

**“THE LIEN IS DEAD, LONG LIVE THE LIEN”:
CAN THE EQUITABLE DOCTRINE OF ESTOPPEL
RESURRECT EXPIRED LIEN RIGHTS ?**

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Recently, on January 19, 2005, Mr. Justice Orsborn of the Supreme Court of Newfoundland and Labrador was called upon to deal with the issue of whether the equitable doctrine of estoppel is available to validate an expired mechanics' lien claim. The facts of the case before him (*Weir's Construction Limited v. D.A.R. Enterprises et al*, (2005) NLTD 16) were as follows:

Weir's Construction was retained to undertake the site preparation and related sidewalk and paving work for a development in St. John's, Nfld. known as Glenhill Plaza. The bulk of Weir's work was performed in 1998; and, although some additional work was performed in 1999, Weir's never received any payment, and the contract was never completed.

On several occasions, when Weir's was poised to file its mechanics' lien claim, the Defendants talked Weir's out of pursuing its claim. Weir's was told that the Defendants were in the process of obtaining mortgage financing, that the filing of the lien would prejudice the Defendants in this regard, and that Weir's would be paid from the proceeds of the financing. Weir's therefore agreed not to proceed with its lien.

Although other creditors were subsequently paid from the proceeds of the financing, Weir's never received payment, and proceeded to file its lien. The fact that its lien was clearly out of time was conceded by Weir's counsel. However, he argued that the circumstances were sufficient to raise an estoppel against the Defendants, which should preclude them from contesting the validity of Weir's lien. As the judge commented, "*Weir's relied on the promise, which was not kept*".

However, the lender who financed construction, Premier Investment, argued that the equitable doctrine of estoppel has no place in determining whether or not a claimant has proven the validity of a mechanics' lien.

Mr. Justice Orsborn reviewed the case authorities in Ontario, Newfoundland and British Columbia. In *Valo v. 430327 Ontario Inc.*, (1982), 36 O.R. (2d) 439, the owner's husband, a lawyer, paid the contractor a portion of the money which was owing, and asked him to wait a week for payment of the balance. When the contractor subsequently expressed concern that his lien rights might expire if he had to wait any longer, the owner's husband advised the contractor that his lien rights "*were not a problem because we were mutually extending time for payment*". The contractor relied upon this, and eventually preserved his lien after the lien period had expired. Master Peppiatt, in dealing with an application by the owner for an order vacating the registration of the contractor's claim for lien, commented that the time for preserving a lien can not be extended by agreement, and that the owner's husband was wrong in law in giving that assurance. In reviewing the doctrine of estoppel, the Master held that,

“in circumstances such as these, a defendant's conduct may be such as to estop him from raising the defence that the claim for lien was registered out of time”.

The *Valo* decision was followed three years later in Ontario in *Soo Mill Lumber Co. v. 499812 Ontario Limited*, (1985), 17 C.L.R. 306. There, the Defendants asked the contractor not to register a lien, and provided him with post-dated cheques. When one of the cheques was dishonoured, the contractor registered a lien beyond the statutory deadline. The judge held that, in the circumstances, the Defendants were estopped from arguing that the lien was out of time.

Mr. Justice Orsborn observed, though, that the application of principles of equity to remedies under lien legislation appears to have been rejected in Nova Scotia (see *Gateway Materials v. B. H. Fancy Construction*, [1994] N.S.J. No. 241), in British Columbia (see *Catt Steel Services v. Delta*, [1995] B.C.J. No.2523), and in Newfoundland (see *Barlow v. Tourism and Recreational Enterprises*, (1988), 49 D.L.R. (4th) 305).

In refusing to follow the Ontario authorities, Mr. Justice Orsborn stated that, *“(w)ith respect, I do not consider these decisions to represent sound law”*. Rather, he held, rather categorically, that,

“ . . . regardless of the facts, the equitable doctrine of estoppel is not available to assist in the validation of an expired mechanics’ lien”.

He also stated:

“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.

. . .

“The lien ‘stops existing’ if not registered in time. Once it has stopped existing, there is no room for judicial indulgence to say otherwise. The lien is dead.”

Epilogue

As happens all too often, we are left with unpredictable results where the application of the law from one province to another is unclear due to differing approaches and perspectives.

What can we tell contractors in Ontario ? As of today, so long as the law of Nova Scotia, British Columbia, and Newfoundland and Labrador is not followed, there is authority that, in some limited circumstances, equity may step in to validate a lien that was preserved out of time.

But contractors in Glace Bay, Grand Forks, Gander and Goose Bay better have their ducks in a row.