



Construction Lien Claims

Irwin A. Duncan

The construction industry enjoys the benefit of special safeguards provided by the *Construction Lien Act*. These unique provisions include the requirement to treat construction-related funds as trust funds and the right to obtain certain information from owners, lenders and general contractors in a timely manner. The most obvious tool made available by the *Act*, though, is the right to register a construction lien claim against a project.

Construction lien claims provide a number of benefits over regular civil proceedings to collect amounts that are owed for work on a construction project:

- the lien is a secured claim against the land, providing the lien claimant with some security in the event that the owner becomes insolvent
- a registered lien will hinder or even stop further progress payments or draws against construction financ-

ing, which puts pressure on the owner or general contractor to pay its accounts

- the *Construction Lien Act* provides for a summary procedure designed to be less expensive and more expeditious than regular civil actions, while still remaining flexible enough to deal with the often complex issues that arise in construction disputes

Once the lien period has expired, a lien cannot be registered and any legal proceeding must be commenced as a regular civil action. (...2)



Highlights:

- Obtaining a title search before you begin a project
- Information required for a lien claim

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Getting Paid: Title Searches

Michael A. van Bodegom

Before embarking on a project of any substantial size, a contractor or sub-contractor will usually complete some due diligence to ensure that it will be paid. From formal credit checks to making a few phone calls, the steps that can be taken to ensure the credit worthiness of the party with whom you are dealing can vary greatly and, to a

large extent, will depend on the size of the project, past dealings with the same party, and a variety of other factors.

One step that is frequently overlooked is obtaining a title search. At its simplest, a search of title will show who owns the land and what encumbrances, such as mortgages or construction liens, are registered (...3)

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If you have any questions about our newsletter or would like to receive your copy by email, please contact our office at (519) 886-3340 or mvb@kwlaw.net

Visit our website at www.kwlaw.net

The Construction Law Newsletter is a publication of White, Duncan, Ostner & Linton LLP, Barristers & Solicitors. The articles in the newsletter are intended to be an overview of current issues in the law that will be of interest to the construction industry. They should not be regarded as legal advice. Any of the lawyers in our Construction Law Group would be pleased to assist you in determining how the legal principles dealt with herein apply to the facts of your particular situation.

Construction Lien Claims (con't)

Lien period

Unless a claim for lien is registered within the following time periods, the right to lien will expire:

- if you contracted directly with the owner, the lien expires 45 days after the earlier of the date the contract is complete or abandoned or the date a certificate of substantial performance is published
- if you contracted with a general contractor or another sub-trade, the lien expires 45 days after the earliest of the last supply of services or materials, the date a certificate of substantial performance is published, or the date the subcontract is certified to be complete

Be aware that some of the terms used to describe the lien period are defined by the *Act* in a way that may not be obvious. For example, a contract may be "complete" when there is still work unfinished if the value of that work does not exceed either one percent of the contract price or \$1,000.

Information to register lien claim

On the back page of this issue of the newsletter is a form which lists the information that must be contained in a lien claim. This form can be used to provide your lawyer with the necessary instructions to prepare the claim for lien which must be registered before the lien period expires.

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From the Internet....

Contractor – A gambler who never gets to shuffle, cut or deal.

Bid Opening – A poker game in which the losing hand wins.

Bid – A wild guess carried out to two decimal places.

Low Bidder – A contractor who is wondering what he left out.

Project Manager – The conductor of an orchestra in which every musician is in a different union.

Critical Path Method – A management technique for losing your shirt under perfect control.

Engineer's Estimate – The cost of construction in heaven.

Delayed Payment – A tourniquet applied at the pockets.

Strike – An effort to increase egg production by strangling the chicken.

Completion Date – The point at which liquidated damages begin.

Liquidated Damages – A penalty for failing to achieve the impossible

Auditor – Person who goes in after the war is lost and bayonets the wounded.

Lawyer – Person who goes in after the auditor to strip the bodies.



Getting Paid: Title Searches (con't)

against the land. This information can be invaluable before embarking on a project.

For example, if a title search reveals that the purported owner of the project is not the registered owner of the property, you will want to clarify its interest in the property. Is it in the process of purchasing the property? Is it a tenant? In order to preserve lien rights, proper notice under the *Construction Lien Act* must be provided to landlords or other persons with a registered interest in the property.

What if the title search reveals a substantial mortgage that has recently been registered? The owner should be asked about the purpose of the mortgage—it may be to finance the purchase of the property, it may be to finance the construction, or it may even be to secure debts of a related corporation. Also, the owner should be asked what amounts have been advanced under the mortgage. In order to preserve lien rights, it may be necessary to provide proper notice to any mortgagees on title.

A guide to project financing and payment security recently produced by the Canadian Construction Association confirms the CCA's view that a title search should always be part of a contractor's due diligence prior to bidding on a project.

Obtaining a title search is generally quick and inexpensive. Most property in Ontario can now be searched online almost instantaneously. And, in most cases, your lawyer can confirm ownership information and any encumbrances right away. Where there are problems identified on title, the search may take slightly longer, but in such cases it will also be that much more important that you obtain all the information available from the search.

Title Searches can save time and money

Two cases on which our firm recently acted illustrate the value of having a title search done before commencing work on a project. In one, an ambitious young fellow set out to build a community ice rink. Unfortunately, he began construction before he actually owned the property. As it turns out, he was ultimately unable to purchase the property or pay his trades, and the registered

owner refused to pay for the services and supplies already made to the project. We were required to take this dispute to trial in order to obtain payment for the general contractor (and to an appeal court in order to recover a significant portion of the legal expense). Although we were successful at trial and on appeal, the necessary litigation was lengthy and expensive, and it might have been avoided if a title search had been completed before the project started.

In the second case, the owner of the property registered a multi-million dollar mortgage to guarantee indebtedness of a related corporation. When the project collapsed, lien claims in excess of \$2 million were registered against the property. Unfortunately, the property was only worth about \$2 million when it sold, so the lien claimants ended up in a dispute with the mortgage holder over who was entitled to the sale proceeds. Following trial, the court held that the lien claimants were entitled to the sale proceeds. We were successful at trial on behalf of the lien claimants, but it was a lengthy and costly process. The court's decision is presently being appealed. A title search would have revealed the mortgage, which was millions of dollars in excess of the value of the property, and steps could have been taken to help protect the trades before they began working on the project.

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Our Firm

White, Duncan, Ostner & Linton LLP, founded in 1861, is proud to be the oldest Waterloo-based law firm still in existence, and one of the oldest firms in Ontario. Our experience and expertise is reflected in having achieved the highest ratings available for both legal ability and ethical standards, as assigned by Martindale-Hubbell, an independent international law firm and lawyer rating organization.

Our Construction Law Group acts as counsel for general contractors, sub-trades, suppliers, owners and municipalities in all areas of construction law, including construction lien actions, contract disputes and surety bond claims. Our construction law lawyers have a demonstrated commitment to excellence and continuing development, as reflected in their numerous reported decisions, their published articles and their past appointments as lecturers for universities and colleges.

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INFORMATION FORM FOR LIEN CLAIM	
Name of lien claimant	
Address (and legal description, if known)	
Name and address of owner	
Name and address of person to whom the lien claimant supplied services or materials	
Time within which services or materials were supplied	
Short description of the services or materials that have been supplied	
Contract or subcontract price	
Amount claimed as owing in respect of services or materials that have been supplied	
Name and title of person signing claim for lien on behalf of lien claimant	