

Construction Law Webinar:

Construction Liens 101

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The contents of this presentation do not constitute legal advice and are incomplete, as they are intended to be supplemented by the commentary given during the presentation.

Agenda

1. Introduction
2. What is a construction lien?
3. How is a construction lien filed?
4. What are the deadlines that apply to construction liens?
5. Are errors in construction liens fatal?
6. What options are available to an owner when a construction lien is filed?

1. INTRODUCTION

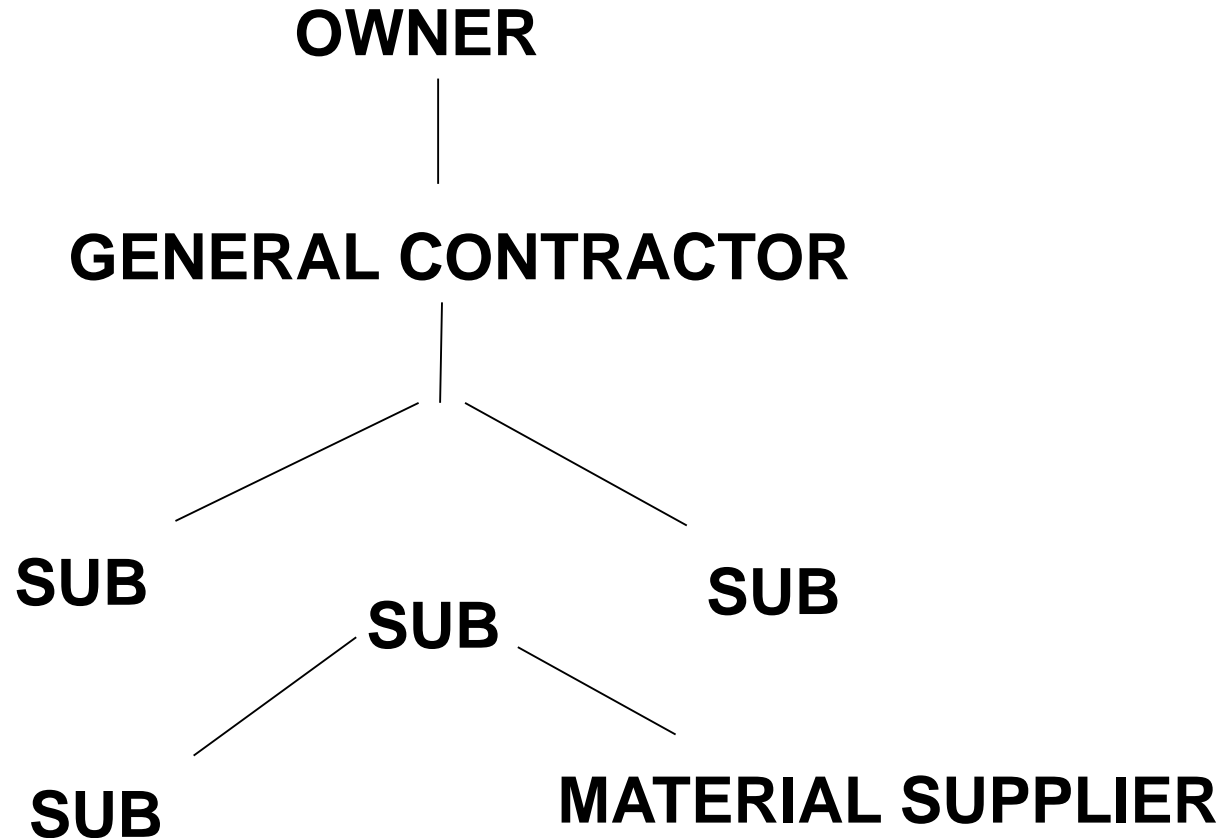
Introduction

- A construction lien (also referred to as a “claim for lien”) is a very important and powerful tool to assist someone in collecting payments owing in respect of services or materials that have been supplied to an improvement (i.e., a construction project)
- The legislative requirements of a construction lien are technical, sometimes complex and impose strict deadlines
- It is imperative that those involved in the construction industry are aware of the legislative requirements that apply to construction liens, and especially the applicable deadlines

Introduction

- Over recent years, Ontario's *Construction Act* (formerly, the *Construction Lien Act*) has undergone significant amendments, some of which affect construction liens
- The purpose of today's seminar is to provide an overview of the key information and requirements relating to construction liens
- Due to the complex nature of construction liens, it is always recommended that a lien claimant seek legal advice if they have questions about liens or wish to exert their lien rights

Traditional Construction Pyramid



2. WHAT IS A CONSTRUCTION LIEN?

What is a Construction Lien?

