

The Adviser



Published by
The Practice Advisory Service
The Law Society of Upper Canada
Osgoode Hall, Toronto
for the information of
its members

Number 4 - April 1983

THE CONSTRUCTION LIEN ACT, 1983

Attached is material prepared under the supervision of David I. Bristow, Q.C. Every member is urged to read it carefully, and then refer to the new Act and other materials that have recently become available.

Because of the technical requirements for compliance with The Construction Lien Act, 1983, the significant changes in law and procedures embodied therein, and limitations on the capacity of the Practice Advisory Service to respond to any volume of calls for guidance, we ask that members who have questions seek the assistance and advice of members who are knowledgeable concerning the Act.

Alan T. Marshall,
Director,
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THE LAW SOCIETY OF UPPER CANADA

THE CONSTRUCTION LIEN ACT, 1983**1. BACKGROUND:**

Bill 216, called the Construction Lien Act, 1983, will be proclaimed in force April 2, 1983. There are wide-spread reforms enacted and practice under the new Construction Lien Act, 1983 will be very different from practice from the old Mechanics' Lien Act. The highlights of the new legislation are listed in the explanatory notes to Government Bill 216 and copies of this are available from the Queen's Printer for Ontario. As well, the intent of the various amendments may be found expressed in the Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, April, 1982 (additional copies may be obtained from the Publications Centre, 5th Floor, 880 Bay Street, Toronto, Ontario, M7A 1N8). Rather than review the substantive highlights in the new legislation, the following materials suggest changes in the practice of mechanics' lien law that will be required by the new statute when proclaimed.

2. TRANSITION:

Until April 2, 1983, practice in mechanics' lien proceedings will remain unchanged. Following that date, a decision must be made by lawyers acting for claimants, owners, mortgagees and others as to whether or not a contract between an owner and his contractor was entered into before or after April 2, 1983. If this contract was entered into after April 2, 1983, then the new Construction Lien Act applies to that contract, all subcontracts entered into under that contract and all labour and materials supplied thereunder (s. 92). These rights include rights of priority over mortgages which may have been registered well before April 2, 1983.

The time limits for registration of the lien are generally longer under the new Act except perhaps in the case of material suppliers (see s. 2(3)). The time for delivery of the statement of claim, registration of certificates of action, and delivery of other subsequent pleadings are shorter under the new Act.

When in doubt, therefore, the solicitor should make an effort to comply with the 37 day, rather than the 45 day, time limit for the registration of the lien, but hereafter the stricter procedural time requirements of the new Act should be complied with and any issue of transition left for a settlement meeting as discussed below.

3. THE LAWYER'S NEW RESPONSIBILITY: Section 88(1)(b) of The Construction Lien Act, 1983:

- 88.(1) Subject to subsection (2), any order as to the costs in an action, application, motion or settlement meeting is in the discretion of the Court, and an order as to costs may be made against,

- (a) any party to the action or motion; or,
- (b) the solicitor or agent of the party to the action, application or motion, where the solicitor or agent has,
 - (i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for lien is without foundation or is for a grossly excessive amount, or that the lien has expired; or,
 - (ii) by his conduct prejudiced or delayed the conduct of the action,

and the order may be made on a solicitor and client basis, including where the motion is heard by, or the action has been referred under section 60 to, a master or an appointed local master.

(a) The Problem of Consolidation:

Practitioners handling cases falling under the new Construction Lien Act, 1983 must be wary of orders consolidating actions and appointing themselves as solicitors with carriage. The concept of carriage of consolidated actions is preserved in the new Act (s. 61); however, once such an order is made, that solicitor may then be taken to have "knowingly participated in the preservation and perfection" of all liens involved in the consolidated actions and may therefore have consequential exposure as to costs under s. 88, at least to the extent that procedures are taken after the order of consolidation. Either a waiver of the benefit of s. 88 or an indemnity in favour of the solicitor having carriage should be executed with respect to all procedures taken after the order for carriage and consolidation being made, all in consideration of the solicitor having undertaken carriage of the consolidated action.

