

**CITATION:** Scott Steel v. Ausenco, 2025 ONSC 473  
**COURT FILE NO.:** 29342/23  
**DATE:** 2025-02-06

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF** the *Construction Act*, R.S.O. 1990, c. C. 30

**BETWEEN:** )  
)  
SCOTT STEEL ERECTORS INC. )  
) *Rocco A. Ruso/Apolone Gentles/Jérémie*  
Lien Claimant/(Responding Party) ) *Lachance*, for the Lien Claimant, Scott Steel  
) Erectors Inc.  
– and – )  
)  
)  
AUSENCO ENGINEERING CANADA ) *R. Seumas M. Woods/Sahil Kesar*, for the  
INC. ) Contractor, Ausenco Engineering Canada  
) Inc.  
Contractor/(Moving Party) )  
)  
)  
) **HEARD:** January 25, 29, and December 6,  
2024

**VARPIO J.**

**REASONS FOR JUDGMENT**

- [1] The Magino Gold Mine is a gold mine located near the town of Dubreuilville, in Northern Ontario. In 2020, Magino’s owners hired the moving party, Ausenco Engineering Canada Inc. (“Ausenco”) to act as general contractor to build and develop the mine site (the “Magino Project”). The head contract was fixed at a price in excess of \$200,000,000.
- [2] Ausenco hired subcontractors to perform services including two companies – Scott Steel Erectors Inc. (“Scott Steel”) and Scott Concrete Services Inc. (“Scott Concrete”) – that were separate but related entities. Other companies associated with Scott Steel and Scott Concrete existed prior to January 1, 2024. These companies referred to themselves collectively as the “Scott Group of Companies”.
- [3] During the course of the Magino Project, Ausenco entered into two subcontracts with Scott Steel: the “Building Subcontract” and the “SMP Subcontract”. Ausenco also entered into a subcontract with Scott Concrete: the “Concrete Subcontract”.

- [4] On July 25, 2023, Scott Steel registered a lien upon the Magino Project. The value of the lien is \$35,250,000 and said lien purports to represent the entirety of the amounts owing under all three subcontracts.
- [5] Ausenco brought this motion pursuant to sections 35 and 47 of the *Construction Act*, R.S.O. 1990, c. C. 30, seeking an order discharging the lien in so far as:
1. Scott Steel could not register the lien on the Concrete Subcontract as it was not a party to same;
  2. The liens relating to the Building Contract and the Concrete Subcontract are out of time; and
  3. The amount secured by the lien is willfully exaggerated given Scott Steel's reliance upon delay damages and should therefore be discharged. In the alternative, Ausenco submits that the lien ought to be reduced.
- [6] After hearing the parties' submissions, I find that there is a triable issue with respect to whether the doctrine of promissory estoppel applies such that Scott Steel may be able to register a lien on the Concrete Subcontract.
- [7] I also find that there is no triable issue that the value of the lien was willfully exaggerated by the inclusion of delay damages associated with the Building and SMP Subcontracts. There is an issue for trial regarding the lien associated with delay damages on the Construction Subcontract.
- [8] Ergo, the lien is hereby reduced to an amount of \$23,670,377.46 plus HST, or \$26,747,526.53.

## **FACTS**

### The Parties

- [9] Ausenco is the Canadian subsidiary of Ausenco Pty Ltd., a global engineering, procurement, construction management and operations company with international headquarters in Brisbane, Australia. Ausenco Pty Ltd. and its subsidiaries have 26 offices in 15 countries. Ausenco Pty Ltd. is currently involved with approximately 80 projects around the globe.
- [10] Scott Steel and Scott Concrete were founded by Dan Scott in or around 1998. They are private companies with headquarters in Hamilton, Ontario.
- [11] Scott Steel creates pre-engineered and conventional stick-built building envelopes. It engages in miscellaneous steel projects. Scott Steel advertises that it provides comprehensive services for oil sands, mining, and gas projects. Prior to its involvement in the Magino Project, Scott Steel had worked with Ausenco on the Moose River mining project in Nova Scotia.

[12] Scott Concrete describes itself as a full-service concrete contractor with the experience and capabilities required for large-scale and complex projects throughout North America and around the world.

[13] On January 1, 2024, Scott Steel and Scott Concrete became one legal entity.

#### The Magino Project

[14] Prodigy Gold Incorporated (“Prodigy”) owned the Magino Project. In October of 2012, Argonaut Gold Inc. (“Argonaut”), a Canadian public mining company, purchased Prodigy. Shortly thereafter, Prodigy/Argonaut began considering whether to change the existing mine structure at the Magino Project from an underground mine to an open pit mine. After undertaking prefeasibility and feasibility studies, Prodigy/Argonaut decided to make the change.

[15] In December 2020, Ausenco entered into a contract with Prodigy/Argonaut to engineer, procure and construct a 10,000 tonne per day gold processing facility. The fixed price contract was set at \$202,891,694, payable as Ausenco achieved a series of milestones. On August 3, 2023, the fixed price of the contract was elevated to \$224,525,113.

[16] Ausenco now owns a portion of Argonaut/Prodigy as it purchased shares during the course of its involvement with the Magino Project.

#### The Building Subcontract

[17] Ausenco and Scott Steel entered into the Building Subcontract on February 12, 2021. The Building Subcontract is a customized version of a standard form contract used in the construction industry. Ausenco hired Scott Steel to design, supply and install pre-engineered metal buildings for the process plant and the gold room. The Building Subcontract was a fixed price contract initially valued at \$7,294,515.23 plus HST, or \$8,242,802.21.

[18] The Building Subcontract contained a number of provisions including provisions that enabled Ausenco to change the work parameters as well as provisions specifying the scope of the work to be completed.

[19] The Building Subcontract contained clauses that governed Scott Steel’s ability to seek extensions of time. Specifically, clauses 6.5.1, 6.5.2 and 6.5.4 of the Building Subcontract stated:

#### **SCC 6.5 DELAYS**

6.5.1 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by an action or omission of the *Contractor*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Subcontract Documents*, then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and *Subcontractor* shall agree that the *Subcontract work* was

delayed. The *Subcontractor* shall be reimbursed by the *Contractor* for reasonable costs incurred by the *Subcontractor* as a result of such delay.

6.5.2 If the *Subcontractor* is delayed in the performance of the *Subcontract Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Subcontractor* or any person employed or engaged by the *Subcontractor* directly or indirectly, then the *Subcontract Time* shall be extended for such reasonable time as the *Contractor* and *Subcontractor* shall agree that the *Subcontract Work* was delayed. The *Subcontractor* shall be reimbursed by the *Contractor* for reasonable costs incurred by the *Subcontractor* as a result of such delay.

...

6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Contractor* not later than *7 Working Days* after commencement of delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.

[20] Clause 6.5.4 was specifically changed by the parties to include this term:

Delete the words “7 Working Days” and replace with “5 Working Days”.

Delete and replace the following:

“No extension shall be made for delay unless a Delay Notice is received by the Contractor not later than 5 Days after commencement of the delay. In the case of a continuing cause of delay only one Delay Notice shall be necessary.”

[21] The Building Subcontract also contained clauses that governed the ability of the parties to make a claim under the Building Subcontract:

#### **SCC 6.6 CLAIMS FOR A CHANGE IN SUBCONTRACT PRICE**

6.6.1 If the *Subcontractor* intends to make a claim for an increase to the *Subcontract Price*, or if the *Contractor* intends to make a claim against the *Subcontractor* for a credit to the *Subcontractor Price*, the party that intends to make the claim shall give timely *Notice in Writing* of intent to claim to the other party.

6.6.3 The party making the claim shall submit within a reasonable time to the other party a detailed account of the amount claimed and the grounds upon which the claim is based.

6.6.4 Where the event or series of events giving rise to the claim has a continuing effect, the detailed account submitted under paragraph 6.6.3 shall be considered to be an interim account and the party making the claim shall, at such intervals as the other party may reasonably require, submit further interim accounts giving the accumulated amount of the claim and any further grounds

upon which it is based. The party making the claim shall submit a final account after the end of the effects resulting from the event or series of events.

6.6.5 The responding party shall reply by *Notice in Writing* within 10 *Working Days* after receipt of the claim, or within such other time period as may be agreed by the parties.

6.6.6 If such reply is not acceptable to the party making the claim, the claim shall be settled in accordance with Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION.

[22] In May 2021, Ausenco and Scott Steel agreed to Change Order 1 to the Building Subcontract which amended the price of the contract and included a cross-liability provision:

3 – SUBCONTRACTOR CROSS-LIABILITY

Subject to the Subcontractor entering into more than one agreement with Ausenco for the Magino Project, the following applies:

(a) Insert Definitions

- (i) Separate Project Agreement: means another contract between Ausenco and the Subcontractor, or a party that is in any way directly or indirectly related to Contractor [sic] in relation to the Project.
- (ii) Subcontractor: Means Scott Concrete Services Inc and/or Scott Steel Erectors Inc. For the purposes of the Magino project [sic] both businesses will be treated as one.

