judge.

[25] C.B. Metal claims that there is a contract by conduct. It relies on *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.*, [1964] S.C.R. 614. In that case, the question before the Supreme Court was "... whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to

bind the acceptor to the fulfillment of the contract ...”. While the Court accepted that a “... mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough ...” to create a contract, there are instances in which conduct can constitute acquiescence.

[26] To determine the existence of an implied contract requires me to review the Parties’ conduct.

[27] On 11 July 2023, Goodwerk transmitted an LOI that “accepted” C.B. Metal’s lump sum bid price of \$7,349,8900, plus HST. The LOI specified that it was to include “All structural steel, joist, decking, anchor bolts, stairs, and railing as outlined in the bid documents.” It also required material to be delivered to the site by 25 September 2025 to allow the erection of Building C to commence. C.B. Metal signed the LOI and returned it to Goodwerk. While the LOI indicated that a contract would follow, no contract was sent. Nonetheless, the evidence indicates that the Parties conducted themselves as if one was in place.

[28] In July 2023, C.B. Metal was provided with the architectural, structural, and mechanical drawings for the Project. On 28 August 2023, Goodwerk’s Mr. Smith wrote to C.B. Metal’s Keith Oates, inquiring as to when he could expect to see the structural shop drawing for Building C. On 30 August 2023, Mr. Oates informed Goodwerk’s Mr. Smith and Mr. Thorne, that he had ordered the anchor bolts for Building C and expected them within two weeks. Ten minutes later, Mr. Oates sent a second email advising Mr. Smith and Mr. Thorne that C.B. Metal could begin delivery of material by 30 October 2023. The next morning, Mr. Smith responded expressing dissatisfaction. He indicated that there was a deadline for occupancy of the building and that “Having the steel delayed by 4 weeks is not acceptable and I expect all parties involved to do whatever is necessary to hold to the original start date.” He then asked Goodwerk’s consulting engineer, Malcolm Pinto, to give C.B. Metal “... whatever information is required to prevent the 4 week delay?” During that day, Mr. Oates and Mr. Pinto worked on the anchor bolt plans. At 5:05 pm, Mr. Oates wrote to Mr. Pinto stating, “Please advise if we can proceed with procuring the material after reviewing the return of the anchor bolt plan.” An hour later, Mr. Pinto responded indicating that he had reviewed the plan, and it was correct “Except for three columns ...” Mr. Oates then responded, “We will procure the

material as soon as we receive the reviewed anchor bolt dwgs locating the 3 extended columns [sic].” Goodwerk’s Mr. Thorne and Mr. Smith were copied on all this correspondence, including the email, indicating that C.B. Metal was proceeding with procuring the material. At no point did they indicate to C.B. Metal that ordering material was premature.

[29] On 14 September 2023, C.B. Metal began delivery of materials to the work site at 6 Lambe’s Lane. There is no evidence that Goodwerk resisted or complained about this delivery. On 15 September 2023, Goodwerk informed C.B. Metal that the Project was being put on hold for a few months. On 4 October 2023, C.B. Metal sought an update on the status of the Project and indicated that the postponement was posing difficulties for the firm because it “... did not take on & also declined on bidding any more work to ensure we could meet the aggressive schedule.” The next day, Goodwerk sent C.B. Metal a letter asking it to immediately stop work on the Project and to remove any equipment from the site. The letter stated that Goodwerk would meet with C.B. Metal to discuss the future of the Project. The evidence establishes that Goodwerk was pausing the Project because the design was exceeding initial cost estimates.

[30] Throughout the fall of 2023, C.B. Metal actively sought payment from Goodwerk. On 21 November 2023, Goodwerk sent another LOI to C.B. Metal. The November LOI stated that the purpose of the “... document is to state we are under negotiation of a contract based on the original bid process. Once signed, Goodwerk would be able to release funds after we finalize the invoice.” C.B. Metal made an adjustment to the price and returned an executed version of the LOI. Goodwerk failed to sign the LOI, and even though C.B. Metal provided invoices, no payment was made. This unexecuted LOI did not modify in any way the contract by conduct that had come into being in September 2023.