(b) Duty to Use New Procedures:

As a result of s. 88, practitioners must now avail themselves of the various procedural reforms enacted by the Construction Lien Act, 1983. No longer may solicitors pay mere lip service to the existence of rights to information, pleading, pre-trial procedure, consolidation of actions and reference of actions to Masters, and such other procedural advantages. To ignore such provisions now is to attract a punitive order as to costs against the solicitor personally:

Trust Claims:

- (i) The practitioner must not join a trust claim in a lien action (s. 50(2));

Claims, Cross-Claims, Counterclaims and Third Party Claims:

- (ii) These may now be made, whether or not such claims are related to the making of the improvement, and therefore must be used wherever possible. Moreover, pleadings may now be noted closed against a party in default if the following time limits are not obeyed:

Service of Statement of Claim: 90 days after filing (s. 55(2))

Cross or counterclaim: with defense, or later, with leave of the Court (s. 55(3))

Statement of Defense to a claim, cross-claim or counter-claim or third party claim: 20 days (s. 56(1))

Settlement Meetings:

- (iii) Provision is now made for formal settlement meetings after defenses have been filed or the time for their delivery has expired. In view the exposure to costs created by s. 88, practitioners must now avail themselves of the settlement meeting procedure. An order for such a meeting is made ex parte (s. 62(1)). At least 10 days before the meeting, notice is served on all persons who were, on the 12th day before the meeting, an owner, a defendant in the action, a registered interest in the property, an execution creditor, a lien claimant, or a third party (s. 62(2)). On the date of the settlement meeting, the attendees elect a chairman or, alternatively, the person who served the appointment is made the chairman (s. 63). All issues are isolated and agreements extracted from the parties as to issues of fact and law. Minutes are kept, signed by all parties present and filed with the Court (s. 63(3)(4)). The statement, when filed, forms part of the record at trial and the Court may, upon application, make such orders as are necessary to implement the settlement (s. 63(5)).

Rights to Information:

- (iv) A practitioner must avail himself of all rights to information that he has given under the new Act (Part VI, ss. 39 and 40). Lien claimants, beneficiaries of trust and mortgagees now have rights to information that are enforceable and, in view of s. 88, must be enforced. A notice may be served requiring production within 21 days by the owner, contractor or subcontractor of the names to the parties to a contract, the contract place, state of accounts, particulars of payment bonds, a statement of certification of completion, if available; in the case of mortgagees, sufficient details concerning the mortgage to enable a decision to be made as to whether the mortgage is a building mortgage, a statement of advances and arrears, a statement of an amount secured under an agreement of purchase and sale and arrears, and other such information. A court order is available under s. 39(6) to enforce compliance by anybody properly served with a notice.

Cross-examination:

- (v) A right to cross-examine the deponent of the affidavit verifying the lien claim is provided by s. 40 and it will be the practice of diligent solicitors to serve an appointment and conduct one cross-examination on behalf of all interested parties of the deponent of the affidavit verifying each lien claim. There must be only one examination and notice of the examination must be given to the person examined, any other person named in the

claim for lien, the contractor, and the payer of the lien claimant. The Rules of Practice pertaining to cross-examination otherwise apply.

4. **ACTING FOR A LIEN CLAIMANT:**

(a) **Registering the Lien:**

There are new time limits for the registration of liens. Registration of the lien claim is now called "preservation" and the statutory period is now 45 days and not 37 days. There are, however, new commencement dates for the running of this period:

(i) **Contractors:**

All persons having privity with the owner must register their liens within 45 days of the earlier of the publication of a s. 32 declaration of substantial performance, or the date of completion or abandonment of the contract. Completion of the contract is defined in s. 2(3) to be the point at which the work left to be completed or corrected is equal to 1% of the purchase price or \$1,000.00 whichever is less. (Section 31(2)(a) and (b));

(ii) **All other persons supplying services or materials:**

Forty-five days after the earlier of a s. 32 declaration, or the date of last supply of services or materials, or the date of certification of substantial completion of this specific subcontract (Section 33). If you act for a material supplier who has privity of contract with the owner, then care must be taken with these time periods. In such a situation when all but 1% of the purchase price of goods ordered have been delivered, the period begins to run. If the material supplier does not have privity with the owner, then it is the date of last supply of materials that commences the period running.

