The *Construction Lien Act*

**OVERVIEW**

- Act provides statutory protections to persons supplying services or materials to an improvement that are not paid.
- Act is mandatory – cannot contract out of its remedial provisions.
- Act is short but complex.
- Devil is in the details and infinite variety of the way in which construction projects can be done.
GENERAL STRUCTURE OF THE CONSTRUCTION LIEN ACT

Complete Statutory Code for

- Construction Liens
- Holdback
- Priorities
- Construction Lien Trust
THE CONSTRUCTION LIEN

• Designed to give security of payment to parties who enhance the value of construction projects but don’t have privity of contract with the necessary parties for effective remedies.

• Because the lien is an exceptional remedy, court will narrowly construe who is entitled to lien, based on the wording of the Act.
There are 4 requirements for entitlement to a Construction Lien

- provide services, or
- provide materials
- to an “improvement”
- for an Owner, contractor or subcontractor
DEFINITIONS

• **Services** – “Any work done or service performed upon or in respect of an improvement”

  Including:
  • rental of equipment with an operator.
  • where making of planned improvement is not commenced, the supply of design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land.
DEFINITIONS (cont’d)

In determining whether a service falls within the definition of the Act, must consider the nexus between the service and the actual improvement.
DEFINITIONS (cont’d)

**Materials** - “Every kind of moveable property, that

a) becomes, or is intended to become, part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement,

b) that is equipment rented without an operator for use in making the improvement.”
DEFINITIONS (cont’d)

For material to be lienable, has to have been for a specific improvement (invoices showing premises, delivered to premises, etc).

Materials sold to a customer as part of general account insufficient to bring under the Act.

Open Contract (Prevenient Agreement) is subject to the Act.
Improvement:

- any alteration, addition or repair to, or
- any construction, erection or installation on, any land, and includes the demolition or removal of any building, structure or works or part thereof

Some form of physical alteration of premises is necessary to fall within the definition of improvement.
Improvement: (cont’d)

Kennedy Case – two stage construction:
1) building
2) assembly line

Court of Appeal upheld decision that 500,000 ton equipment, bolted into 100,000 square feet of premises with 3000 bolts, not an improvement.
Improvement: (cont’d)

Reasons:
- strictly construe who is entitled to lien rights
- two stage process involving different parties, contracts
- assembly line fully portable
There are 3 requirements for an owner that needs to be met:

1. the person have an interest in the Premises,
2. the person make a request for the Improvement, and
3. the work is done on the person’s behalf, credit, request, privity or consent.
FOR AN OWNER, CONTRACTOR OR SUBCONTRACTOR (cont’d)

• Special rules apply for situations where the improvement is done on leased premises.

• Significant exclusion for home buyers.
The Act draws a distinction between lands and Premises.

Lands exclude the Improvement while Premises includes the Improvement.

Premises specifically includes lands “enjoyed therewith”.

PREMISES TO BE LIENED
CROWN LANDS TREATED DIFFERENTLY

• Liens do not attach to:

  1. interests of the Crown in premises,
  2. improvements made to public streets or highways owned by municipalities, or
  3. improvements to railway right of way.

• This doesn’t mean that there aren’t certain remedies available to claimants or that claimants don’t need to be concerned about preservation of their rights.
THE PRICE OF THE CONTRACT

• The Act defines the “price” to be the price agreed on between the parties or the actual value of services or materials supplied to the improvement.

• As a result, liens for claims such as quantum meruit are permitted.

• Interest payable to a contractor or subcontractor is NOT lienable (but can still be recovered in an action).

• Damages for breach of contract not lienable.
LI MITATION ON QUANTUM OF LI EN

• There is a limitation on the quantum of the lien to “the least amount owed in relation to the improvement by a payer to contractor or subcontractor” under which the lien claimant has provided the work. Subject to not reducing the Holdback, this amount may be reduced by any set-off claims, damages etc which the payer is entitled to at law.
LI MITATION ON QUANTUM OF LIEN (cont’d)

• If someone knowingly liens for an exaggerated amount or when they know there are no lien rights, they are liable for any damages they cause as a result of filing the lien.
GENERAL LIENS

• Where the owner enters into a single contract for multiple premises, the contractors and subcontractors are entitled to a general lien – which is a charge against all the premises.

• However, if the owner sells one of the premises in the face of an unregistered lien, the purchaser takes title free and clear of all liens.
TIMING OF WHEN THE LIEN ARISES

• A lien arises as soon as services or materials are provided to the improvement.

• Anyone dealing with lands where an improvement has started needs to take steps to ensure they can deal with the lands free of the claims for lien.
MAINTAINING A CLAIM FOR LIEN

• There are a number of concepts which are critical to maintaining the lien claimant’s rights:
  1. When a contract is completed;
  2. Preservation;
  3. Perfection;
  4. Expiry of the Lien; and
  5. Obtaining a Trial Date.
COMPLETION OF CONTRACT

• It is important to draw the distinction between contracts (those with the owner) and subcontracts (those with other parties to the improvement).

