George Brown College
School of Construction Management and Trades
School of Architectural Studies programs

Construction Liens

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Outline

LIENS

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TRUST CLAIMS

- Who Has a Trust Claim
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Introduction

- Construction liens are strictly a statutory remedy under the Ontario *Construction Lien Act* ("CLA").

- Liens create a charge on lands that would not otherwise exist, granting a security preference to one class of creditors not enjoyed by all.

- The CLA is to be strictly interpreted in determining who is entitled to a lien:

Introduction

● The Purpose of the CLA as enunciated in the 1982 Report of the Attorney General’s Advisory Committee is:

  ● “To protect those who contribute their services or materials towards the making of an improvement to a premises. ... While the definition of “improvement” is broad, the Committee has attempted to draft it in such a way that it will be clear that the lien created by the Act applies only in the case of the construction and building repair industries.”

(i) Entitlement to Lien

- When a person has supplied services or materials to a construction improvement.
- “Improvement” is defined as any alteration, addition, or repair to, any construction, erection, or installation on any land, and includes the demolition or removal of any building, structure, or works, or part thereof.
- Can’t contract out of lien rights (s. 4)
(i) Entitlement to Lien

“Materials” are “Supplied to an Improvement” when at least 1 of following conditions met:

a. Placed on the land on which improvement being made,

b. Placed on land designated by owner or agent, in immediate vicinity of Premises,

c. Incorporated into, or used in making, or facilitating, making of improvement
(ii) Time to Lien

- Lien by Prime Contractor ("person contracting directly with owner")
  - Supply of materials or services on or before substantial performance.
  - Lien expires, if not preserved, within 45 days from the earlier of:
    - Publication of substantial performance of Prime Contract (e.g. in the *Daily Commercial News*)
    - Date contract is completed or abandoned
    - Complete means lesser of $1000 or 1% of the contract price of remaining work (including deficiencies)
(ii) Time to Lien

- Subcontractor Lien ("person not contracting directly with owner")
  - Supply of material or services on or before substantial performance.
  - Lien expires if not preserved within 45 days from the earlier of:
    - Publication of substantial performance of Prime Contract
    - Last supply of material or services
    - Date Subcontract certified complete
(iii) Content of Lien

i. Name and address for service of:
   - person claiming lien,
   - owner of premises,
   - person for whom services or materials were supplied

ii. Time within which services or materials supplied;

iii. Short description of services or materials supplied;

iv. Contract price or subcontract price;

v. Amount claimed; and

vi. Description of the premises.
(iv) Perfecting Liens

- Preserved lien expires unless perfected before 45 days from last day on which lien could have been preserved.
(iv) Perfecting Liens

- Commencement of Action
- Statement of Claim
  - Parties to action
  - Relief claimed
  - Priority over mortgages
- Certificate of Action
- Perfecting a Lien by Sheltering
(v) Loss of Lien

- Not preserved in time
- Not perfected in time
- Lien against wrong lands
- Failure to name owner
(vi) Electronic Registration of Liens

- Now compulsory in most of Ontario.
(vii) Liens That Do Not Attach to Premises

- Act binds provincial Crown, not federal Government
- Liens on certain projects (municipal and provincial government) do not attach to the land; but are a charge against holdback. (ss. 16(3), 21)
- These liens are not registered. Rather, a copy of lien must be given to the clerk of the municipality, or for Ontario Crown to the office prescribed by regulation, or where no office has been prescribed, to the ministry or Crown agency for whom the improvement is made. (ss. 34(2), 34(3))
- Where Contract is with a college of applied arts and technology, the office of the president of the college
(viii) Written Notice of Lien

- Mechanism by which lien claimants can increase owner’s holdback.
- When s. 24(2) notice is delivered, payor must retain the amount claimed by lien over and above the basic holdback, if holding sufficient funds.
- Constructive notice no good.
- Notice Requirements (s. 24)
  - In writing and received
  - Must identify payer and premises
  - Amount owed
- Still requires formal preservation of lien.
(ix) Liencing Leaseholds

- Tenant can be an “owner” under the Act.
- Landlord’s freehold interest is not lienable unless a s. 19 notice given in advance of the supply of materials and/or services.
- Landlord can disclaim responsibility for the improvements.
- Only if no disclaimer can freehold be liened.
There are 2 situations where a landlord’s interest in a premises may be subject to liens for the supply of services or materials to tenant improvements:

i. Where the landlord retains a contractor to carry out improvements on the leased premises; and

ii. Section 19 of the *Construction Lien Act*. 
(ix) Liencing Leaseholds

Where owner’s interest leasehold

19.(1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.
(x) Holdbacks

- Basic holdback
  - Each class of lien claimant has the notional profit of its contract held back by person immediately above in contractual “chain” = 10%
  - Holdback applies to all “improvements”, whether home renovations or mega-projects.
(x) Holdbacks

- Finishing Holdback
  - Separate fund equal to 10% of the price of the remaining services or materials actually supplied after substantial performance has been achieved.
(x) Holdbacks

Holdback paid when all lien rights that could arise have expired or have otherwise been dealt with, such as through vacating.
(x) Holdbacks

- Lien claimants entitled to:
  - Share of holdback to satisfy properly preserved and perfected liens.
  - Distribution is ratable within a class of lien claimants and paid from “bottom up”.
  - Liens of workers have priority to extent of 40 regular-time working days’ wages.
(xi) Priorities

- Section 78 of the *Construction Lien Act* contains a comprehensive code for determining priorities between liens and mortgages registered against property.
(xi) Priorities

- Lien claimants have priority to holdback fund over
  a. any “building mortgage”,
  b. subsequently registered non-building mortgage, and,
  c. subsequent advances on prior registered non-building mortgages.