(b) **PART 3 – EXECUTION OF THE WORK**

(i) **Insert Clause**

When Ausenco and the Subcontractor enter into a Separate Project Agreement, the Subcontractor acknowledges and agrees that it shall have no claim against Ausenco, or be entitled to any form of monetary or other compensation or relief (including, but not limited to, an extension of time), if the event or circumstance giving rise to the claim or relief is caused (directly or indirectly) by or a result of the Contractor's performance under the Separate Project Agreement. The subcontractor is to manage and mitigate any delays originated by their Separate Project Agreement. [Emphasis in original.]

The Concrete Subcontract

[23] On June 3, 2021, Ausenco and Scott Concrete entered the Concrete Subcontract. The parties agreed that Scott Concrete would provide concrete-related products and services to

the Magino Project including materials, labour, tools, plant and equipment. Ausenco initially agreed to pay Scott Concrete \$10,311,446.81 plus HST, or \$11,651,934.90.

- [24] The Concrete Subcontract contained a number of terms and conditions including a term that enabled Ausenco to vary the work terms. It also included an “entire agreement clause” that stated:

This *Subcontract* constitutes the entire agreement between AUSENCO and the Subcontractor in connection with the performance of the *Subcontract Work under the Subcontractor* and it supersedes any previous arrangements, correspondence, tenders, representations, proposals, understandings and communications between the *Parties*, whether oral or in writing.

Any part of the *Subcontract* which is unenforceable or invalid for any reason shall only be ineffective to the extent of such unenforceability or invalidity, and shall not invalidate the remainder of this *Subcontract*.

- [25] The Concrete Subcontract also contained terms that governed delay. Clause 21.1 indicated that Scott Concrete was to provide Ausenco with written notice of any delays within 5 business days in order to receive an extension of the time required to complete the contemplated work.

- [26] As regards costs associated with delay, the Concrete Subcontract stated:

#### **21.6 Delay Costs**

- (a) For every day the subject of an *Extension of Time* for a *Compensable Cause* and for which the *Subcontractor* gives AUSENCO claim for *Delay Costs* strictly in accordance with clause 29, the *Subcontractor* shall be entitled to recover such additional costs in respect of the *Subcontractor's* personnel, *Secondary Subcontractors* and construction plant directly engaged either on-*Site* or off-*Site* in the performance of the *Work under the Subcontract* (excluding profit, mark-up or off-*Site* overheads) which are reasonably, necessarily and actually incurred directly as a result of the delay and which are substantiated to AUSENCO in writing, provided that the *Subcontractor* will not be entitled to any amount exceeding the amount stated in *Item 31*.
- (b) The amount of *Delay Costs* payable pursuant to this clause is the agreed damages which will be payable by AUSENCO in these circumstances and will be a limit upon AUSENCO's liability to the *Subcontractor* for any delay, disruption or prolongation which arises out of or in connection with the *Subcontract*, however caused, except in respect of a suspension *Direction* issued by AUSENCO pursuant to clause 20.4 or arising pursuant to a right under clause 27.9(a), in which case the *Subcontractor's* sole entitlement shall be its entitlement pursuant to clause 20.4(d) or 27.9(b), as the case may be.

- (c) The *Subcontractor* must take all reasonable steps to reduce, and where possible eliminate, the costs referred to in this clause 21.6.
- (d) Compliance by the *Subcontractor* with this clause 21.6 and clause 29 is a pre-condition to the *Subcontractor*'s entitlement to the payment of any amount in connection with any delay. If the *Subcontractor* fails to comply with this clause 21.6 in respect of any delay, the *Subcontractor* shall have no *Claim* in connection with the delay.

[27] As regards claims to be made by Scott Concrete, the Concrete Subcontract had a clause that governed both discrete claims and ongoing claims:

## **29 Claims**

### **29.1 Making of Claims**

Except for *Claims* of an *Extension of Time* under clause 21 or payment under clause 22, the *Subcontractor* must give AUSENCO the notices required by clause 29.2 if it wishes to make a *Claim* against AUSENCO in respect of any *Direction*, act, omission or any other fact, matter or thing (including a breach of this *Subcontract* by AUSENCO) under, arising out of or in any way in connection with the *Work under the Subcontract* or this *Subcontract*.

### **29.2 Prescribed Notice**

The notices referred to in clause 29.1 are:

- (a) A notice within ten (1) *Business Days* after the commencement of the first occurrence of the *Direction*, act, omission or any other fact, matter or thing upon which the *Claim* is based, expressly specifying that the *Subcontractor* proposes to make a *Claim* and the *Direction*, act, omission or any other fact, matter or thing upon which the *Claim* is based; and
- (b) A written *Claim* within ten (10) *Business Days* after the date on which the notice was required to be given to AUSENCO pursuant to clause 29.2(a), which must include:
  - (i) detailed particulars concerning the *Direction*, act, omission or other fact, matter or thing upon which the *Claim* is based;
  - (ii) the legal basis for the *Claim*, including the terms of this *Subcontract* upon which the *Claim* is based;
  - (iii) the facts and evidence relied upon in support of the *Claim* in sufficient detail to permit verification; and
  - (iv) details of the amount claimed and how it has been calculated.

### **29.3 Continuing Events**

If the *Direction*, act, omission or other fact, matter or thing upon which the *Claim* under clause 29.2 is based or the consequences of the *Direction*, act, omission or other fact, matter or thing are continuing, the *Subcontractor* must continue to give the information required by clause (b) every twenty (20) *Business Days* after the written *Claim* under clause (b) was required to be given to AUSENCO, until after the *Direction*, act, omission or any other fact, matter or thing upon which the *Claim* is based, has, or the consequences thereof have, ceased.

If the *Subcontractor* fails to comply with clause 29.1, 29.2 or 29.3, AUSENCO will not be liable upon any *Claim* by the *Subcontractor* and the *Subcontractor* will be absolutely barred from making any *Claim* against AUSENCO, arising out of, or in any way in connection with, the relevant *Direction*, act, omission or other fact, matter of thing (as the case may be) to which clause 29.1 applies.

[28] The Concrete Subcontract contained a special condition adding the following definitions:

**Separate Project Agreement:** means another contract between Ausenco and the Subcontractor, or a party that is in any way directly or indirectly related to Contractor [sic] in relation to the Project.

**Subcontractor:** Means Scott Concrete Services Inc and/or Scott Steel Erectors Inc. For the purposes of the Magino project [sic] both businesses will be treated as one.

[29] The Concrete Subcontract contained a risk allocation term:

SC 13 – Subcontractor’s Acceptance of Risk

Except to the extent expressly allocated to, or reimbursable by AUSENCO or as otherwise stated to the contrary under this Subcontract, all risks, costs, and expenses in relation to the performance by the Subcontractor of its obligations under this Subcontract are allocated to, and accepted by, the Subcontractor as its entire and exclusive responsibility.

[30] The Concrete Subcontract also contained a clause that described the subcontracts as being “Separate Project Agreements”:

When Ausenco and the Subcontractor enter into a Separate Project Agreement, the Subcontractor acknowledges and agrees that it shall have no claim against Ausenco, or be entitled to any form of monetary or other compensation or relief (including, but not limited to, an extension of time), if the event or circumstance giving rise to the claim or relief is caused (directly or indirectly) by or a result of the Contractor’s performance under the Separate Project Agreement. The Subcontractor is to manage and mitigate any delays originated by their Separate Project Agreement.

### The SMP Subcontract

- [31] Ausenco and Scott Steel entered into a subcontract dated April 29, 2022 for work related to structural steel, mechanical work and piping installation. The SMP Subcontract was a fixed price contract wherein Scott Steel agreed to commence work on April 29, 2022 and to practically complete same by February 22, 2023. The initial set price for the contract was \$18,330,593.66 plus HST, for a total of \$20,713,570.84.
- [32] The relevant terms of the SMP Subcontract were in the same form as the Concrete Subcontract.

Performance of the Subcontracts and Initial Representation of “As One”

- [33] Initially, the estimated capital cost outlay for the project was between \$450 million and \$475 million.
- [34] Scott Steel began working on the Building Subcontract in early 2021 and the SMP Subcontract in 2022. There were delays at the start of the project. Ausenco was periodically forced to engage non-payment provisions of the sub-contracts. Mr. Douglas Hood, President and Chief Operating Officer of Scott Steel swore an affidavit in this matter wherein he deposed that Prodigy/Argonaut “frequently mentioned in its notices of non-payment that the three agreements were to be “treated as one” for justification of setting off amounts”. However, Mr. Hood only pointed to one such notice of non-payment dated January 17, 2021 that indicated that “both businesses will be treated as one”.
- [35] Although he did not provide specifics of any verbal representations made by Ausenco in this regard, Mr. Hood deposed that Ausenco made several assertions that the subcontracts were to be treated “as one”. Mr. Hood concluded that:

I believed that [three] subcontracts formed part of a larger whole based on these constant assertions from Ausenco. The Scott Group and I acted on those representations by deciding not to lien on the Concrete Subcontract or any of the other individual subcontracts. It is only after we acted to our prejudice that Ausenco now says the subcontracts are separate.