Contracts:
  • Substantial Performance when ready for use and % set out in the Act is met.
  • Deemed completed when less than 1% or $1000 left on the contract.

Subcontracts:
  • Completed when work finished in accordance with its terms.
PRESERVATION OF LIEN RIGHTS

• Lien rights must be preserved within a 45 day lien period which starts when prescribed by the Act. Preservation is achieved by registering on title to the lands where the work was performed. Failure to do so is fatal.

• If a contract is certified as substantially complete (and published), the 45 day period starts from publication for work done to that date. Finishing work after the date is not prejudiced.
PRESERVATION OF LIEN RIGHTS (cont’d)

• The period for subcontracts starts 45 days after the contract is certified complete or 45 days after it is, in fact, completed.

• Where the contract or subcontract is not completed but the work stops, it is 45 days from the date of last providing services or materials.
PRESERVATION WHEN THE OWNER IS A CROWN AGENCY

• In cases involving:
  ▪ the Crown’s interest in premises; or
  ▪ premises that are a public street or highway owned by a municipality or a railway right-of-way, do not need to register.

• To preserve, need to deliver a copy of the claim for lien with an affidavit of verification to the appropriate Crown Agency.
PERFECTION

• Once a lien is preserved, it must be perfected within the next 45 days (ie after the expiry of the first 45 day period).

• Perfection is achieved by issuing a Statement of Claim and registering on title to the lands, a Certificate of Action.

• Again, failure to do so is fatal.
SHELTERING

- A lien claimant who has preserved but not perfected may be saved if they can shelter under another perfected lien.

- Unfortunately, this likely only works in the same payment stream since the unperfected lien is bound by the claim under which it is sheltering.
TRIAL DATE

• If a trial date or the lien action is not set down within a period of two years, the perfected lien expires.
PRE TRIAL AND TRIAL PROCEEDINGS

• Very few construction disputes are arbitrated. Rather they are litigated. This despite the fact most contracts have mandatory arbitration provisions.

• The Act calls for a summary and expeditious proceeding of construction lien claims. Regrettably, this invariably doesn’t happen and the process is virtually identical to a normal claim.
PRE TRIAL AND TRIAL PROCEEDINGS (cont’d)

There are a number of unique procedural matters in construction lien actions:

1. Discharging or vacating a lien,
2. Carriage of an Action,
3. Right to Information,
4. Determination of the amount of Holdback,
5. Appointment of a Construction Lien Trustee,
6. Determination of Priorities, and
7. Sale of the interest in the Premises.
DISCHARGING OR VACATING A CONSTRUCTION LIEN

• There is a significant distinction between discharge and vacating. Once a lien is discharged, no rights flow from the discharged lien and it cannot be revived. Vacating a lien simply means it no longer attaches to the Premises but rather the monies in court or bond.
A party can also move to reduce the amount of a lien for a number of reasons (work not lienable, quantum exaggerated etc.). In the same way, if the party can prove all of the lien is improper (ie out of time, wrong premises etc.) the court has jurisdiction to discharge the lien.
• Generally, a party may post money into court for the amount of the lien and for costs or this can be done by posting security with the Court in the prescribed form.
Because construction lien actions typically involve numerous parties, the court has jurisdiction to give primary carriage of the action to any of the parties. The additional legal costs (called salvage costs) are paid first, before the lien claimants.
RIGHT TO INFORMATION

- Since a party providing services or materials may not have sufficient information to properly protect and advance their interests, the Act provides the ability of any party to make enquiries of other parties to the Improvement, including mortgagees, for certain specified information.

- There is a strict period (21 days) for responding to such requests and consequences for failure to do so.
DETERMINING HOLDBACK

- The quantum of the holdback and who is entitled to share in that amount are central to the security provided to lien claimants.

- Therefore, one of the issues that the Court must determine is the complex issues of what holdback(s), deficiencies in the holdback, entitlement, liability etc.
• The Act specifically provides for the appointment of a Construction Lien Trustee.
The circumstances where this would be appropriate is generally where the owner has become insolvent or abandoned the improvement. Any party can apply for this relief and it is typically a mortgagee but can also be the Contractor.
• The Trustee has the power to borrow further funds to complete the project and sell the project free and clear of the liens and the mortgages (if priority at issue).

• The proceeds of sale are usually paid into Court until the final determination in the Construction lien action.
DETERMINING PRIORITIES

• Because the Act creates a security interest in favour of lien claimants, this interest sometimes conflicts with the interests of others such as mortgagees and other lien claimants.

• The Act sets out the rules to be applied in these circumstances.
SALE OF AN INTEREST IN THE PREMISES

• Because the ultimate remedy for a lien claimant who receives a judgment but is not paid is to realize on its security, the Act provides some rules regarding the Court’s jurisdiction to sell the Premises.

