

## Case Comment:

### 9585800 Canada Inc. v. JP Gravel Construction

**Case Comment:**  
9585800 Canada Inc. v.  
JP Gravel Construction

LUC #153 [2019]

**Primary Topic:**  
IX Construction and  
Builders' Liens

**Jurisdiction:**

Ontario

**Author:**

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CanLII Reference:

[2019 ONSC 3396](#)

## ONTARIO

In 1877, an article on the new Ontario *Mechanics' Lien Act* appeared in the *Canada Law Journal*, commenting that “the enactment is in itself unnecessary and illogical, the wording is obscure and its provisions unintelligible and contradictory”.

While the wording has become clearer since then, at least to those who practice construction law on a regular basis, even today not too many things in the world of construction liens are crystal clear. One thing that *had* been crystal clear for the last quarter of a century was that the discharge of a lien is irrevocable. Ever since Master Sandler’s decision in *Southridge Construction Group Inc. v. 667293 Ontario* (1992), 2 C.L.R. (2d) 177, aff’d (1993), 2 C.L.R. (2d) 184 (Div. Ct.), section 48 of the *Construction Act* has been interpreted to the effect that once a lien is discharged, a claimant cannot lien again for services performed prior to the date of the perfection of the first, discharged lien.

Section 48 of the *Construction Act* (unchanged from the *Construction Lien Act*) provides as follows:

A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by the person subsequent to the preservation of the discharged lien.

In *Southridge*, a lien claimant liened for certain work done over a period of time, then realized that it had under-liened, discharged the first lien and registered a second lien for the same work. In discharging the second lien, Master Sandler pointed to two aspects of s. 48. First, the section clearly makes the discharge “irrevocable”. Second, the section provides that the discharge does not affect the claimant’s rights to lien for services supplied *after* the preservation of the discharged lien, which must mean, conversely, that the discharge does affect the right to claim for work done *before* the preservation.

The Divisional Court upheld the master’s decision, holding that “although in equity the result appears harsh I agree with the decision of the master”.

That decision has since been uniformly applied,<sup>1</sup> until the recent decision in *9585800 Canada Inc. v. JP Gravel Construction*, 2019 ONSC 3396 (S.C.J.). In that case, a lien claimant registered a lien in the amount of \$662,100.48 on May 15, 2018, then proceeded to discharge that lien and registered a

<sup>1</sup> See, for example, *Ben Air Systems Inc. v. Toronto Transit Commission*, 2018 ONSC 2375 (S.C.J.); *Khalimov v. Hogarth*, 2015 ONSC 6244 (Master); *Carpenters' Local 27 Benefit Trust Funds (Trustee of) v. Embee Properties Ltd.*, 2003 CarswellOnt 5535 (Master); *N.K.P. Painting v. Polygrand Developments Inc.*, 1995 CarswellOnt 417 (Master).

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second lien for the same amount and using substantially the same information as contained in the May 15, 2018, lien. That should have brought the case squarely within *Southridge*. However, the court distinguished *Southridge* on the following basis:

I find that this matter is distinguishable from *Southridge* in which the error related to the amount listed in the lien. The second registered lien encompassed the work completed in the first lien. Consequently, s. 48 of the *CLA* applied. In this matter, the error related to the year in which the work was performed. As per article 4.1 of the Subcontract, the "*Subcontractor shall perform the Subcontract Work: . . . 3 starting on or about 30/10/2017 and substantially perform the Subcontract Work by, on or about 31/01/18.*" In the First Lien that was registered, the document noted under the heading "Statements": "Time within which services or materials were supplied from 2017/10/30 to 2017/05/09." This timeframe is clearly incorrect since the work was not performed during this period. I find the First Lien to be a nullity since it was a lien for non-existent work. Consequently, I find that the Second Lien is an appropriate lien. Since the Second Lien is valid, s. 48 of the *CLA* does not apply in this matter.

The main distinction therefore seems to be that the error in *Southridge* concerned the amount of the lien, while the error in *JP Gravel* concerned the date for the supply. The fact that the claimant in *JP Gravel* had used the wrong timeframe was held to have turned the lien into a "nullity".

With respect, there are at least two issues with that conclusion. To begin with, nothing in section 48 would seem to indicate that the basis on which a lien is discharged matters. If a lien is discharged, it is discharged and precludes liening again for work done before the preservation. Why it was discharged should not matter. A third party reviewing title should not have to guess at motives or speculate as to whether the lien may re-appear. A discharge is irrevocable.

Secondly, in *David J. Cupido Construction Ltd. v. Humphrey Funeral Home & Chapel Ltd.*, 2008 CarswellOnt 4382, Master Albert held that where a claim for lien contains erroneous dates, the claim can be amended at trial if the court is satisfied that evidence proved that materials or services were supplied on different dates. Both the Nova Scotia and Saskatchewan Courts of Appeal have similarly held that wrong dates in a claim for lien are curable under the lien legislation in those provinces: *Garden Crest Developments Ltd. v. W. Eric Whebby Ltd.*, 2003 NSCA 59; *Imperial Lumber Yards Ltd. v. Saxton*, 1921 CarswellSask 163 (C.A.).

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Bristow, Glaholt, Reynolds & Wise, *Construction Builders' and Mechanics' Liens in Canada*, 7<sup>th</sup> ed. (Toronto: Carswell, 2005) at 6.3.5 state that "if the wrong date is stated in the claim for lien, the lien should not be invalidated where no person has been prejudiced", and that "if some prejudice can be shown, the lien will be invalidated only to the extent of the prejudice".

In other words, a lien containing wrong dates is not a "nullity".

If the first lien registered in *JP Gravel* was not, in fact, a nullity, then the discharge of that lien triggered section 48. Following the long line of cases that have applied *Southridge*, it is respectfully submitted that the second lien in *JP Gravel*, being for the very same work and the very same amount as the first lien, ought to have been discharged as well.

It is well-settled law that an unsuccessful motion to discharge a lien is interlocutory in nature, so it is likely that the motion judge's decision in *JP Gravel* will be the final word as between the parties. It will be for future cases to determine whether the court's distinguishing of *Southridge* was valid. In the meantime, the court's finding in *JP Gravel* that the first lien was a nullity could in fact have unintended consequences which on the whole could harm, not assist, future lien claimants where an error is made in the description of the timeframe in which services were provided.