- Priority only translates into cash when land is sold.
(xi) Priorities

- **Section 78(1)**
  - “Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owners interest in the premises.”
(xii) Lien Claimant’s Entitlement to Information

- **Section 39(1)**

  "Any person having a lien ... may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, as follows:

  1. By the owner or contractor, with,
     
     i. the names of the parties to the contract,
     
     ii. the contract price,
     
     iii. the state of accounts between the owner and the contractor,
(xii) Lien Claimant’s Entitlement to Information

- **Section 39(1) (Cont’d)**
  
  iv. A copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner, and
  
  v. a statement of whether the contract provides in writing that liens shall arise and expire on a lot-by-lot basis.
(xiii) Case Study: *Kennedy Electric*

- Cases are fact driven, but according to the Ontario Court of Appeal in *Kennedy Electric*:
  - In most cases, the installation of machinery used in a business operated in a building will not give rise to lien rights, particularly where the machinery is portable, since movable machinery does not improve the building in which it is located — does not become a part of the building.
  - Where the machinery installed in a building is completely and permanently integrated into the building, there may be lien rights.
  - Act has since been amended to expand definition of improvement.
(xiii) Case Study: Kennedy Electric

- Dana Canada Corp. contracted with Ford to build truck frames for the F150 pickup truck.
- Dana decided to split production work between 2 plants: one in St. Mary’s, Ontario, and the other in Kentucky.
- Dana had a history of decommissioning and moving lines.
- The assumed program life for the line was 8 years.
- Dana contracted separately with Newman Bros. to construct a new Building Addition to its existing plant in St. Mary’s.
- Dana contracted with Rumble Automation to design, build and install the line at St. Mary’s.
- Rumble subcontracted with Kennedy Electric.
Case Study: Kennedy Electric

- **Ford Motor Company**
  - **Dana Canada Corporation**
    - **Rumble Automation Inc.**
    - **Newman Bros.**
      - **Kennedy Electric Limited**
      - **Subcontractors**
      - **Cassidy Industrial et al.**
(xiii) Case Study: *Kennedy Electric*

- The Assembly Line was found not to be part of one integrated construction “improvement” within the Building Addition.

- Nor could the Assembly Line be considered a “free-standing improvement” on its own within the CLA.

- The Assembly Line installation remained manufacturing equipment within the Building Addition and did not constitute an “improvement” or part of an “improvement” within the CLA.
The Building Addition was a flexible and “generic” industrial building: Engineer who designed it testified he didn't know exact nature of the machinery that would ultimately be installed in the addition, other than it would be “some kind of assembly line”.

Building Addition housed 2 other lines installed by third parties, which were not part of the Rumble Assembly Line.

No question that Building Addition was an “improvement” within the meaning of the CLA:

- Holdbacks maintained under CLA down the contract chain.
- Certificate of Substantial Performance under the CLA.
(xiii) Case Study: Kennedy Electric

- Building Addition attained substantial performance before Assembly Line installation commenced.

- Building Addition contractor was responsible for all services to the building, such as: electrical, mechanical, ventilation and argon gas.

- Dana’s original building and earlier addition housed other manufacturing lines which had, over time, been decommissioned, added to or substituted.
(xiii) Case Study: Kennedy Electric

- Line was assembled, installed and tested at other “build sites” in Mississauga and Oakville.

- Following tests, line was disassembled, packed and transported by truck from build sites to new Building Addition, where it was unpacked, reassembled and installed.

- Despite its size, it could be “readily disconnected from the Building Addition with virtually nominal damage to the addition or its services”.

(xiii) Case Study: Kennedy Electric

- Unlike Building Addition Contract, there was no statutory holdback retained pursuant to the CLA and no Substantial Performance of the Assembly Line Contract.

- Inescapable fact that assembly line was designed as a portable line, fully capable of being assembled, disassembled and removed to another site for reactivation.

- Despite its significant size and weight, assembly line remained machinery and did not become a part of the Building Addition.
(xiii) Case Study: Kennedy Electric

- Decision was fact driven. C of A does not lay down bright-line test.
- C of A does signal a distinction between manufacturing equipment for business operations within a building and equipment installed for operation of building itself.
- Ultimately, trial judge found, on facts, that Assembly Line remained machinery which did not, and was never intended to, form part of the Building Addition it occupied.
- Importantly, if Assembly Line was to be disassembled and removed, there would be no “improvement” to the St. Mary’s plant.
(xiv) Recent Amendments to the Ontario Construction Lien Act

- Ontario’s *Open for Business Act, 2010* (OFBA) amended numerous statutes, including the *Construction Lien Act* (CLA).