- [36] Scott Concrete was to begin work in May of 2021 but that work was delayed by several weeks. Ausenco sent a letter to Scott Concrete on June 3, 2021 that stated that, *inter alia*, a mitigation plan was required as a result of the conditions on the ground. On June 25, 2021, a change order was issued based upon the remediation of blast sites. Several change orders were issued and ultimately agreed upon by the parties. These change orders increased the total value of the subcontracts. Although Scott Concrete and Ausenco disagree as to the exact amount of the total revised value of the Concrete Subcontract, both parties agree that the total revised value of same is over \$17 million.
- [37] On July 9, 2021, Scott Concrete issued a delay notice to Ausenco. In that letter, a Scott Concrete representative wrote:

Scott Concrete Services Inc. is issuing this Notice of Delay to address delay gaining access to the site due to the over-blast conditions...

[38] On August 16, 2021, Scott Concrete issued another delay notice to Ausenco. It stated:

Scott Concrete Services Inc. is issuing this Notice of Delay, per G.C. clause 21.1, to address the delay in being able to pour the Ball Mill and SAG Mill raft slabs due to incomplete information supplied by Ausenco and due to blasting in the immediate area being incomplete (SCS deems this to be a risk per G.C. clause 12.1(b)).

[39] On August 21, 2021, Ausenco sent a letter to Scott Concrete advising of further delays. Blasting was occurring on sites adjacent to where Scott Concrete would be pouring a foundation and, as a result, the potential for excessive vibration (which could damage the foundation) necessitated delay.

[40] Given these delays, Mr. Hood deposed that Scott Steel could not start building the processing plant in August 2021, as was foreseen by the Building Subcontract. The building of the plant was commenced in December 2021. This delay allegedly increased costs for Scott Steel and Scott Concrete as they were forced to work in the Northern Ontario winter.

[41] On December 14, 2021, Prodigy/Argonaut fired its CEO and revised its anticipated capital cost outlay for the Magino Project to approximately \$800 million.

#### Further Delays

[42] On December 17 and 21, 2021, Ausenco issued two change orders that, per Mr. Hood, required Scott Steel and Scott Concrete to dedicate additional resources to the Building Subcontract and the Concrete Subcontract. Mr. Hood further deposed that these factors had ripple effects whereby work on all subcontracts was delayed. Nonetheless, by January 2022, the Building Subcontract was partially completed.

[43] Ausenco retained a mining consultant who provided a report dated March 3, 2022 which stated that the “uneven nature of the bedrock, once exposed below the glacial fill, required much more time and capital to create a suitable foundation area than originally estimated. The additional work to prepare the area led to delays in delivering the plant site to Ausenco”.

[44] On May 11, 2022, Prodigy/Argonaut revised its anticipated capital cost outlay by a further 15%, to approximately \$920 million.

[45] Mr. Hood deposed that the commencement of the SMP Subcontract was delayed as a result of the aforementioned issues. Mr. Hood deposed that Ausenco did not provide the necessary materials to start the SMP Subcontract and that same was discussed at a May 19, 2022 meeting with Ausenco.

[46] By the end of May 2022, the processing plant was erected, and cladding was being placed on the building. At the same time, two of Scott Concrete’s operator groups went on strike.

Scott Concrete advised Ausenco of this fact, and Ausenco began paying some of Scott Concrete's subcontractors directly because Scott Concrete was facing cashflow issues.

- [47] Scott Steel and Scott Concrete each billed Ausenco for its periodic services rendered and materials provided. Scott Concrete sent invoices for work performed on the Concrete Subcontract whereas Scott Steel sent invoices for work undertaken on the Building Subcontract and the SMP Subcontract. Scott Steel's invoices had unique identifier numbers for each of the Building Subcontract and the SMP Subcontracts.
- [48] By July 2022, Prodigy/Argonaut's share price dropped to \$0.41/share, from a high of \$3.80/share in November 2021.
- [49] Mr. Hood deposed that the "Scott Group" made decisions and representations regarding Scott Steel and Scott Concrete's involvement in the Magino Project. Despite this evidence that the "Scott Group" acted as a whole, on August 8, 2022 Scott Concrete issued a delay claim letter to Ausenco stating that Scott Concrete "has had and continues to incur additional costs of several million dollars on the Magino Gold Project". That letter began as follows:

Scott Concrete Services Inc. (hereon referred to as SCS) is writing this letter to outline its case of the estimated monetary loss of which this document outlines the right to recover. SCS has had and continues to incur additional costs of several millions of dollars on the Magino Gold Project (known as the "The Project"). SCS identifies this mainly to the fact that Argonaut Gold had overblasted the Magino Gold Mine site in numerous areas, leaving the site in a completely unexpected and unworkable terrain, parlaying into the snowball effect this has caused. This claim outlines the direct costs that SCS can reasonably identify. SCS has also realized the subsequent indirect costs that it is experiencing due to the obvious direct costs. SCS senses that the impacts of The Project, though recognized by Ausenco, are not fully understood. SCS welcomes an early opportunity to amicably resolve the following outlined monetary losses and mitigate any further losses.

[The letter then outlined numerous concerns over several pages].

- [50] Ausenco replied on August 18, 2022 with a letter that began as follows:

We refer to the letter dated 8 August 2022 from Scott Concrete Services (SCS) entitled "Escalating Concrete Costs".

As you will note from the below table, in Ausenco's opinion most of the items claimed by SCS have been previously addressed by way of executed change orders issues pursuant to clause 14 of the Contract and accepted by both parties.

The balance of the items are the subject of agreed unit rates; therefore, the SCS is not entitled to a variation...

- [51] On October 16, 2022, the parties met to discuss the invoicing of the Concrete Subcontract. The parties agreed that Ausenco would review the Scott Concrete change orders it was not

disputing and the parties would engage a process to work together to complete the project. On October 21, 2022, Ausenco paid some of Scott Concrete's claims.

[52] On January 30, 2023, Mr. Mark Cornwell, Ausenco's Head of Project Delivery, Global Projects, wrote to Mr. Hood. In that letter, Mr. Cornwell stated that Ausenco intended to use set-off provisions contained in the subcontracts:

Dear Sir

Notice of Claim / Set Off

We refer to the discussion held between senior representatives of the parties on 20 January 2022.

We write to reiterate that, in our opinion and for the following reasons, the agreements between the parties are to be "treated as one".

On or about 21 May 2021, and in relation to the agreement between Ausenco Engineering Canada Inc ("Ausenco") and Scott Steel Erectors Inc ("Scott Steel") for the prefabricated buildings (103198-0503), the parties agreed in writing to a Change (signed by Mr D Scott) as follows:

***ii Subcontractor:** Means Scott Concrete Services Inc. and/or Scott Steel Erectors Inc. for the purposes of the Magino project both businesses will be treated as one.*

On or about 3 June 2021 Ausenco entered into an agreement (103198-0501) with Scott Concrete Services Inc. ("Scott Concrete"). The agreement was signed for Scott Concrete by Messrs G Thomas and D Hood.

Under that agreement, "Subcontractor" is defined as :

***Subcontractor:** Means Scott Concrete Services Inc. and/or Scott Steel Erectors Inc. For the purposes of the Magino project both Subcontractors will be treated as one.*

On or about 6 June 2022 Ausenco entered into a further separate project agreement (103198-0505) with Scott Steel. The agreement was signed for Scott Steel by Mr D Scott.

Again, in the agreement "Subcontractor" is defined as:

***Subcontractor:** Means Scott Concrete Services Inc. and/or Scott Steel Erectors Inc. For the purposes of the Magino Project both Subcontractors will be treated as one.*

At the request of Scott Concrete, and pursuant to the terms of agreement 103198-0501, Ausenco has paid Secondary Subcontractors. This has had the effect of diminishing the amount of Holdback retained by Ausenco under the Construction Act.

Pursuant to clause 22.7 of each agreement, Ausenco is entitled to set off amounts otherwise due to “the Subcontractor” (as defined in the agreement, as noted above):

### 22.7 Set Off

Without prejudice to any other right available to AUSENCO under this *Subcontract* or at law, AUSENCO may, at any time, deduct or set-off from either or both of any money payable or to become payable by AUSENCO to the *Subcontractor* under this *Subcontract* and/or any security provided by the *Subcontractor* under this *Subcontract*:

- (c) Any money due, or reasonably claimed to be due or to become due, from the *Subcontractor* to AUSENCO whether in connection with this *Subcontract* or otherwise, including:
- (d) Any amount which the *Subcontractor* owes to AUSENCO (whether or not the amount is expressed to be a debt due from the *Subcontractor* to AUSENCO or is an amount in respect of which the *Subcontractor* indemnifies AUSENCO); and
- (e) Any other loss, cost, expense or damage incurred by AUSENCO in respect of which the *Subcontractor* is or may be liable to AUSENCO (including under this *Subcontract*, any other agreement or on any other basis whatsoever).