- A construction lien is a statutory remedy available under the *Construction Act* (Ontario)
- A type of security interest
- Registered against an owner's interest in real property (i.e., land)
OR
- The holdback funds retained by an owner
- By someone who has supplied services or materials to an improvement on the subject land, but remains unpaid in full or in part

The *Construction Act*, R.S.O. 1990, c. C.30

- Ontario legislation
- Similar statutes in other provinces and territories
- In Newfoundland and Labrador, it is called the *Mechanics' Lien Act*
- In British Columbia, it is called the *Builders Lien Act*

A Brief History of Lien Legislation

The Long-Ago Past (pre-1873)

- Subcontractors have no right to claim vs owner
- Only claim vs general contractor
- Risk: general contractor has no \$
- Owner benefits
- *Mechanics' Lien Act* enacted (1873)
- “Mechanics’ lien” created – interest in land

A Brief History of Lien Legislation

The Recent Past – *Construction Lien Act*

- In force 1983
- Person who supplies services or materials to an improvement has lien vs interest of the owner in the lands
- Lien = price of services or materials supplied
- In the event of non-payment, the lands may be sold and the proceeds used to pay the claims of those having valid liens

A Brief History of Lien Legislation

The Recent Past – *Construction Lien Act*

- Must register (preserve) claim for lien within 45 days (section 31)
- Must perfect – start lawsuit – within total 90 days (section 36)
- Must be ready for trial within 2 years
- Problem: long time to get paid

A Brief History of Lien Legislation

The Present – *Construction Act*

Legislative Amendments – Key Dates:

- July 1, 2018: Ontario's *Construction Lien Act* was renamed the *Construction Act* + various amendments took effect
- Dec 2018: Additional amendments were made (but they mainly related to “housekeeping”)
- October 1, 2019: Further amendments took effect, with the most significant being those related to prompt payment and interim adjudication

Legislative Amendments – Key Dates

- As a result, we are currently operating under essentially three separate “regimes” of the *Construction Act* (the “Act”):
 - 1) pre-July 1, 2018;
 - 2) post-July 1, 2018 / pre-October 1, 2019; and
 - 3) post-October 1, 2019

Who is Entitled to a Construction Lien?

- Anyone who has supplied services (including labour) or materials to an improvement and is still owed payment is entitled to a construction lien
- Typically, lien claimants are contractors, subcontractors, suppliers, architects, and engineers

When Does a Construction Lien Arise?

- A lien arises as soon as a person supplies services or materials to an improvement (construction project)

What Types of Projects are Considered Improvements?

The Act defines an improvement as:

- any alteration, addition or capital repair to the land,
- any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
- the complete or partial demolition or removal of any building, structure or works on the land.

What Amounts Can be Claimed in a Construction Lien?

- A person is entitled to lien for the price of the services or materials that have been supplied to the improvement and which remain unpaid
- Includes the value of unpaid invoices, extras, change orders, and holdback
- The amount of the construction lien cannot include the price of services or materials not yet supplied, lost profits due to breach of contract, legal costs, or interest on overdue payments, however, those items can still be claimed in the lawsuit associated with the construction lien

3. HOW IS A CONSTRUCTION LIEN FILED?

Preservation of Construction Liens

- 1st Step – Preservation of the Lien
 - The first step for asserting a construction lien is to “preserve” the lien
 - A lien may be preserved while the services or materials are being supplied or at any time before the expiry of the applicable lien period
- There are two different ways to preserve a construction lien, depending on the owner of the land

Preservation of Construction Liens

- Registered against title to the land:
 - Most commonly, a construction lien is preserved by registering a claim for lien against title to the land in the land registry office where the subject land is located

OR

- Delivered to the owner:
 - If the land is owned by the Provincial Crown (including an applicable Crown agency) or a municipality
 - If the land is a railway right-of-way
 - The construction lien must be preserved by delivering a copy of the claim for lien to the applicable representative of the owner

