

The Construction Lien, a Tool to Help You Get Paid and a Tool to Protect Owners

June, 2014 | David J. Wilson

The construction process in Ontario can be complex and usually involves many different players, including owners, lenders, architects, designers, engineers, surveyors, contractors, subcontractors, suppliers and workers. Unfortunately, the complexity of the process creates an environment where disputes easily arise.

While getting the contract, the work and the opportunity to supply material and services is important, making sure you get paid for the work and materials supplied is paramount. Many contractors have performed services and supplied materials at projects only to not get paid. Unforeseen problems such as financing, insolvency, site conditions and design issues in a construction project can often interrupt or cut off the flow of money down the construction pyramid. One needs to be prepared to deal with these types of problems and being able to react quickly and knowledgeably can often mean the difference between obtaining payment and incurring a substantial loss.

Those involved in the construction industry are continually faced with financial risks not encountered in other commercial contexts. These financial risks stem from the fact that most construction work is carried out by different construction trades people who have no direct contract with the owner of the project and who work without any form of security.

As a result of these risks, contractors and suppliers of work, services and supplies to real property in Ontario have been granted special protections by the **Construction Lien Act** (the "CLA"). The CLA sets out the rules as to who has a lien (security against the property) and the process by which lien claimants can enforce their various rights.

Section 14(1) of the CLA provides that, "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."

The lien creates an interest in the land in favour of those who supply materials or services, thereby creating security. This operates to prevent the owner from receiving improved land without making payment for the improvement. This is especially important to subcontractors who have no direct contract with the owner (and therefore no right to bring an action for payment under a contract).

Knowing what was supplied, and to whom, is crucial, because there can be many roles being played, all of which fall into different categories under the CLA. This will affect the timing of when a claim for lien must be registered and the holdback obligations of those who are obliged to make payment.

If one is an owner, the owner is obligated to withhold ten percent from all amounts paid and to stop payments if given a notice of lien. Generally speaking, this will protect the owner from subcontractor claims. However, claims from a general contractor are a different matter and are rooted in contract and the facts of each specific situation.

The Holdback Requirements

In most cases, the flow of funds under a construction project contemplates payments being made as the work progresses from the owner down to the contractors, subcontractors, and those claiming under them. This is the "construction pyramid".

The CLA provides that each payer on a contract or subcontract is required to retain a holdback of 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or have otherwise been satisfied or discharged. The term "payer" is defined in section 1(1) of the CLA as meaning the owner, contractor, or subcontractor who is liable to pay for the materials or services supplied to an improvement under a contract or subcontract. The purpose of this holdback is to create a fund to which lien claimants may look if they are unable to recover from the person with whom they have a direct contract.

In addition to the basic holdback, there is a separate holdback for finishing work completed after the date of substantial performance of the contract. There is also a "notice holdback" that may be applicable to increase the amount of funds available.

Provided that the owner retains the proper holdback over the course of the construction and otherwise complies with its statutory obligations, the owner's exposure to a subcontractor or supplier lien claimant, with whom the owner has no direct contract, will be limited to the amount of the holdback. There have been many disputes in regards to holdbacks and owner liability and priorities of lien claimants. As a payer in the scheme, it is important



that once a claim for lien has been registered and the payer is informed of the registered claim for lien, the payment stream must stop. Potentially severe consequences await the payer who ignores a notice of claim for lien.

Time Limits for Enforcing a Claim for Lien

Once it is established that one has a claim for lien, it is important to maintain those lien rights and enforce them. If certain steps or dates are missed, it could be costly to the lien claimant who is trying to enforce its lien rights. The CLA sets forth specific time limits for a claim for lien, first, to be preserved by registration against the title to the property, and second, to be perfected by the commencement of a court action.

The lien must be preserved by the claimant's registration of a claim for lien within 45 days after the earliest of publication of a certificate of substantial performance of the contract or the date the contract is completed or abandoned in the case of a contractor, or the last supply or certification of completion in the case of a subcontractor.

Next, following preservation of the lien, to maintain and enforce the lien right, the claimant must commence an action (a Court matter) to enforce the lien prior to the end of the 45-day period next following the last day on which the lien could have been registered. If this step is not taken within that time period, the lien will expire and the lien right will be lost.

There are also circumstances by which a preserved lien of a lien claimant may be perfected by "sheltering" under the perfected lien of another lien claimant in respect of the same improvement. However, in order to ensure one is protected, we always recommend that a lien claimant commence its own action rather than rely on the "sheltering" provision.

It is also important to note that a claim for lien will become void and unenforceable in the event the action commenced to perfect the claim for lien is not set down for trial within a period of two years from the date of commencement of the action.

Vacating the Lien

If a construction dispute arises and a lien is registered against an owner's property, often there will be a quick resolution to this dispute, especially if the owner wishes to deal with his property.

An owner with a lien on his property will have to remove it from title before any prospective purchaser will close a transaction. In order to clear title, the owner has some options. Security can be posted into court for the full amount of the claim plus 25 per cent for costs in order to vacate the lien from title, or the owner can negotiate with the lien claimant for the payment of an amount sufficient enough to settle the lien in exchange for a discharge.

The Construction Lien Trial

Once the action is commenced, the Statement of Claim is served upon the Defendants, who then have a short time to deliver their Statement of Defence.

If the lands are in Toronto, it is common that a Judge will refer the action to a Master of the Ontario Superior Court of Justice. Masters are judicial officers who have expertise in managing and conducting construction lien trials. If the lands are outside of Toronto, then the action will remain before a Judge. There are times when the dispute can be referred to an outside third party who is not an officer of the Court.

The construction lien trial is quite similar to any other civil trial. Depending on the parties involved, the particular process may be altered based upon the prior pre-trial or settlement conference. The goal of a contractor or subcontractor is to prove the value of the services and materials supplied and to establish compliance with all of the required time limits for preservation and perfection of the Claim for Lien. Often, the goal of the owner, as against the contractor, or the goal of a contractor, as against the subcontractor, is to show that the amounts are not owed and that there has not been compliance with the CLA or that there are valid set offs against the amount claimed.

At the end of trial, the Court will pronounce judgment.

Conclusion

The goal in any construction lien action is to collect the amount that is owed. The ultimate remedy in any construction lien action is to sell the interest of the owner in the land if the amount that is found to be owed by the owner is not paid. This article provides an outline of the general procedure when work or materials are supplied to privately owned land.

There is very little other legislation in Ontario that provides parties entering into agreements with the type of protection offered by the CLA. Construction trades are often working without any other form of security or contract with the property owner. Not only does the CLA provide a method for assuring that there will be a source of funds available for those with a valid claim for lien, but the CLA can also be credited with facilitating the expeditious and relatively inexpensive resolution of construction disputes.

The above information is meant to be informational and does not constitute binding legal advice. Special legal advice should be sought for your particular circumstances.



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