Ausenco hereby notifies the Subcontractor that it intends to set off amounts paid to Secondary Subcontractors under agreement 103198-501 as money due, or reasonably claimed to be due, from the Subcontractor to Ausenco pursuant to agreement 103198-503, further or alternatively, agreement 103198-505.

All of Ausenco’s rights are expressly reserved.

[53] Mr. Nathan Grob, Ausenco’s Senior Vice-President of Global Projects (Americas) swore an affidavit wherein he described the background to Ausenco’s letter:

In terms of Mr. Cornwell’s January 29, 2023 letter to Mr. Hood that is included as Exhibit 115 to Mr. Hood’s affidavit, a letter I helped to prepare, Mr. Cornwell sent that letter to put [Scott Steel] on notice that Ausenco intended to use its rights under section 22.7 of the SMP Subcontract to set off monies owing to it by [Scott Concrete] against monies owing to [Scott Steel] under the SMP Subcontract. Mr. Cornwell’s reference to treating [Scott Steel] and [Scott Concrete] as one was therefore made in that context.

[54] Scott Concrete stopped providing services during the 2022 Christmas holidays and reattended on site in early 2023 to finish certain tasks. On January 20, 2023, Mr. Hood spoke with Mr. Cornwell regarding a possible path forward. Mr. Hood deposed that “[t]o facilitate a final negotiated resolution on all outstanding matters on the Concrete Subcontract, I agreed to submit a claim setting out how we had been delayed on the

Project”. Accordingly, Scott Concrete retained Ankura Consulting Group (Canada) Inc. (“Ankura”) to assist with such a claim.

[55] On February 9, 2023, Ausenco advised Scott Concrete via letter that it had made certain errors in regards to the payment of Scott Concrete’s subcontractors.

#### The First Ankura Report

[56] In its first report dated February 10, 2023, Ankura found that Scott Concrete incurred delays which were caused by:

1. Ausenco’s insufficient tender process;
2. An unprepared site and consistent delays in the receipt of drawings; and
3. The actual design being more complicated than that which was represented in the tender process.

[57] As for quantum of damages, Mr. Hood deposed that Ankura did not independently quantify or assess damages given time constraints. Accordingly, Ankura used Scott Steel and Scott Concrete’s estimate of \$15 million, exclusive of overhead, loss of profits and applicable taxes as a damage estimate.

#### Certificate of Completion – Concrete Subcontract

[58] Mr. Grob deposed that, in February 2023, the Concrete Subcontract was completed. Accordingly, a certificate of completion was published on February 12, 2023.

[59] Mr. Cornwell sent a letter to Scott Concrete on behalf of Ausenco advising them of their position regarding project completion. The form of the letter mirrored the language used in section 2(1) of the *Construction Act* that is utilized when a contract has been substantially performed (as opposed to a subcontract).

[60] Beyond formalistic concerns, Scott Concrete did not think that the Concrete Subcontract was “totally complete” at that time. Mr. Hood deposed that Scott Concrete continued to work on site until March 2023.

[61] Mr. Hood deposed that he “did not raise the premature certification with Ausenco because we did not intend to register a lien on the Project at that time. We still had a lot of work to do on the Building Subcontract and the SMP Subcontract and Ausenco made it clear that it treated all of the subcontracts as one...” Furthermore, Mr. Hood deposed that registering a lien might cause Ausenco to engage set-off provisions in the subcontracts.

[62] Mr. Hood provided Ausenco with the first Ankura report on February 13, 2023. Ausenco replied the next day to schedule a meeting regarding same.

[63] On February 26, 2023, Prodigy/Argonaut increased its anticipated capital cost outlay to \$980 million.

The March 21, 2023 Meeting and the Second Ankura Report

- [64] On March 21, 2023, Ausenco and Scott Concrete agreed to a Memorandum of Understanding (“MOU”).
- [65] The MOU provided that, *inter alia*, all claims pursuant to the Concrete Subcontract would be itemized and sent to Ausenco by April 21, 2023. Mr. Hood deposed that “Ausenco... asked for further and better particulars than provided in the Ankura report. It specifically requested a quantification of costs and an explanation of how those costs were caused by the disruptions suffered”.
- [66] On April 21, 2023, Scott Concrete sent Ankura’s second report to Ausenco (the “Second Ankura Report”). The Second Ankura Report described the damages under the Concrete Subcontract as being \$25,377,228 plus HST.
- [67] At para. 16 of the conclusions section, the Second Ankura Report stated:
- The additional payment now being sought by [Scott Concrete] is \$25,377,228. Such has been calculated on a Total Cost methodology. The detailed narrative presents argument in justification of that approach in preference to other approaches.
- [68] The Second Ankura Report then gave a detailed analysis about how certain delays led to damages. The issues identified and described within the report included damages allegedly arising from the delayed start, the operators’ strikes and other such issues.

Certificate of Completion – Building Subcontract and SMP Subcontract

- [69] According to Mr. Grob, the Building Subcontract was substantially completed on April 28, 2023. A certificate of substantial completion was published on May 3, 2023. According to Mr. Hood, the form of the certificate contained procedural problems *viz-a-vis* using incorrect forms. Other problems with the document included naming Argonaut as the owner instead of Argonaut and Prodigy, the name of the contractor was listed as Scott Steel instead of Ausenco, Ausenco was named as the certifier when there was no certifier for the project, and there was no legal description of the property under the “identification” section of the document.
- [70] On May 17, 2023, Scott Steel wrote to Ausenco seeking additional funds for cost overruns associated with alleged delay:
- Therefore, the Subcontractor requests for additional indirect costs based on the following assessment: [Scott Steel asked for \$969,549.18 + HST]
- [71] On May 28, 2023, Ausenco responded to the Second Ankura Report and described it as being “bogus”.
- [72] The SMP Subcontract was certified as being substantially complete as of June 1, 2023. A certificate of substantial completion was published on June 6, 2023. According to Mr.

Hood, the form of the certificate of completion for the SMP Subcontract contained the same problems as did the certificate of completion for the Building Subcontract.

- [73] On June 14, 2023, Ausenco wrote to Scott Steel advising it that Ausenco had issues with Scott Steel having demobilized and effectively ceased work. It demanded that Scott Steel return to work and complete tasks valued at \$602,376.

#### The Liens

- [74] On July 25, 2023, Scott Steel registered a lien on title worth \$35,250,000.
- [75] On July 28, 2023, the Head Contract was certified as being substantially completed.
- [76] A number of subtrades registered construction liens as regards the Magino Project, as did Ausenco.

#### The Litigation

- [77] Ausenco questioned the validity of Scott Steel's lien and asked Scott Steel's then lawyer (not counsel on this application) to provide particulars of same. Via correspondence dated August 8, 2023, Scott Steel's counsel provided a spreadsheet that outlined the lien. In that spreadsheet, counsel indicated that the following values would be attributed to the respective liens:

1. Concrete Subcontract: \$29,058,009.29;
2. Building Subcontract: \$1,348,788.51; and
3. SMP Subcontract: \$4,977,159.33.

- [78] Originating process was filed, litigation ensued and the parties cross-examined each other's representatives. On October 12, 2023, all liens were vacated by Ausenco when it posted alternate security in the form of a lien bond.
- [79] On November 2, 2023, the Magino Project began commercial production.

#### Mr. Hood's Evidence on Damages

- [80] In his affidavit, Mr. Hood deposed that the lien registered by Scott Steel actually represents the following damages outstanding for each subcontract:
1. Concrete Subcontract: \$15,771,566.87;
  2. Building Subcontract: \$4,434,086.93 and
  3. SMP Subcontract: \$9,158,966.19.
- [81] This sum represents a total of \$29,364,619.99 which, when HST is added, comes to a total of \$33,182,020.59.

[82] Of this total, Mr. Hood deposed that the quanta could be broken down into two heads of damages: (1) Balance Due on Subcontracts; and (2) Delay Damages and Extras.

[83] With respect to the “Balance Due on Subcontracts” category, Mr. Hood outlined that the following amounts were as yet unpaid:

1. Concrete Subcontract: \$1,219,807.79;
2. Building Subcontract: \$1,949,835.62; and
3. SMP Subcontract: \$5,948,974.97.

[84] The unpaid amounts on each subcontract therefore represents a total of \$9,118,618.38 plus HST or \$10,304,038.80.

[85] The “Delay Damages and Extras” portion of each damages claim are as follows:

1. Concrete Subcontract: \$14,551,759.08;
2. Building Subcontract: \$2,484,251.31; and
3. SMP Subcontract: \$3,209,991.22.

[86] The Delays and Extras portion of the damages registered by the lien total \$20,246,001.60 plus HST, or \$22,877,981.80. This amount represents 68.9% of the total amount registered under the lien.