Preservation of Construction Liens

NOTE:

- Construction liens are not able to be preserved against federally owned lands
- The Act is provincial legislation
- The Ontario legislature is precluded from passing laws in respect of federal property

Perfection of Construction Liens

- 2nd Step – Perfection of the Lien
 - The second step for asserting a construction lien is to “perfect” the lien
- There are two different ways to perfect a construction lien, depending on the owner of the land
- Where the lien attaches to the subject lands
 - the lien claimant commences a lawsuit to enforce the lien
 - and, except where the lien has been vacated from title, the lien claimant registers a Certificate of Action against title to the subject lands

Perfection of Construction Liens

- Where the lien does not attach to the subject lands
 - the lien claimant commences a lawsuit to enforce the lien
- The lawsuit must be commenced in the Ontario Superior Court of Justice, regardless of the amount claimed
- Once the pleadings have closed, the lawsuit can be “referred” (transferred) to the Small Claims Court, which has jurisdiction over monetary claims up to \$35,000

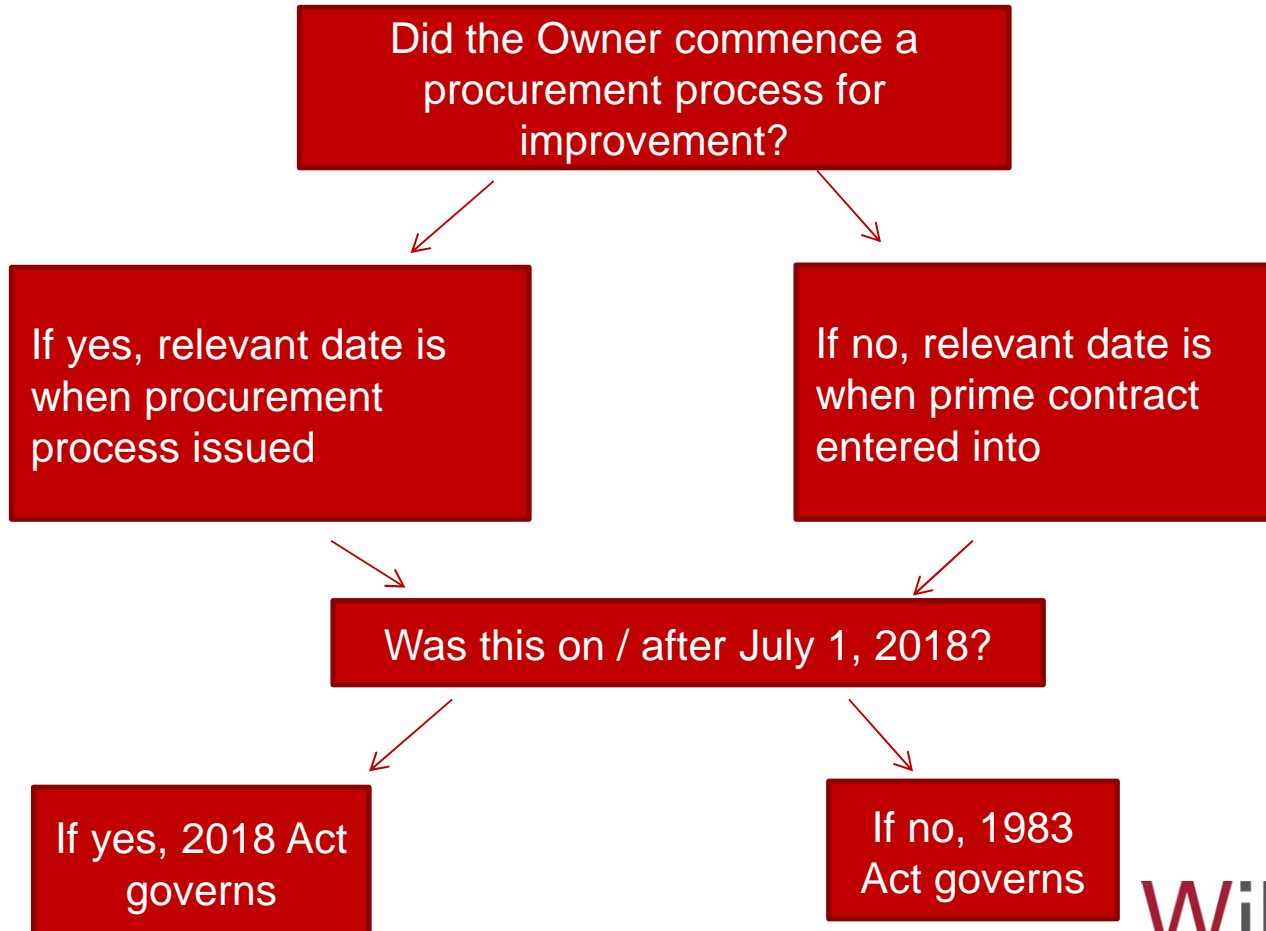
4. WHAT ARE THE DEADLINES THAT APPLY TO CONSTRUCTION LIENS?