(b) **Registration of the Certificate of Action:**

Liens that are not sheltered must be "perfected" by commencement of an action and registration of a certificate of action (in the case of registered liens) within 45 days after the last day upon which the lien could have been preserved. The effect of this wording will shorten the period during which people must commence actions and register their certificates.

(c) **Stricter Formal Requirements:**

Changes have been introduced removing the concept of "substantial compliance" from the curative section of the Act. The former Mechanics' Lien Act, section 19, included reference to substantial compliance. The new Construction Lien Act in section 6 reads as follows: "... no certificate, declaration or claim for lien is invalid by reason only of a failure to comply strictly with subsections 32(2) or (5), or section 33(1), or section 34(5) ...". The change was introduced by the Committee to stipulate that substantial compliance was no longer sufficient and therefore the present section is therefore designed to relieve only against minor errors or omissions in the preparation of documents and forms.

(d) Preparing to Register the Lien:

The lien claim itself must be completed with greater care. An effort should be made to comply exactly with the requirements of the various prescribed forms and greater care must be taken before registration to ensure that the claim is accurately stated:

(i) Exaggerated Liens:

Under the old Act, liens were registered for "work to be done". This resulted in large liens being registered where little work had been done. Section 35 of the new Act gives any person damaged as a result of an exaggerated claim or otherwise invalid claim a direct cause of action against the registrant for all damages suffered. This appears to be a wider remedy than an action for slander of title and clients should be advised of the possibility of such a claim against them if an improper or misstated lien is registered;

(ii) Cross-examination:

Cross-examination of deponents of affidavits verifying liens is now provided for in the statute. If your client has an exaggerated or invalid claim, it will be revealed on cross-examination and a liability for damages may crystallize at that time. Due diligence would therefore seem to require that prima facie documentary evidence backing up the amount claimed and other particulars be provided to the solicitor during the course of preparing the claim for lien and, in any event, prior to deposition of the affidavit of verification or registration of the lien.

5. ACTING FOR THE OWNER:

(a) New Holdback Provisions and Liability:

The owner is now liable to new holdback provisions. There are now two holdbacks. The first holdback is of an amount equal to 10% of the price of services or materials until all lien claims have expired, been satisfied, been discharged or until there has been a payment into Court. (Section 22(1)). The second holdback is finishing holdback of 10% of the price of remaining services or materials as they are actually supplied, and after substantial performance has been certified or declared. This holdback must be retained until all liens against it have expired or been satisfied or discharged or are otherwise provided for under section 44 of the Act. An owner now has personal liability to every lien claimant for these 10% holdbacks.

(b) Vacating Liens:

Owners may now vacate liens without notice to any other person by securing or paying into court the full amount claimed as owing plus the lesser \$50,000.00 or 25% of the amount as security for costs. Discretion is now given to the court upon notice of motion to all parties to reduce such payments into court.

(c) New Owners' Trust:

New trusts are imposed in Part II of the Act. The owner's trust is laid out in section 7(1) through (4) and will not feel any more strenuous obligation than he did in the past; however, there is a personal liability attaching to every director or officer of the corporation and every person including employees and agents of the corporation who have effective control of it, who assent or acquiesce in conduct that is known or reasonably ought to have been known to amount to a breach of trust by the corporation.