[87] Mr. Hood was cross-examined with regard to the delay damages as outlined in his affidavit. With respect to the Concrete Subcontract, Scott Steel initially claimed \$28,393,220.49 in delay damages. In his affidavit, that amount was reduced to \$16,443,487.76. When asked about the reduction, Mr. Hood’s answered that the original number, “was based on the information we had at the time”.

[88] Questions were then asked and answered about particular cost entries in the lien claim. The following questions were asked and answers given:

Q (565). And just in terms of the backup, you haven’t given us any of the source documentation to substantiate any individual costs that you have incurred, have you?

A. No.

Mr. Ruso: We intend to at discovery, counsel.

Mr. Woods: Lead trump or face the consequences, Counsel, but in any event, so...

[89] Mr. Hood was then asked about the delay portions of the lien claim. Counsel for Scott Steel intervened in this questioning and stated:

But, yeah, so any question in connection with the way in which the delay costs and damages and the extent to which they are lienable he [Mr. Hood] is deferring

to the expert report, which he has already explained to you that he used to inform himself on how to calculate these damages.

[90] Mr. Hood was asked to provide Scott Steel and Scott Concrete’s financial records for all three subcontracts but that request was refused.

## **THE POSITIONS OF THE PARTIES**

[91] Ausenco argues that the lien ought to be discharged from the Magino Project. It initially advanced three principal arguments in support of that proposition:

1. Scott Steel cannot register a lien for work preformed by Scott Concrete, and *vice versa*. The Concrete Subcontract therefore has no lien registered in regards to it;
2. Each subcontractor must register a lien for work done on each specific sub-contract. Therefore, Scott Steel had to register a lien for each of the Building Subcontract and the SMP Subcontract. The Building Subcontract is therefore out-of-time; and
3. The amount of each lien was inflated. The *Construction Act* demands that the lien ought to be vacated outright or, in the alternative, the lien ought to be reduced substantially.

[92] In the summer of 2024, and prior to my release of these reasons, the Divisional Court released *Prasher Steel Ltd. v. Pre-Eng Contracting Ltd.*, [2024] O.J. No. 3856 (Div. Ct.) which effectively rendered Ausenco’s second argument moot. *Prasher* states that a subcontractor need only register one lien for all of its work, and that the time to register a lien is to be calculated using the timeline established by the “last-in-time” subcontract: see para. 33. Ausenco abandoned its argument in this regard on December 6, 2024 so as to comply with the binding jurisprudence.

[93] For its part, the Scott Group argues that:

1. It was the intention of the parties to treat Scott Steel and Scott Concrete “as one” which allows Scott Steel to register a lien on behalf Scott Concrete. Scott Steel may therefore register a lien with respect to the Concrete Subcontract and, given *Prasher*, the lien is timely; and
2. The damages secured pursuant to the lien are reasonably viable and particularized and adequate notice has been given. As such, the alleged damages are capable of supporting a lien irrespective of whether they arise from delay damages.

## **ANALYSIS**

### **Motions to Discharge or Reduce Liens**

#### Who May Register a Lien and the Timing Thereof

- [94] The registration of construction liens is governed by the *Construction Act*. Section 14 of the *Construction Act*<sup>1</sup> empowers a person who performs work on a construction project to register a lien upon a property:

Creation of lien

14 (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1); 2017, c. 24, s. 12 (1), 66.

- [95] Section 17 of the *Construction Act* describes the amounts that may be secured via a lien under this statute:

Limitation on value of lien

17 (1) The lien of a person is limited to the amount owing to the person in relation to the improvement and, subject to Part IV (holdbacks), it is further limited to the least amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien. R.S.O. 1990, c. C.30, s. 17 (1); 2017, c. 24, s. 67.

- [96] Section 31 of the *Construction Act* describes the ways in which a construction lien expires. Sections 31(1), 31(2) and 31(3) state:

Expiry of liens

31 (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1); 2017, c. 24, s. 67.

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor...

...

Liens of other persons

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of

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<sup>1</sup> The *Construction Act* replaced the *Construction Lien Act*, R.S.O. 1190, c. C. 30

the contract, expires at the conclusion of the 60-day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32,

(ii) the date on which the person last supplies services or materials to the improvement,

(ii.1) the date the contract is completed, abandoned or terminated, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

### The Discharge or Reduction of a Lien

[97] Given the special litigation position attributed to lien holders under the *Construction Act* – that is, lien holders receive a presumptive legal interest without the need for prior adjudication – it is incumbent on me to ensure strict compliance with the terms of the *Construction Act*. In *Federated Contractors v. Ann-Maura Developments*, 2010 ONSC 347, Master Albert stated at para. 20:

The court will not be an accomplice to an abuse of the *Construction Lien Act*. The Act is designed to provide an extraordinary remedy to legitimate suppliers of materials and services to construction projects. Federated has not come to court with clean hands. It forfeits any entitlement to benefit from the extraordinary remedies the Act provides.

[98] Section 35 of the *Construction Act* addresses the liability of a person who exaggerates their claim:<sup>2</sup>

Exaggerated, false claims

#### Liability

35 (1) In addition to any other ground on which the person may be liable, any person who preserves a claim for lien or who gives written notice of a lien in the following circumstances is liable to any person who suffers damages as a result:

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<sup>2</sup> In its Notice of Motion, Ausenco sought a reduction of the amount paid into court as per s. 44(5) of the *Construction Act*. Section 44(5) governs the reduction of the sum of money paid into court which is correlated to the total value of the lien. Any reduction of the lien as per s. 35 of the *Construction Act* will therefore cause a reduction as per s. 44(5) of the same act.

1. The person knows or ought to know that the amount of the lien has been wilfully exaggerated.
2. The person knows or ought to know that he or she does not have a lien. 2017, c. 24, s. 30 (2)

Reduction of lien amount

(2) In the circumstances described in paragraph 1 of subsection (1), the court may, on motion, order that the lien amount be reduced by the exaggerated portion, as determined in accordance with section 17, if it finds that the person has acted in good faith. 2017, c. 24, s. 30 (2).

[99] Section 47 of the *Construction Act* outlines the powers of a court to discharge a construction lien:

- (1) The court may, on motion, order the discharge of a lien,
  - (a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or
  - (b) on any other proper ground. 2017, c. 24, s. 37 (1).

Power to vacate, etc.

(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.

...

[100] In *GTA Restoration Group Inc. v. Baillie*, [2020] O.J. No. 3665; leave to appeal refused 2021 ONSC 1250, Master Robinson considered the amended *Construction Act* as it relates to the test for reducing a construction lien under the new section 35 and discharging same pursuant to section 47. At paras. 32 and 34 of his decision, Master Robinson stated:

While the structure of the provision has changed, the only substantive difference is the addition of a specific ground for discharging a lien [the new section 47], namely on the basis that the lien is "frivolous, vexatious or an abuse of process." That amendment was one of the recommended changes outlined in the April 2016 expert report prepared by Bruce Reynolds and Sharon Vogel entitled, "Striking the Balance: Expert Review of Ontario's Construction Lien Act", which was a precursor to the legislative amendments. In Section 5.3 of that report, the following recommendation was made:

Section 35 of the [Construction Lien] Act, which imposes penalties for exaggerated claims, should be amended to replace the concept of

"grossly inflated" liens with the concept of "wilfully exaggerated" liens, refocussing the threshold at a more sensitive level. As well, the court should be given the discretion to discharge a claim for lien in whole or in part if on a balance of probabilities it is established that the claim is frivolous, vexatious, or an abuse of process.

...

The current s. 35 adds the proposed good faith criteria in assessing reduction of an exaggerated lien, providing as follows [the current s. 35 of the *Construction Act* was reproduced in the decision].

[101] Master Robinson canvassed the jurisprudence and stated that motions under section 35 are akin to motions for summary judgment under Rule 21 of the *Rules of Civil Procedure*. The court will grant the moving party a remedy where, based on the evidence before it, the court can determine an issue of willful exaggeration and good faith without the need for a trial: see para. 115.

[102] As regards the test under s. 47 of the *Construction Act*, a moving party must prove on a balance of probabilities that there is no triable issue in respect of the bases upon which discharge of the lien is sought. In *Maplequest (Vaughan) Developments Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308, the Divisional Court described the similarities of a motion under s. 47 of the *Construction Act* to a summary judgment motions at para. 25:

In our respectful view, the motions judge erred when he said that this motion was the same as a motion for summary judgment. It is analogous to such a motion - a point that has been made in the cases many times - and the underlying test - whether there is a triable issue in respect to any of the bases on which discharge of the lien is sought - is the correct test to apply. However, as this court has noted recently in *R&V Construction v. Baradaran*, a motion under s. 47 and a motion for summary judgment under the Rules are procedurally different things.

