

SUBCONTRACTORS MAY UNKNOWINGLY LACK GENERAL LIEN RIGHTS

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A subcontractor's lien rights can be limited by the prime contract, even if the subcontractor has never seen it. In *Yorkwest Plumbing Supply Inc. v. Nortown Plumbing (1998) Ltd.* ("Yorkwest"),^[1] the Ontario Court of Appeal affirmed that the onus is on subcontractors to determine whether the prime contract eliminates their right to a general lien.^[2] The court also confirmed that an improper general lien cannot be cured. As a result, subcontractors may lose their lien rights altogether if they mistakenly register a general lien.

For owners, *Yorkwest* provides assurance that they will be protected from subcontractors asserting general liens where they have contracted out of that right in the prime contract.

Yorkwest Was Not Paid and Asserted General Liens

The plaintiff Yorkwest was a plumbing subcontractor on two home development projects that were constructed on multiple lots. It provided plumbing supplies to the contractor, Nortown. Nortown failed to pay Yorkwest and ultimately went bankrupt. Yorkwest then asserted a general lien against each of the projects.

The right to a general lien is set out in section 20(1) of the *Construction Lien Act* ("CLA").^[3] It provides that where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or a subcontract under that contract, may assert a lien against *each* of the premises for the price of *all* services and materials the person supplied to all the premises.^[4] In *Yorkwest*, for example, Yorkwest supplied only a few thousand dollars worth of supplies to each lot. However, under section 20(1) it could claim a lien against *each* lot for the total amount of *all* of the supplies it provided to the entire project.

Parties may contract out of the right to assert a general lien. Section 20(2) of the *CLA* provides that "no general lien arises under or in respect of a contract that provides in writing that liens shall arise and expire on a lot-by-lot basis."^[5] In *Yorkwest*, the prime contract provided that liens would arise and expire on a lot-by-lot basis.

The owners in *Yorkwest* brought a motion to discharge Yorkwest's general liens on the basis that they were barred by the prime contract. Yorkwest argued that its liens were valid because section 20(2) of the *CLA* did not

apply to subcontracts. It further argued that the court should uphold the general liens because to find otherwise would be an unfair result. The trial court and first appeal court agreed with the owners that the liens were invalid. Accordingly, Yorkwest appealed to the Court of Appeal.

Court of Appeal Affirms Subcontractors May Lose Right to General Liens

The Court of Appeal held that where owners and contractors contract out of general lien rights under section 20(2) of the *CLA* that subcontractors are barred from asserting general lien claims. The Court found that this rule is not unfair to subcontractors who might not have reviewed the prime contract. Section 39(1) of the *CLA* provides that a person with a lien is entitled to receive information from the owner or contractor within 21 days of making a written request. In particular, section 39(1)(v) states that subcontractors are entitled to a statement as to whether the contract provides in writing that liens will arise and expire on a lot-by-lot basis.^[6] In other words, subcontractors have the ability to determine whether they are barred from asserting a general lien before their lien rights in respect of any particular lot would expire.

The Court held that the improper general liens could not be cured. Section 6 of the *CLA* did not apply because it may cure only procedural errors. The improper registration of a general lien is a substantive, not procedural, error.^[7] Similarly, the general liens could not be viewed as liens for excessive amounts. In an earlier case,^[8] the court viewed a lien as an excessive lien where the liens were described as general liens and did not refer to services provided to other lots. However, those were not the facts in *Yorkwest*.^[9] Finally, *Yorkwest* was not entitled to assert unjust enrichment or quantum meruit against the owners. Section 55 of the *CLA* bars subcontractors from asserting such claims against parties with whom they have no privity of contract.^[10] Accordingly, the Court upheld the lower courts' orders discharging Yorkwest's liens.

Make Early Information Requests

Yorkwest is an important reminder that subcontractors should always ask to see a copy of the prime contract. If the contractor refuses to provide a copy, the subcontractor should make a request for information under section 39 of the *CLA* as soon as lien rights arise on the first lot in a multi-lot project. The prime contract must be provided within 21 days, which should leave time to claim an ordinary lien against the first and subsequent lots if necessary.

For owners, *Yorkwest* provides assurance that the Courts will not permit subcontractors to claim general liens where the prime contract bars them.

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[1] 2016 ONCA 305 (“*Yorkwest*”).

[2] That is, a lien against more than one premises pursuant to a single contract for improvements on such

premises for the price of all services and materials the lien claimant supplied to all premises.

[3] R.S.O. 1990, c. C.30 (“CLA”).

[4] *CLA*, s. 20(1).

[5] *CLA*, s. 20(2).

[6] *Yorkwest*, para. 32; *CLA* s. 39(1)(v).

[7] *Yorkwest*, paras. 48 and 49.

[8] *Brian T. Fletcher Construction Co. v. 1707583 Ontario Inc.* (2009), 80 C.L.R. (3d) 143 (Ont. Sup. Ct.).

[9] *Yorkwest*, paras. 50 and 51.

[10] *Yorkwest*, para. 54.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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