[31] In January 2024, Goodwerk continued to have C.B. Metal review the structural plans for the redesign and provide it with a list of issues. The evidence is clear that all Parties expected C.B. Metal would continue to provide input into the evolving Project. On January 16, 2024, Goodwerk’s Shawn Lennox indicated that he would send a copy of a template contract “... by end of week, or early next week

for CBM’s review.” Again, no final contract was transmitted, and no payment was ever made.

[32] In the ensuing months, Goodwerk continued to engage with C.B. Metal, seeking information from it, requesting it review materials, and holding meetings with it. None of this activity was to the benefit of C.B. Metal. It did not lead to a new contract, nor did it result in Goodwerk paying it for the services and materials already provided.

[33] Based on the evidence, an objective bystander would find that a contract existed. There was *consensus ad idem*. The evidence clearly proves the Parties had agreed upon the essential terms: the price (\$7,349,900, plus HST), the schedule (delivery commencing 25 September 2023), and the scope of work (set out in the tender.) While the non-executed LOI may have specified that a written contract was to be put into place, Goodwerk waived that requirement through its conduct in September 2023.

[34] This is not a case of one party to a contract being silent, resulting in unrequested goods being foisted upon it. Goodwerk was quite loquacious. It demanded strict compliance with the delivery schedule. For Goodwerk, delay was simply “unacceptable.” It had full knowledge that C.B. Metal was ordering material to comply with the aggressive timelines, and it expressed no concern until it decided to alter the design. In this case, as in *Saint John Tug Boat Co.*, the circumstances in this matter give rise “... to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered.”

2. Did C.B. Metal file the lien within the applicable time limit under the *Mechanics’ Lien Act*?

[35] The time limits for registration of a lien are set out in s. 22 of the *Act*:

22. (1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or

of the subcontract or within 30 days after the completion or abandonment of the contract or of the subcontract.

(2) A claim for lien for materials may be registered before or during the placing or providing of the materials, or within 30 days after the placing or providing of the last material so placed or provided.

(3) A claim for lien for services may be registered during the performance of the service or within 30 days after the completion of the service.

(4) A claim for lien for wages may be registered during the doing of the work for which the wages are claimed or within 30 days after the last work was done for which the lien is claimed.

[36] Goodwerk asserts that C.B. Metal was out of time when it registered the lien. It argues that s. 22(2) requires a lien for “materials” to be registered “... within 30 days after the placing or providing of the last material ...” It points to the fact that the last day that this occurred was 14 September 2023, putting the registration of the lien 228 days after that event.

[37] Goodwerk argues that even if the contract is for “services” and not “materials,” the lien is still invalid. Section 22(3) imposes a 30-day time limit for registration of a lien for services. Goodwerk points out that C.B. Metal was instructed on 14 September 2023 to cease all work, including services, and that the 21 November 2023 LOI expressly prohibits any further work without written authorization.

[38] C.B. Metal’s position is that the contract is a complex “prevenient contract” and s. 22(1) of the *Act* applies. In *Menzies & Herbert Ltd. v. Rocky Mountain House School District No. 2590*, [1954] S.C.R. 589, at para. 36, Locke J. adopted the following Statement of Law, 27 Cyc. 144:

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 furnished 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.

[39] More recently, Justice Romaine in *Blue Range Resource Corp., Re*, 1999 ABQB 873, at para. 3, explained:

A prevenient arrangement is said to exist where there is a preliminary understanding between parties that they are entering into an ongoing relationship. This preliminary understanding does not have to be a binding contract or contain all the terms upon which materials or services are to be supplied, but it serves to link together what would otherwise appear to be a series of contracts into one continuing contract or open account: *Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas Co.*; *Menzies & Herbert Ltd. v. Rocky Mountain House School District No. 2590*.

[40] C.B. Metal cites the Alberta Court of Appeal's decision in *Tage Davidsen Drywall Supplies Ltd. v. Alberta Natural Gas Co.* (1991), 117 A.R. 143, 28 A.C.W.S. (3d) 159 (Alta. C.A.), to support its argument. However, that case is readily distinguishable on its facts from the matter before me. In *Tage*, the parties had a relationship that went back several years in which one party supplied drywall to the other. While there was no written contract, the parties had a routine method of conducting business, and this was maintained over eight to ten different projects. Chief Justice Laycraft found that this general pattern supported finding a prevenient arrangement existed.