[103] In *GTA Restoration Group*, Master Robinson canvassed the jurisprudence and held that a party responding to a motion pursuant to section 47 of the *Construction Act* bears some responsibility for providing a reasonable basis for the lien claimed. At para. 56, Master Robinson stated:

In my view, neither *R&V Construction* nor *Maplequest* alter the prior case law requiring both the moving party and responding lien claimant to put their best foot forward in s. 47 motions where the court must assess if there are triable issues, such as challenges to timeliness of a lien, quantum of a lien, or lienability of services or materials supplied. On my reading, the Divisional Court has

clarified only that the evidentiary onus extends solely to the bases on which discharge is sought.<sup>3</sup>

- [104] With that stated, however, the onus on a moving party “is a high one” as per para. 47 of *DNR Restoration Inc. v. Trac Developments Inc.*, 2023 ONSC 1849:

Under old CA section 44(5) the court may reduce the amount posted for a claim for lien. Because such a reduction amounts in effect to a reduction of the lien itself, the onus of proof on the moving party is a high one. The moving party must prove that there is no genuine issue for trial concerning the amount of the claimed reduction; see *Ledcor Construction Limited v. Canalfa Liberty Village Homes Inc.*, 2008 CanLII 87009 (ONSC) at paragraph 35.

- [105] Courts interpreting section 47(1) of the *Construction Act* have applied the jurisprudence developed under Rule 21.01(3)(d) of the *Rules of Civil Procedure* when they consider the terms “frivolous”, “vexatious” and “abuse of process”. Associate Justice Wiebe summarized that law in *1936230 Ontario Inc. v. Hari Kaush Developments Ltd.* 2023 ONSC 4718 at para 33:

What constitutes frivolousness, vexatiousness and an abuse of process? The caselaw provides some guidance in this regard. "Frivolous" is used to describe an action that is so highly unlikely to succeed that it is apparently devoid of practical merit; "vexatious" includes actions that obviously cannot succeed and that are brought for an improper purpose; "abuse of process" is a flexible doctrine that gives the court the inherent power to prevent the misuse of its process; see *XPL Construction Solutions Inc. v. North Bay Capital Investments Ltd.*, 2023 ONSC 238 (CanLII) at paragraphs 34 to 39.

- [106] Ultimately, *GTA Restoration* provides a good example of how a lien is reduced under section 35 of the *Construction Act* without resorting to the discharge provisions found in s. 47 of the Act. In that case, the contractor registered a lien for \$163,400.88. The homeowner contended that the lien had been willfully exaggerated. She asked that it be discharged or, in the alternative, that its value be reduced to \$16,000 or less. Master Robinson found that the contractor had engaged in opportunistic billing when an insurer became involved (paras. 71, 110 to 113) but he declined to discharge the lien entirely. At paras. 117 to 119, Master Robinson held:

In these circumstances, I do not agree with Baillie that a discharge of GTA's lien is warranted or just. In my view, it would be inconsistent with the CA [the *Construction Act*] to deny an entirely unpaid contractor the opportunity to prove entitlement to a lien for amounts regarding which there are triable issues. Baillie's allegations of bad faith and fraud are more fairly adjudicated on a more fulsome record that will be available at trial.

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<sup>3</sup> I need not consider the procedural differences as between a motion brought under s. 47 of the *Construction Act* and a summary judgment motion brought under the *Rules of Civil Procedure* because the distinction was not argued before me and it is not relevant to my decision.

It is, however, fair and just that the value of GTA's lien be reduced pursuant to s. 35(2) by the amounts for which I am satisfied there is no triable issue regarding exaggeration. Baillie has tendered no evidence on the value of many of the exaggerated items, nor has any evidence been tendered from which the court could reasonably estimate the value. My determinations on the reduction of GTA's lien are accordingly based on the evidence filed, and are made without prejudice to Baillie arguing for further reductions in the value of the lien at a later date or at trial.

GTA's lien shall accordingly be reduced by the amount of \$48,041.80, being the amount I have determined to be wilfully exaggerated, calculated as follows:

- (a) \$39,227.54, representing the difference between the amount of the initial service invoice rendered on Baillie and the lien amount; plus
- (b) \$738.68, representing the undisputed amount of charges for baseboard removal that GTA acknowledges was not performed; plus
- (c) \$8,075.58, representing unsubstantiated charges of \$806.37 for plastic containers for "trauma/crime scene cleanup", \$262.08 for plastic bags for "hazardous waste cleanup", and \$7,007.13 for "trauma/crime scene waste hauling and disposal".

### **Can Scott Steel Make a Claim on Scott Concrete's Behalf?**

- [107] Ausenco concedes for the purposes of this motion that Scott Steel placed a valid lien upon the Mangino Project for the SMP Subcontract because that lien was placed within 60 days of the publication of the certificate of substantial completion for the SMP Subcontract. As a result, and as noted earlier, *Prasher* directs that the Building Subcontract lien is also validly registered.
- [108] With regard to the Concrete Subcontract, Ausenco argues that unless Scott Steel is legally entitled to register a lien on Scott Concrete's behalf, the time to register a lien pursuant to the Concrete Subcontract has expired.
- [109] Scott Steel submits that Ausenco's representations about the agreements being "as one", Scott Steel and Scott Concrete's reliance upon those statements, and the doctrine of promissory estoppel mandate that Ausenco has failed to meet its onus on this motion.

### Contractual Interpretation and Promissory Estoppel

- [110] The doctrine of promissory estoppel is outlined in S.M. Waddams' book, *The Law of Contracts*, (7<sup>th</sup> ed) Thomson Reuters, 2017. At page 133, the author described the doctrine as follows:

The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. A definition that has been judicially approved is as follows:

“...where one person (‘the representor’) has made a representation to another person (‘the representee’) in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.”

- [111] The Supreme Court of Canada described the test for promissory estoppel in *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC) at para 13:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

### Application to This Case

#### *Parties to A Contract*

- [112] Prior to engaging in an analysis of the doctrine of promissory estoppel, it must be stated that distinct legal entities are just that – distinct legal entities – unless there is an express contractual provision that blurs the distinction: see *Solomon v. Solomon & Co.* [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). Scott Steel and Scott Concrete were separate entities and, as such, a lien placed by Scott Steel only protects Scott Steel’s interests, absent other considerations. This statement of law is consistent with the fact that Scott Steel and Scott Concrete provided separate invoices for the subcontracts to which each was a party. It is also consistent with the correspondence filed in this motion wherein each of Scott Steel and Scott Concrete referred to themselves as such, and not collectively as the “Scott Group”. The fact that Mr. Hood persistently deposed that the “Scott Group” undertook certain actions is therefore of no moment.

- [113] The Separate Project Agreement provisions of the subcontracts suggest that each individual subcontract stands as its own agreement. I note that, like all contracts, a document that

purports to be a Separate Project Agreement must be interpreted in a manner consistent with its plain wording and without resort to extraneous and superfluous *viva voce* evidence: see *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633. This “separate project” terminology must, therefore, be given its plain interpretation.

- [114] Further, Ausenco submitted that I ought to draw a negative inference from Scott Steel’s unwillingness to produce financial records for the three subcontracts. Ausenco also submitted that I ought to draw a negative inference from Mr. Hood’s lack of specificity regarding the alleged “as one” conversations. I am prepared to draw adverse inferences because it would seem clear that relevant financial documentation might help explain the ostensibly hazy nature of the financial relationship between the parties. Also, specific recollections regarding conversations had by Mr. Hood regarding the “as one” arrangement would also have advanced Scott Steel’s case. Given this lack of evidence, I am willing to draw such inferences and, on the evidence before me, I find that said documents are not helpful to Scott Steel and that the purported conversations are of no moment.
- [115] Thus, and absent other considerations, Ausenco has a solid argument to suggest that Scott Steel has not presented sufficient evidence to depart from the “Separate Project Agreement” clause and the settled rule of law that only parties to a contract may make a contractual claim upon that contract.

#### *Contractual Ambiguity*

- [116] Despite this initial concern, however, a fulsome review of the evidence suggests that the doctrine of promissory estoppel requires a trial of this issue.
- [117] First, the subcontracts themselves contain clauses that appear to be inherently contradictory. For example, while the Concrete Subcontract contained an “entire agreement” clause, the subcontracts all contained the following clause:

**Separate Project Agreement:** means another contract between Ausenco and the Subcontractor, or a party that is in any way directly or indirectly related to Contractor [sic] in relation to the Project.

**Subcontractor:** Means Scott Concrete Services Inc and/or Scott Steel Erectors Inc. For the purposes of the Magino project both businesses will be treated as one.

- [118] Pursuant to this clause, the subcontracts are separate agreements but the same clause also states that Scott Steel and Scott Concrete may be “treated as one”. Even strict contractual interpretation as per *Sattva* leads to an unclear analysis of this provision.
- [119] Second, and despite my concerns regarding Mr. Hood’s evidence regarding the “as one” conversations, Ausenco made written representations to Scott Steel and Scott Concrete that it intended to treat the parties as one entity. On January 17, 2021, Ausenco made reference to the “as one” position when it issued a notice of non-payment. Ausenco’s letter dated January 29, 2023 outlined that position in detail when Mr. Cornwell stated:

We refer to the discussion held between senior representatives of the parties on 20 January 2022.