• The Court does have the jurisdiction to also grant personal judgments (between parties who have privity of contract) or any other personal claim.
THE HOLDBACK

• Act obliges every payer under a contract or subcontract for services/materials provided to an improvement, to holdback 10% of the price of such services of materials, as they are actually supplied).
FEATURES OF THE HOLDBACK

- acts as an insurance fund
- when Act is complied with, acts as maximum liability of Owner and others without privity of contract
- lien is a charge against the holdback
THE TWO TYPES OF HOLDBACKS

“basic holdback”

- 10% of the price of services or materials supplied under a general contract or subcontract;

- for the benefit of those trades who supply services or materials to the improvement before the date of certification or declaration of substantial performance;
THE TWO TYPES OF HOLDBACKS
(cont’d)

“holdback for finishing work”

- where a contract has been certified or declared to have been substantially performed but services or materials remain to be supplied in order to complete the contract;

- in such circumstances a separate holdback equal to 10% of the price of the remaining services or materials must be retained until completion or abandonment of the contract.
• In addition to these holdbacks, if a payer receives a written notice of lien, the payer must also retain, in addition to the holdback, the amount of the lien claimed.
**NO RIGHT TO SET OFF AGAINST HOLDBACK**

- In order to ensure that the holdback remains available for lien claimants, the Act specifically prohibits any claims against or set off against the holdback funds until all liens which may claim against it have expired.
RELEASE OF HOLDBACK

• The holdback funds may be released by a payer, provided there is no notice of liens or registration of liens, as follows:

• Subcontracts — 45 days after the subcontract is certified complete or completed.
RELEASE OF HOLDBACK (cont’d)

Contracts: 45 days after
- Substantial performance (if published);
- Date contract is completed; or
- Date contract abandoned.
RELEASE OF HOLDBACK (cont’d)

• Contract finishing work — 45 days after the work is completed or abandoned.

• While the Act permits a payer to make payments directly to the beneficiary of the holdback funds, this never occurs because of the possibility of a dispute between the beneficiary of the holdback funds and its payer.
PRIORITIES

- There are two types of priorities dealt with by the Act:
  1. Mortgage Priorities, and
  2. Other Priorities.
MORTGAGE PRI ORITIES

• The Act differentiates mortgages into several categories:

Building Mortgages

▪ These are mortgages intended to secure financing of the improvement.
▪ Liens have a priority over these mortgages to the extent of any deficiency in the Owner’s holdback.
**Prior Non Building Mortgages**

- These mortgages have priority to the lesser of the value of the property at the time the first lien arose or the amount of advances before registration or receiving notice of claims for lien. All subsequent advances do NOT have priority.
Subsequent Non Building Mortgages

- These mortgages have priority for the amount of any advances before registration or notice of lien arises.

Home Buyer Mortgages

- These mortgages are excluded from the Act and have priority unless taken in the face of a registered mortgage.
PRIORITY ISSUES ON REALIZATION

Power of Sale

- A mortgagee, where priority over the mortgage is claimed by the lien claimants, cannot sell free and clear of the mortgage.

Receiver

- A privately appointed receiver is in no better position than the owner of the property. A court appointed receiver, can obtain the benefits of the Act’s Trustee provisions.
Priorities Amongst Lien Claimants

- As a general rule, all lien claimants of a class are treated equally. The difficulty is that there may be many classes of lien claimants, depending predominantly on who their payer is.
PRI ORITY ISSUES ON REALI ZATION (cont’d)

Priorities Amongst Lien Claimants

- There is a major exception for construction workers who enjoy special priority to the extent of 40 regular working days.

- There is a particular mechanism which deals with how general liens share in any proceeds.
• The Act creates layers of trusts in an attempt to ensure the funds in a project stay in a project to pay the contractors and subcontractors below.
OWNER’S TRUST

• There are four trusts created for Owners:

1. Monies received by an owner to finance the project,

2. Monies in the hands of or received by the owner when certified payable,

3. Monies in the hands of or received by the owner when substantial performance is certified, and

4. Proceeds of the sale of the Premises (less expenses and discharge of mortgages.)
CONTRACTOR / SUBCONTRACTOR TRUST

- All monies actually received by contractor or subcontractor on account of improvement.

- All monies owing to contractor or subcontractor (whether or not due or payable.)
DISCHARGE OF TRUST OBLIGATIONS

• Obviously, the best way to avoid a breach of trust is to ensure that payment is made in accordance with the Act.

• Once trust funds are found to have existed and not paid, the onus shifts to the trustee to show the funds were properly used.
DI SCHARGE OF TRUST OBLI GATIONS (cont’d)

• A payer can pay trust funds to the beneficiary of the trust. This is permitted because upon payment to the beneficiary, the beneficiary becomes the trustee of those funds.
PERSONAL LIABILITY FOR BREACH OF TRUST

• The Act provides that:
  ▪ Persons with effective control of the corporation (officers, directors, employees, agents, or any other person).
  ▪ That knew or ought to have known there was a breach of trust.
PERSONAL LIABILITY FOR 
BREACH OF TRUST (cont’d)

• Can be personally liable for the breach of trust by the corporation.

• The Act does not make these people trustees but extends liability for the corporation’s breach of trust.
• The Act specifically prohibits a trust action from being part of a construction lien action. However, in some cases, the court may order that they be heard one after the other or together but they cannot be joined.

• The normal limitation period of two years will apply to a trust action.