[41] In this case, the evidence does not support such a finding. The relationship between Goodwerk and C.B. Metal is not a series of contracts to supply goods and services, nor is it part of a longstanding arrangement to supply material on an as-needed basis. There was a single contract for \$7,349,900, plus HST to supply

material and services. Once performance was commenced, Goodwerk attempted to escape the contract due to its redesign of the Project.

[42] The fact that there is no prevenient arrangement does not mean that s. 22(1) is not applicable. In its Amended Memorandum of Fact and Law, C.B. Metal argues that ss. 22(2) to (4) of the *Act* "... address liens which are limited to separate or discrete contracts for (exclusively) "materials" or "services" or "wages" ..." It asserts that "... more complicated cases involving a combination of either two or all of these three items – more commonly found in larger commercial construction projects ... ought to fall within the purview of Section 22(1)."

[43] Goodwerk's response is that all contracts for materials involve some level of supply of services. These services are ancillary or incidental to the supply of materials. It claims that if C.B. Metal's argument is accepted, then most contracts for the supply of materials will be captured by s. 22(1) of the *Act*.

[44] There has not been a judicial interpretation of s. 22(1). In *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167, Justice Handrigan made passing reference to s. 22(1) applying to "contractors," whilst s. 22(2) applies to "material suppliers" and s. 22(3) applies to "service providers."

[45] While there is no judicial consideration of s. 22(1), Nova Scotia's courts have commented on a nearly identical provision in that province's *Builders' Lien Act*, R.S.N.S. 1989, c. 277. In *Allterrain Contracting Inc. v. Rockwork Construction Ltd.*, 2011 NSSC 212, Justice Moir interpreted s. 24(1) as applying to hybrid contracts involving both services and materials. At paragraph 37, he stated:

The time for registration of a claim for Rockwork lien was "before or during the performance of the contract, or within sixty days after the completion or abandonment thereof", if the contract is regarded as being for both goods and services, and "at any time during the performance of the service or within sixty days after the completion of the service" if the contract is regarded as being for services only: s. 24(1) and s. 24(3).

[emphasis added]

[46] Goodwerk raises two arguments against interpreting s. 22(1) in this manner. First, it claims that such an interpretation would be contrary to the presumption against tautology. Second, it asserts that it would not promote business efficacy. As I explain below, neither of these arguments are persuasive.

Presumption Against Tautology

[47] In Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Canada: Butterworths Canada Ltd., 2002), at p. 159, the presumption against tautology is explained as follows:

... every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[48] Goodwerk argues that “Construction projects require considerable amount of planning,” and that it is almost impossible to conceive of any supply of materials that would not be subject to s. 22(1). It submits that if s. 22(1) is interpreted in the manner advocated by C.B. Metal, then the remaining subsections will become redundant.

[49] The presumption against tautology is a double-edged sword for Goodwerk. If the Legislature carefully and intentionally chooses its words, and every word must be given effect, then the words “not otherwise provided for” in s. 22(1) of the *Act* must also have meaning. In *R. v. Proulx*, 2000 SCC 5, at para. 28, Lamer, C.J.C. wrote, “It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.”

[50] I cannot accept that s. 22(1) is simply surplusage. Some meaning must be given to the words “in cases not otherwise provided.” Hybrid contracts combining the supply of materials with a substantial services component are not directly addressed in the *Act*.

[51] Section s. 22(1) must be read in the context of the other subsections. It should be assumed that the Legislature has created a coherent scheme of time limits for liens. Each type of lien (services, wages and materials) is dealt with ss. 22(2) to (4). It makes teleological sense that s. 22(1) would capture liens that involve substantial amounts of two or more of those categories.

Business Efficacy

[52] Goodwerk argues that s. 22 should be interpreted in a manner that promotes “business efficacy.” It claims that if hybrid contracts fall under s. 22(1), it would mean that “... an owner or financier would be unable to assess the point at which the supplier of materials would cease having outstanding lien rights.” There are two problems with this argument.