- The OFBA amendments to the CLA are the most significant changes to the Province’s lien legislation in several years.
Recent Amendments to the Ontario Construction Lien Act

Amendments to the CLA consist of the following:

- An expanded definition of “improvement” (Section 1(1))
- The requirement for condominium developers to publish notice prior to registration (Section 33.1)
- The elimination of the Affidavit of Verification from Claims for Lien (Section 34(6) repealed)
- The elimination of the requirement for a “sheltering statement” when vacating the registration of Certificates of Action (Section 44(9))
The New Definition of Improvement

- S.1(1) - Definition expanded to include:

  “the installation of industrial, mechanical, electrical or other equipment on land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works.”
(xiv) Recent Amendments to the Ontario Construction Lien Act

- New s. 33.1 of the CLA requires owners of land intended to be registered under the *Condominium Act, 1998* to publish a notice of intended registration at least 5 days, and not more than 15 days, before submitting the condominium description for approval.

- Addresses lien registration issues created by “home buyer” exception.
(xiv) Recent Amendments to the Ontario Construction Lien Act

33.1(2) Notice required

An owner of land described in a description that is intended to be registered together with a declaration in accordance with the Condominium Act, 1998 shall publish notice of the intended registration in a construction trade newspaper at least five and not more than 15 days, excluding Saturdays and holidays, before the description is submitted for approval under subsection 9 (3) of the Condominium Act, 1998.
(xiv) Recent Amendments to the Ontario Construction Lien Act

### 33.1(3) Contents

The notice shall be in the prescribed form [Form 24] and shall include,

a. the owner’s name and address for service;

b. a concise overview of the land described in the description, including reference to the lot and plan number and the parcel number or numbers of the land; and

c. if, to the best of the owner's knowledge, information and belief, a contractor supplied services or materials to an improvement in respect of the land during the 90-day period preceding the day on which the description is to be submitted for approval under subsection 9 (3) of the *Condominium Act, 1998*, the contractor’s name, address and, if known, address for service.
(xiv) Recent Amendments to the Ontario Construction Lien Act

33.1(4) Liability for failure to comply

An owner who fails to comply with this section is liable to any person entitled to a lien who suffers damages as result.

Stay tuned.....
Trust Claims

- One must have/had lien rights in order to pursue trust remedy.
- Part II of Act has same requirement as Part III (the Lien).
- Claims against trust funds restricted to privity of contract.
Trust Claims

- **Section 7 – Owner’s Trust**
  - Amounts received by owner used in financing of improvement are trust funds for benefit of contractor.

- **Section 8 – Contractors and Subcontractors Trust**
  - Amounts owing to contractor or subcontractor whether or not due or payable or received on account of the contractor or subcontract constitute a trust fund for benefit of subcontractors and suppliers.
  - Contractor or Subcontractor is trustee of the trust fund and contractor or subcontractor shall not appropriate or convert any part of the fund to own use or to any use inconsistent with the trust.
Trust Claims

● General obligations

  ● Contractors, subcontractors and other persons should not appropriate or convert trust property to trustee's own use or to any use inconsistent with the trust until beneficiaries of the trust are paid

  ● Use of trust funds by contractor/subcontractor to pay overhead costs is payment inconsistent with the trust
Trust Claims

- **Separate “Trust” accounts**
  - No specific requirement in the Act
  - Preferred practice
  - Commingling funds places trustee and lender at risk
Trust Claims

“Robbing Peter to pay Paul”

- Cannot pay trust beneficiaries of Project A with funds from Project B and C
- Not a mere “technical problem”
- No defence that “everybody” in the construction industry does it
Trust Claims

PERSONAL LIABILITY of Officers/Directors/Employees under s.13

13(1) In addition to the persons who are otherwise liable for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities

Who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for breach of trust
Trust Claims

13(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.
Trust Claims

- Section 13 of the Act was included to prevent the use of a shell corporation as a device of defrauding creditors.
- Section 13 allows the courts to disregard the limited liability of a corporation and to impose liability upon those who are actually responsible for a breach of trust.
- "assents to or acquiesces in" is to convey that those who had the power to prevent the breach of trust are to be found liable under section 13 of the Act.
Trust Claims

- Not strict liability but direct dealings by officers and directors need not be proven to establish personal liability under section 13 of the Act.
- The relative sophistication of the officers and directors is relevant.
- An element of personal benefit will attract personal liability in a breach of trust case.
Trust Claims

- Trust provisions are especially important in bankruptcy.
- Trust funds are not available for normal distribution among bankrupt's creditors.
- Payments from the trust go first to parties with registered claims for lien as of the date of bankruptcy and then to those who did not register liens, and as per the priorities set out in the Act.
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