We write to reiterate that, in our opinion and for the following reasons, the **agreements** between the parties are to be “treated as one” [emphasis added]

- [120] This written representation by Ausenco is neither equivocal nor parsed: although the letter deals with proposed set-offs, the letter clearly states that Ausenco intended to treat *the agreements* as being one contract, not just the set-off provisions. Taken at face value, Ausenco’s letter is a statement that it views the business arrangement between the three parties – Scott Steel, Scott Concrete and Ausenco – as being one broader arrangement. Such a statement would therefore demand that Scott Steel could not only register a lien on Scott Concrete’s behalf, but that the time to register that lien would expire on the last subcontract’s lien expiration date (in this case, the SMP Subcontract).
- [121] While Mr. Grob’s reply affidavit attempted to contain this representation to the set-off provisions, *Sattva* suggests that Ausenco’s intentions may not override the plain meaning of the letter, especially as the letter informed Scott Steel’s actions.

*Detrimental Reliance*

- [122] The doctrine of promissory estoppel requires that, in order to make such a claim, Scott Steel and Scott Concrete must show that they relied upon Ausenco’s representation. Mr. Hood deposed that these companies in fact did so, and that Scott Concrete did not register a lien on the Concrete Subcontract as a result of the “as one” position taken by Ausenco.
- [123] Ausenco submits that Mr. Hood’s affidavit evidence ought to be rejected in this regard given the concerns outlined above.
- [124] In response, Scott Steel’s counsel submitted that I ought to accept Mr. Hood’s evidence that Scott Concrete and Scott Steel failed to undertake protective action as against Ausenco as a result of Ausenco’s size. Ausenco was, in Scott Steel’s words, a “behemoth” and Scott Steel and Scott Concrete were concerned that Ausenco would use its size to engage in business practices that would materially and negatively affect Scott Concrete and/or Scott Steel.
- [125] Scott Steel’s position is belied by the fact that Ausenco paid Scott Concrete’s subcontractors directly when Scott Concrete was unable to make said payments on its own. Such an action would not suggest that Ausenco was engaged in any sort of predatory business practices. Rather, it would appear that Ausenco was concerned with getting the project completed in an effective and timely fashion that would presumably inure to the financial benefit of all parties involved.
- [126] I also note that Scott Steel and Scott Concrete, while potentially not as large and as profitable as Ausenco, do not appear to be unsophisticated entities. Indeed, these two companies bid on multi-million-dollar projects in the Canadian north. Both companies

advertise as having the resources to complete substantial projects and Mr. Hood deposed that Scott Steel previously worked with Ausenco on another large project.

- [127] To suggest that the Scott Steel or Scott Concrete lacked sophistication or were otherwise subject to an improvident imbalance of bargaining power fails to adequately assess the objective facts. Put another way, Scott Steel and Scott Concrete were not unsophisticated “mom and pop” subcontractors being taken advantage of by an unscrupulous contractor. Scott Steel and Scott Concrete were sophisticated companies that made decisions in their best business interests and they cannot therefore claim that a lack of bargaining power overrode that decision-making.
- [128] As a result of these two facts – the direct payment of Scott Concrete’s own subcontractors and the Scott Steel and Scott Concrete’s obvious sophistication – I disagree that Scott Concrete could not reasonably have registered a lien on the Magino Project prior to July 25, 2023 for fear of an overly volatile work relationship.
- [129] Nonetheless and despite that concern, the January 29, 2023 letter is a powerful piece of evidence that Ausenco intended to treat the agreements “as one”. Ausenco did not represent that it only intended to treat certain aspects of the agreements “as one” (namely the set-offs). Rather, the clear implication of the letter is that Ausenco intended to treat the entirety of the subcontracts as one: one set of subcontractors, one subcontract. It is entirely reasonable for sophisticated business interests like Scott Steel and Scott Concrete to rely on a clear representation made by another sophisticated enterprise like Ausenco, especially when Ausenco is trying to use the “as one” representation to enforce the set-off provisions. Mr. Hood’s evidence that Scott Steel and Scott Concrete acted upon that representation therefore has meaningful weight.
- [130] Thus, the unusual circumstances of this case are such that there is an issue that requires a trial, namely whether Scott Steel and Scott Concrete relied to their detriment upon Ausenco’s January 29, 2023 representation as well as any prior representation that the three agreements were to be treated “as one”. The January 17, 2021 notice, the January 29, 2023 letter, and certain clauses within the subcontracts themselves suggest that Ausenco adopted that position. Mr. Hood’s evidence that Scott Steel relied upon these representations is therefore reasonable in the circumstances. The weight to be afforded to the written “as one” representations is sufficient so as to negate any concerns I have regarding Mr. Hood’s evidence at this stage. This issue cannot be resolved without *viva voce* evidence.

### *Conclusion*

- [131] I reject Ausenco’s argument that the lien ought to be vacated because Scott Steel could not validly register a lien for damages flowing from the Concrete Subcontract. This is an issue that requires a trial.

**Should the Lien be Discharged and/or Reduced due to Excessive Amounts Claimed and/or Inappropriate Reliance on Delay Damages?**

[132] Ausenco submits that the lien ought to be discharged, or at the very least reduced, as a result of exaggerated claims. For the purposes of this motion, Ausenco agrees that the amounts ultimately sought for services rendered under each subcontract were justifiable in support of a lien. In other words, Ausenco does not dispute that \$1,219,807.79, \$1,949,835.62 and \$5,948,974.97 are capable of supporting a lien under the Concrete Subcontract, the Building Subcontract and the SMP Subcontract, respectively. Rather, Ausenco submits that Scott Steel's lien has been willfully exaggerated such that the lien cannot be substantiated. Ausenco effectively submits that delay damages have been used to "backfill" the quantum of damages of an exaggerated lien. This fact supports the discharge of the lien or, in the alternative, a reduction thereof.

[133] Ausenco makes five arguments in support of this position:

1. The amount registered on the lien is approximately \$35 million, as opposed to the approximate \$33 million dollars that is accounted for;
2. Fixed price contracts do not generally give rise to claims for delay damages, absent other considerations;
3. The delay notices provided by Scott Steel and Scott Concrete are faulty or non-existent;
4. Scott Steel and Scott Concrete have furnished insufficient documentary support for their calculations; and
5. The delay damages sought in relation to the Concrete Subcontract have fluctuated greatly.

[134] Scott Steel denies Ausenco's allegations and submits that there is a genuine issue for trial because:

1. The difference between a \$33 million lien and a \$35 million lien is not material;
2. Scott Steel is entitled to claim for delay damages; and
3. The documentation filed sufficiently outlines the claim for delay damages. Mr. Hood adequately explained same.

#### The Actual Lien v The Amount Particularized

[135] I agree that \$2 million (the difference between the approximate \$35 million secured by the lien and the approximate \$33 million particularized) is a substantial amount of money for the vast majority of people and entities. However, this number must be taken in context of the total capital cost of the project, that is \$980 million. As such, the \$2 million difference represents 0.2% of the total cost of the project. It represents approximately 0.9% of the value of Ausenco's Head Contract and approximately 4.9% of the total initial value of the fixed price subcontracts combined.

- [136] While I am satisfied that Scott Steel has an obligation to lien for an amount that can reasonably be justified in the circumstances, the \$2 million difference described in these paragraphs is not a sufficiently weighty factor to suggest that the lien amount has been willfully exaggerated or that it is frivolous, vexatious or an abuse of process.

#### Fixed Price Contracts

- [137] The cost methodology described by the Second Ankura Report does not appear to accord with the binding jurisprudence. In *HMI Construction Inc. v. Index Energy Mills Road Corp.*, 2017 ONSC 4075, the Divisional Court held that totalling a subcontractor's costs is not the appropriate approach to quantifying delay damages in a fixed price contract at paras. 17 and 18:

There is a "stipulated price contract" between Index and HMI. The price of contract work is measured by the stipulated price contract, not by HMI's costs. The proper calculation of claims for extras may be made in different ways, depending on the nature of those claims and the terms of the contract. HMI also claims that it is entitled to payment for claims such as delay costs. Entitlement and calculation of claims such as delay costs may also subject to the terms of the written contract, depending on the terms of that contract.

When HMI was asked to account for its lien claim, it did not do so properly. HMI did not provide an itemized claim showing (i) contract accounting plus (ii) extras (with amounts claimed for each extra, including the basis on which those claims were calculated), less (iii) credits for contract work not done, and less (iv) acknowledged deficiencies (if any), plus (v) any other claims (such as delay costs). Instead, HMI provided an accounting of its total costs for the project. In the words of the motions judge, "HMI totally ignored the fact that they were bound by a fixed price contract" (para. 17). The motions judge found, correctly, that this is simply the wrong way to approach the issue where there is a written contract with a stipulated price that governs the lien claimant's claim.