[53] First, Goodwerk has conflated contractual and statutory interpretation. Business efficacy is a principle by which courts imply terms into commercial agreements. In *The Moorcock*, (1889) 14 PD 64, at p. 68, Lord Bowen explained, “In business transactions ..., what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men.” *The Moorcock* involved a contract between a wharf operator and a ship owner in which the court employed business efficacy to imply a term in the contract that the ship could be safely docked.

[54] While courts have employed business efficacy in contractual interpretation for well over a hundred years, it has not been recognized as a substantive presumption of legislative intent. There is no basis to presume that when the Legislature passes a law it does so with an implied intention of promoting business efficacy. In fact, the Legislature frequently does the opposite. There are countless examples of laws regulating and restraining trade to promote public policy goals.

[55] Goodwerk cites *Bank of Montreal v. 100875 P.E.I. Inc.*, 2014 PECA 12, in support of its business efficacy argument. This case does not help its cause. In *Bank of Montreal*, the PEI Court of Appeal identified lien legislation as having a primary and secondary purpose. It stated that, “... first and foremost ...” its purpose is to

protect “... the commercial interests of persons who, under contract and on credit, contribute services or materials to the improvement of real property.” The “secondary purpose” is to protect the “commercial interests of others” to “ensure business efficacy.” It is obvious that these dual purposes can be in direct conflict. In *Bank of Montreal*, the Court ultimately gave effect to the primary, not the secondary purpose.

[56] The second problem with employing “business efficacy” as a principle of statutory interpretation, is that it is a relative concept. Just as beauty and ugliness are in the eye of the beholder, so too is business efficacy. What is efficacious in a particular case is very much tied to the specifics of a contract or a particular transaction. While it is a useful tool in resolving commercial disputes between private parties, its variable and indeterminate nature makes it unhelpful in interpreting a statute.

[57] After examining the scheme of the *Act* and situating s. 22(1) in its context, I conclude that the section applies to hybrid contracts that combine both services and materials. For a materials contract to fall within the ambit of s. 22(1), the services component cannot be merely incidental to the work; rather, it must form a substantial portion of the contract’s value.

[58] The evidence in this case supports such a finding. Delivering fabricated steel for a multi-story building is very different from simply providing raw construction material. Fabrication is the creation of a bespoke steel product. It is akin to manufacturing, and as the evidence indicates, it involves the fabricator hiring its own engineers as well as engaging with the Project’s engineers and architects. A large component of this type of contract is project management. This is confirmed in the affidavit of Mr. Oates where he describes his responsibilities as C.B. Metal’s lead on the Project. These responsibilities included:

- a) overseeing and coordinating project requirements and timelines;
- b) the negotiation and procurement of steel from suppliers;

- c) negotiating subcontracts for the drafting of plans and drawings for the Project;
- d) negotiating a subcontract with a connection designer for the Project;
- e) coordinating with the project manager(s) from Goodwerk;
- f) reviewing or modifying designs and plans;
- g) submitting plans and designs to Goodwerk's (subcontractor) engineering and architectural firms for approval and coordinating timelines with them;
- h) coordinating shipping/transport and storage arrangements for supplied steel; and
- i) fabricating and finishing the steel for the project.

[59] During cross-examination, Goodwerk's CEO, Daniel Goodfellow, testified that the firm was contracting for materials and not project management. This is contradicted by Goodwerk's 6 February 2024 Request for Bid, which required bidders to break down the costs of the bid, including specifying an amount for engineering, shop drawings, and "project management."

[60] During cross-examination, Mr. Goodfellow described the contract as "complex", involving a "bunch of different design issues ... design elements ... and timelines."

[61] Mr. Oates' affidavit establishes that services comprised a substantial portion of the contract. His evidence was that the project management fee would be 30% of the value of the contract. There is nothing to suggest that Goodwerk objected to C.B. Metal including project management fees on its invoices. While Goodwerk was concerned over the amounts, there was no suggestion that this type of charge was improper, or that C.B. Metal would not be compensated for it.

[62] Project management was not the only service component of the contract. C.B. Metal's invoice of 21 September 2023 included \$45,000 for structural "detailing," and a charge of \$55,000 to "engineer, design, stamp and submit drawings." There is no indication that Goodwerk objected to being charged for detailing and engineering services.

