

A Subcontractor's Right to Access Money Paid into Court

A recent case from the Superior Court of Justice clarified the extent of a subcontractor's access to funds paid into court by a bank under letters of credit as security for the subcontractors' claims. This is not a unique decision but one that reaffirms the current state of the law.

The facts in the case of *Basic Drywall Inc. v. 1539304 Ontario Inc.*, 2012 ONSC 1155, were as follows: The bank financed the project under a building mortgage. The total amount the owner owed to the general contractor under the building contract far exceeded the amount the owner was required to withhold for the benefit of the subcontractors. The owner was placed in receivership and the property was sold. The proceeds were not sufficient to satisfy the full amount due the bank under the building mortgage. Liens were registered against the property and the holdback.

The subcontractor lien claimant argued that the amount due for distribution to the subcontractors who registered constructions liens was \$276,072.42, the minimum amount the property owner owed to the general contractor for unpaid work certified as complete. The amount paid into court was in excess of that amount. The bank argued that the amount due for distribution to the lien claimants was limited to \$50,696.98, the amount of the statutory holdback required under section 22 of the *Construction Lien Act*.

The subcontractor further argued that by paying money into court and vacating the lien, the bank lost the priority it would otherwise have had as mortgagee under subsection 78(2) of the *Construction Lien Act*, since under subsection 44(6), the amount paid into court took the place of the property, and the lien claimants' rights went beyond a charge against the holdback deficiency. The argument was based on section 21 of the *Construction Lien Act*, which provides that a construction lien is a charge upon the holdback required under Part IV of that statute and "any additional 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 material giving rise to the lien". According to the subcontractor, the "additional amount" referred to in section 21 was the amount due by the property owner to the general contractor at the relevant time, that is, \$276,072.42.



The Court disagreed with the sub-contractor's position and held that under s. 78(2) of the *Construction Lien Act*, it was clear that the priority of the lien claimants over the lender under the building mortgage did not extend beyond the deficiency in the amounts required to be withheld by the owner under Part IV. In this regard, the lien claimants' priority did not extend to any "additional amount" referred to in section 21, that section being included in Part III of the statute and not Part IV. Therefore only \$50,696.98 were available for distribution to the lien claimants.

This case accords with the intent of the *Construction Lien Act* and case law interpreting the relevant provisions of the *Construction Lien Act*. It is not the decision most sub-contractors would prefer but one that stresses the importance of demanding payment when due.