(d) Certification and Declaration of Substantial Performance:

There are new rules governing the certification and declaration of substantial performance. These are found in s. 32 of the Act and are set out below:

- (i) On the application of the contractor, the payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed in accordance with section 2, and where he or they so determine, shall certify the substantial performance of the contract by signing a certificate in the prescribed form;
- (ii) The payment certifier or the owner and the contractor jointly, as the case may be, shall set out in the certificate the date on which the contract was substantially performed;
- (iii) The date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of this Act to be the date on which that event occurred;
- (iv) Where the payment certifier certifies the substantial performance of a contract, he shall within seven days of the day the certificate is signed give a copy of the certificate to the owner and to the contractor;
- (v) The contractor shall publish a copy of the certificate once in a construction trade newspaper;
- (vi) Where the contractor does not publish a copy of the certificate within seven days of receiving a copy of the certificate signed by the payment certifier or, where there is no payment certifier, signed by the owner, any person may publish a copy of the certificate;
- (vii) Where there is failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract;

- (viii) Unless the Court otherwise orders, the day the declaration is made shall be deemed to be the date the contract was substantially performed;
- (ix) The person who applied to the Court shall publish a copy of the declaration of substantial performance once in a construction trade newspaper;
- (x) For the purposes of this Part, a certificate or declaration of the substantial performance of a contract has no effect until a copy of the certificate or declaration is published.

Again, in subsection 32(3), there is a penalty of direct action for damages against any person who fails to cooperate in preparing a certificate of substantial completion. The owner is therefore exposed to any one who suffers damages as a result of his failure and negligence in preparing such a certificate. This is a wide liability.

6. ACTING FOR THE MORTGAGEE:

(a) Opinions on Title:

Section 80(2) provides that whenever a mortgagee takes a mortgage with the intention of securing the financing of an improvement, the liens arising from the improvement have priority over that mortgage and any mortgage taken out to repay that mortgage to the extent of any deficiency in the 10% holdback irrespective of when the mortgage or any replacing mortgage taken to repay it is registered. It is possible, in consequence of this section, that lien claimants may have an entire priority over a "building mortgage". In reporting to their clients, solicitors for mortgagees should therefore qualify their opinions by stating that they give no opinion whatsoever on the liability, if any, of the mortgagee under s. 80(2) and their opinion on title is subject to the application of that section of the Construction Lien Act.

(b) Sale of Mortgaged Premises:

In order to complete the sale of mortgaged premises, the mortgagee may satisfy his liability under s. 80(2) of the new Act by posting a financial guarantee bond in the present form (s. 80(10)).

7. ACTING FOR A VENDOR:

Section 9 of the new Act provides that there is a vendor's trust equal in amount to the value of consideration received by the owner as a result of the sale less any expenses arising from the sale and paid to discharge any existing mortgage indebtedness. The vendor is the trustee of this trust and may not appropriate or convert any part of the trust property to his use until the contractor has been paid all amounts owed to him related to the improvement.

8. ACTING FOR ENGINEERS AND OTHERS:

(a) Payment Certifiers:

The Act defines a "payment certifier" as an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract (section 1(1)(7)). The payment certifier is obligated by sections 32 and 33 of this statute to certify substantial performance of contracts and subcontracts. A payment certifier who refuses to certify or who fails to furnish a copy of his certificate is now directly liable to all persons who suffer damages as a result (section 32(3) and (4)). Given the new rules as to claims, cross-claims and counterclaims, it is quite possible that claims arising out of breach of this duty by design professionals, engineers and payment certifiers may properly be joined in with lien actions.

(b) Construction Trade Newspapers:

Section 32(5) of the new Construction Lien Act provides that a construction trade newspaper shall publish upon commercially reasonable terms copies of certificates or declarations of substantial performance in the prescribed form and manner. The definition of construction trade newspaper is wide enough to include any newspaper circulated generally in Ontario on weekdays which contains tender and contract information as part of its normal business and is primarily devoted to the publication of matters concerned with the construction industry.