[63] Based on the evidentiary record, it is clear that the services provided by C.B. Metal were not merely incidental to a contract for materials, but they formed a substantial portion of the contract's value. It was a hybrid agreement not covered by s. 22(2) or s. 22(3). This is clearly a case "not otherwise provided for" under the *Act*, and therefore s. 22(1) applies. Based on this, C.B. Metal had 30-days from abandonment of the contract to register its lien.

3. Was the contract abandoned by the Parties?

[64] Goodwerk argues that if a contract exists, it was abandoned "well before March 30, 2024," meaning that when C.B. Metal registered the lien on 29 April 2024, it was outside the 30-day time limit imposed under s. 22(1). Goodwerk claims that abandonment occurred when C.B. Metal signed a new LOI in November 2023. Alternatively, it submits abandonment occurred on 16 February 2024 when C.B. Metal submitted an estimate in response to Goodwerk's Request for Pricing.

[65] C.B. Metal's position is that at no time did it agree to abandon the original contract. It points out that it registered the lien within days of becoming aware that Goodwerk had hired a different company to do the fabrication work.

[66] The law is clear that a temporary cessation of work does not equate to abandonment, nor does one of the parties simply ignoring the contract. *Dieleman Planer Co. v. Elizabeth Townhouses Ltd.*, 1973 CarswellBC 5 BCCA, at para. 28; aff'd [1975] 232 S.C.R. 449; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55, at para. 16. For abandonment to occur, the law requires the parties to enter

into a new contract “... in which the parties agree to abandon the old one.” *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, at para. 17.

[67] I will now examine each of Goodwerk’s arguments that the contract was abandoned.

Does the November 2023 LOI amount to abandonment of the original contract?

[68] Goodwerk filed a “Memorandum” and a “Supplemental Memorandum.” Both submissions take a position on the legal effect and enforceability of the November LOI. These are contradictory positions. While a party is always free to make an argument in the alternative, riding two horses in completely different directions can be a challenge.

[69] The Supplemental Memorandum argues that the November LOI constituted an offer “... to terminate such prior agreement and replace it with a new agreement.” Goodwerk claims that “By signing and returning the November LOI, C.B. Metal Works accepted Goodwerk’s offer.” It asserts that this amounts to an agreement to abandon. As a result, C.B. Metal “... would have been required to register the Claim for Lien on or before December 21, 2023.”

[70] This position directly contradicted by Goodwerk’s first Memorandum. In that submission, Goodwerk argues that the November LOI is not binding. It states that Goodwerk “... did not execute the November LOI, nor were the terms of the November LOI otherwise accepted by Goodwerk ...”

[71] The first Memorandum goes on to deny the existence of any form of a contract at any time. It states:

At no time (whether after the date of the November LOI or otherwise) did Goodwerk and CB Metal Works execute any contract to govern the Supply of Materials (or any other supply of works, services or materials to the Property by CB Metal Works).

[72] This position is tied to the evidence. In his affidavit, Mr. Goodfellow states:

I have been advised by Garry Smith and Trevor Thorne and do believe that at no time (whether subsequent to the date of the November LOI or otherwise) did Goodwerk and CB Metal Works execute a construction contract to govern the Supply of Materials (or any other supply of works, services or materials by CB Metal Works).

[73] Setting aside Goodwerk's contradictory submissions, it is necessary to examine the negotiation and formation of the November LOI to determine if it created an enforceable contract. In *Jedfro*, McLachlin, C.J.C stated at paragraph 16 that for a contract to be abandoned, there must be a new contract and, "To establish a new agreement it must be shown that there was an offer by one party, accepted by the other, or an exchange of promises, supported by consideration. There must be a meeting of the minds on the essential terms ..."