- [138] In *Selectra Inc. v. Penetanguishene (Town)*, 2016 ONSC 2293 (SCJ), the court considered a fixed price contract where the costs of extra labour and materials were the basis of a registered lien. At para 28, the presiding justice stated:

As a lien is limited to the amount a contractor is owed. If there is a fixed price contract, in the absence of approved change orders, the contractor cannot include in its claim for lien extra labour or materials charges for work described in the fixed price contract simply because those costs were more than usual or anticipated when the fixed price contract (or change orders) were agreed to. Some amount of risk of a cost escalation is assumed by the contractor (see *Structform International Ltd. v. Ashcroft Homes Construction Inc.*).

- [139] Thus, Scott Steel's claim appears to run contrary to the jurisprudence holding that delay damages will not generally give rise to an award of damages absent some basis for departing from the risk allocation inherent within such contracts (i.e. the subcontractor

generally bears the risk for its fixed price compensation). I also note that the Concrete Subcontract contained a risk allocation clause.

#### Fluctuation in Value and the Failure to Explain

- [140] The first Ankura report found that the entirety of the damages for unpaid services and delay under the Concrete Subcontract totaled approximately \$25 million. Subsequently, Scott Steel made a lien claim in the amount of \$32 million wherein \$15,771,566.87 was apportioned to the Concrete Subcontract. While Mr. Hood deposed that Ankura based their initial estimate on his personal rough estimate, the suggestion that a sophisticated party simply estimates a \$25 million delay claim so that it may commence negotiation defies common sense. This concern is further exacerbated by the fact that Scott Steel's previous counsel sent Ausenco a spreadsheet that outlined the attribution of the amounts secured. These allocations were meaningfully different from those described by Mr. Hood in his affidavit. This is not a case of an estimate being off by a few thousand dollars. These numbers differed by millions and millions of dollars.
- [141] Mr. Hood failed to explain this disparity on cross-examination. Counsel averred that this refusal came about because Mr. Hood was not a damages expert. While this may well be the case, the failure to provide adequate explanation substantiating Scott Steel's fluid delay claim regarding all three subcontracts causes me considerable concern that the delay claims were willfully exaggerated.

#### Supporting Documentation

- [142] The Second Ankura Report is a detailed document describing the alleged delays and the damages flowing therefrom. However, Scott Steel has a duty to adequately substantiate its lien claim. One can well image that, in the face of large cost overruns, sourcing and producing individual invoices for daily items might be incredibly time-consuming, counter-productive and unnecessary. Nonetheless, and in so far as the delay damages for the three subcontracts have varied greatly over time, Scott Steel's need to substantiate its claim and its failure to produce supporting documentation suggests that it cannot do so.

#### Notices Given and Not Given

- [143] The fact that Scott Steel's delay damages (presumably pertaining to the Building and SMP Subcontracts) were first mentioned in a letter dated May 17, 2023 is also troubling. Irrespective of which notice provisions applied, Scott Steel had the contractual obligation to notify Ausenco of delays in a timely fashion. Scott Steel is a sophisticated party. It could have written to Ausenco in a timely fashion. Instead, it wrote to Ausenco advising of delay damages after the certificate of completion was published for the SMP Subcontract. Scott Steel did not provide timely written notice regarding delay damages which causes me further doubt with respect to the accuracy of the delay claim under these two subcontracts.
- [144] On the other hand, Scott Concrete may have complied with the notice provisions of the putative "as one" contract. As noted earlier in these reasons, the Concrete and SMP

Subcontracts had different notice provisions than did the Building Subcontract. Specifically, the Concrete/SMP Subcontracts mandated that any claims for ongoing delay had to be renewed in writing every twenty days whereas the Building Subcontract only required a single notice.

- [145] This is a key distinction in so far as Scott Concrete first provided written notice to Ausenco about delay on July 9, 2021, and it repeated those concerns in writing on August 16, 2021 and again on August 8, 2022. If the subcontracts are to be treated “as one”, then one question to be resolved involves which delay provisions apply to the “as one” contract. If Scott Concrete had to conform with the notice provisions of the Concrete Subcontract, it certainly appears to be in breach of the notice terms and is presumably not entitled to lien for ongoing delay damages.
- [146] Alternatively, if the doctrine of promissory estoppel applies in the circumstances, it is possible that the July 9, 2021 written notice of delay delivered by Scott Concrete would suffice given the notice provisions contained within the Building Subcontract (the single notice provision). Since the applicability of the doctrine of promissory estoppel is a triable issue, Scott Concrete’s notices also meet the test for being a triable issue. Indeed, one wonders why Ausenco, if it wished to rely upon the strict interpretation of the Concrete Subcontract’s notice provisions, would pay any subsequent claims as it did on October 21, 2021.

#### Willful Exaggeration

- [147] Therefore, I note the following regarding delay damages claimed pursuant to the SMP and Building Subcontracts:
1. The Subcontracts are fixed price contracts which may not be eligible for delay damages in any event;
  2. The delay damage estimates have varied greatly over time;
  3. Supporting documentation for the delay damages has not been produced;
  4. Scott Steel did not provide reasonable written notice for the delay as was contemplated by all subcontracts; and
  5. Mr. Hood failed to adequately explain the above points in cross-examination.
- [148] Given the foregoing, there is no triable issue as to whether Scott Steel has wilfully exaggerated its claim for delay damages. The record before me does not provide any meaningful substantiation for this claim and Scott Steel did not give any meaningful notice thereof. As a result, Scott Steel has not met its evidentiary burden as described in the jurisprudence. Scott Steel cannot register a lien for delay damages under the SMP or Building Subcontracts. There is no triable issue.

[149] With regard to the delay damages claimed under the Concrete Subcontract, I have the following concerns:

1. The Subcontracts are fixed price contracts which may not be eligible for delay damages in any event;
2. The delay damage estimates have varied greatly over time;
3. Supporting documentation for the delay damages has not been produced; and
4. Mr. Hood failed to adequately explain the above points in cross-examination.

[150] The doctrine of promissory estoppel is such that I am satisfied that an issue for trial exists with respect to delay damages under the Concrete Subcontract. Adequate notice may have been given which, on the evidence before me, appears consistent with general delays and cost overruns that apparently plagued the Magino Project. Scott Concrete raised the issue of delay with Ausenco in writing at the beginning of the Magino Project and towards the end thereof. Ausenco paid some claims after a meeting to discuss same. The validity of such damages is therefore in question despite my concerns outlined in these reasons. It is possible that Scott Steel may be capable of registering a lien for delay damages under the Concrete Subcontract such that there is a triable issue in that regard.

#### Frivolous, Vexatious, and Abuse of Process

[151] My findings in the preceding paragraphs do not take me to the point where I find that Scott Steel's liens are frivolous, vexatious or an abuse of process.

[152] Given the quantum of work being performed on the Magino Project, the pressing timelines and the large sums of money involved, a lien was placed on the project based upon estimates that were inaccurate. Indeed, the total cost of the Magino Project expanded greatly over time and when they placed the lien, Scott Steel acted in the face of the need to place a large and timely lien. Mr. Hood stated that Scott Steel estimated their damages differently at different times "based on the information we had at the time". Although I have some misgivings about some parts of Mr. Hood's evidence, given the realities of the situation, I have insufficient grounds to reject that statement.

[153] Thus, it cannot be said that Scott Steel is "highly unlikely to succeed" in a claim for delay damages as they relate to the Concrete Subcontract (or possibly the other Subcontracts, despite the lack of timely notice) or that the action "obviously cannot succeed" and/or that it was "brought for an improper purpose". The lien claim is therefore neither frivolous nor vexatious. Equally, I do not believe that Scott Steel "misused" the court process such that this lien constitutes an abuse of process even though I am satisfied that it is exaggerated.

[154] Accordingly, I do not find that this motion falls within the purview of s. 47 of the *Construction Act*.

#### **CONCLUSION**

[155] I am satisfied that the lien ought to be reduced to reflect the following amounts:

1. Concrete Subcontract: \$1,219,807.79 plus HST;
2. Building Subcontract: \$16,501,594.70 (which represents a balance due of \$1,949,835.62 plus alleged delay damages of \$14,551,959.08) plus HST; and
3. SMP Subcontract: \$5,948,974.97 plus HST.

[156] The lien is therefore reduced to an amount of \$23,670,377.46 plus HST, or \$26,747,526.53. Ausenco must therefore only post security in that amount as per s. 44(5) of the *Construction Act*.

### **COSTS**

[157] In light of the divided results, costs of this motion will be assessed by the trial judge.

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Varpio J.

**Released:** February 6, 2025

**CITATION:** Scott Steel v. Ausenco, 2025 ONSC 473  
**COURT FILE NO.:** 29342/23  
**DATE:** 2025-02-06

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SCOTT STEEL ERECTORS INC.

- and -

AUSENCO ENGINEERING CANADA INC.

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**REASONS FOR JUDGMENT**

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Varpio J.

**Released:** February 6, 2025