[74] It is clear from the evidence that the November LOI is not a binding agreement. C.B. Metal did not accept Goodwerk's offer with its listed "Contract Price" of \$841,999.38. When C.B. Metal returned an executed version of the LOI to Goodwerk, it had changed the Contract Price by ten thousand dollars, to \$8,452,385.00. The former price was struck out, and a new price was inserted in red ink, presumably to bring the change to Goodwerk's attention. This change in price constituted a counteroffer. It is well established in the common law that a "... counteroffer is a rejection of the offer and "kills" it." A. Swan, J. Adamski, & A. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis Canada, 2018), at p.247; *Pearce v. Pearce*, 2023 NLSC 42, at para. 58. Once C.B. Metal made the counteroffer, the roles of the Parties switched, and C.B. Metal became the offeror. Goodwerk admits that it did not execute C.B. Metal's counteroffer. In light of these facts, Goodwerk cannot rely on the November LOI as being an agreement to abandon the original contract.

[75] A written instrument is not the only mechanism by which a contract can be abandoned. As Hoegg, J.A. stated in *Quinlan Brothers Ltd. v. Coady*, 2013 NLCA 31, at para. 27, "... it is possible that an agreement to abandon a contract can be inferred from the parties' conduct, for the terms of a new contract can be expressly stated or implied from the surrounding circumstances."

[76] There must still be *consensus ad idem* for there to be a new contract by conduct that abandons the previous one. In this case, there is no evidence supporting such a consensus. In fact, the evidence establishes that the Parties were unsuccessful in reaching a new agreement. In January 2024, Goodwerk wrote to C.B. Metal stating that it would "... send to CBM a copy of a template contract by end of week, or early next week for CBM's review." C.B. Metal responded, "We look forward to reviewing & executing a contract so we can get paid for the outstanding work to date." There is nothing to suggest that a contract was sent or that the Parties conducted themselves as if a new contract was in place.

Did the February Request for Pricing amount to abandonment?

[77] Alternatively, Goodwerk argues that if a contract existed, it was abandoned on 16 February 2024 when it issued a Request for Pricing for the revised Project, and C.B. Metal submitted an estimate. Goodwerk asserts that this exchange constituted a new contract. In support of this argument, it invokes the "Contract A/Contract B" analysis of *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. In that case, the Supreme Court held that Contract A occurs when a bidder submits a compliant bid in response to an invitation to tender. Once a winning bidder is selected, the parties then enter into a Contract B, containing the terms and conditions of the work. Goodwerk argues that once C.B. Metal submitted its bid, a Contract A came into existence and the original construction contract was abandoned.

[78] This argument fails because of the wording of Goodwerk's Request for Bid. The first page plainly states: "This Request for Bid is not to be construed as an offer, contract or commitment of any kind ...". Based on this wording, I must reject Goodwerk's position that Request for Bid amounted to an offer, and that offer was accepted by C.B. Metal. Goodwerk had absolutely no intention of creating a Contract A through the bidding process and it expressly stated this in the Request for Bid.

4. Is the value of the lien grossly exaggerated and therefore invalid?

[79] Goodwerk argues that I should declare the lien invalid because the registered value is a “gross exaggeration.” This is a question of fact. Goodwerk bears the burden of proving that this is the “clearest of cases” in which a court should intervene and reduce the lien’s value or declare it invalid.

[80] Goodwerk has not filed any evidence proving that the value of the lien is “grossly exaggerated.” Attached to Mr. Goodfellow’s affidavit is correspondence in which Goodwerk asks questions about invoices, and C.B. Metal responds justifying the amounts charged. C.B. Metal, through the affidavit of Mr. Oates, filed detailed invoices breaking down the charges for services and materials. This evidence includes a letter from C.B. Metal to Goodwerk on 8 January 2024, stating that the value of the goods and services is \$525,157.75 (including interest.) The letter attaches more than twenty pages of invoices from subcontractors, along with proof that C.B. Metal had actually paid the subcontractors. Goodwerk chose not to cross-examine Mr. Oates on this evidence, nor did it file any contradictory evidence. In the absence of competing evidence, it is not the role of the Court to engage in its own forensic analysis of the value.

[81] Goodwerk has not proved that this is the clearest of cases in which a lien’s value has been grossly exaggerated.

DISPOSITION

[82] Based on the reasons above, Goodwerk’s application is dismissed. C.B. Metal shall have its costs in accordance with Column 3 of the Scale of Costs.

JUSTIN S.C. MELLOR
Justice