Construction Lien Deadlines

NOTE:

- Strict deadlines to preserve and perfect a lien and set action down for trial!
- The deadlines vary depending on which regime of the Act applies
- In order to determine which regime applies, must look to the transition provisions of the Act

Transition Provisions: July 1, 2018



Transition Provisions: July 1, 2018

- Note: must be “procurement process for the improvement” commenced by the owner
- Note: date of prime contract is key, regardless of date any subcontract under prime contract was entered into
- Leased Premises:
 - 1983 Act applies: if lease was entered into before July 1, 2018, but a contract (directly with the owner) for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before December 6, 2018
 - 2018 Act applies: if lease was entered into on or after July 1, 2018

Deadlines for Liens

- Lien Preservation
 - 1983 Act: 45 days from “trigger event” (see slides below)
 - 2018 Act: 60 days from “trigger event” (see slides below)
- Perfection of Lien
 - 1983 Act: 45 days from last date lien could be preserved
 - 2018 Act: 90 days from last date lien could be preserved
- Set Action Down for Trial

Deadline to Preserve Liens

Expiry of Liens:

- See section 31(2) of the Act – Contractor’s Liens
(contractor = party that contracts directly with owner)
- See section 31(3) of the Act – Liens of Other Persons
(other persons = parties that do not contract directly with owner)

Deadline to Preserve Liens of Contractors

- “Trigger event”
 - See sections 31(2)(a) and 31(2)(b) – Contractor’s liens
 - Section 31(2)(a):
 - For services/materials supplied on or before date certified or declared to be date of substantial performance of contract, EARLIER of
 - publication of Certificate of Substantial Performance (“CSP”); and
 - date contract is completed, abandoned or terminated

Deadline to Preserve Liens of Contractors

- Section 31(2)(b):
 - For services/materials supplied where no certification or declaration of substantial performance of contract, or supplied after date certified or declared to be date of substantial performance of contract, EARLIER of
 - date contract is completed; and
 - abandoned or terminated

Deadline to Preserve Liens of Contractors

- Don't forget “deemed completion”:
 - Section 2(3) of Act
 - A contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,
 - (a) 1 per cent of the contract price; and
 - (b) \$5,000

Deadline to Preserve Liens of Other Persons

- “Trigger event”
 - See sections 31(3)(a) and (b) – Liens of other persons
 - Section 31(3)(a):
 - For services/materials supplied on or before date certified or declared to be date of substantial performance of contract, EARLIER of
 - publication of CSP;
 - date person last supplied services or materials;
 - date contract is completed, abandoned or terminated; and
 - date subcontract certified to be completed under s. 33

Deadline to Preserve Liens of Other Persons

- Section 31(3)(b):
 - For services/materials supplied where no certification or declaration of substantial performance of contract, or supplied after date certified or declared to be date of substantial performance of contract, EARLIER of
 - date person last supplied services or materials;
 - date contract is completed, abandoned or terminated; and
 - date subcontract certified to be completed under s. 33

Deadline to Perfect Liens

Perfection of a Lien:

- Section 36(2) of the Act
- A preserved lien must be perfected by the end of either the 45-day period or the 90-day period (as of July 1, 2018) next following the last day, under section 31, on which the lien could have been preserved

Deadline to Set Action Down for Trial

- The lawsuit associated with the construction lien must be set down for trial within the two-year period following the commencement of the lawsuit (date that the Statement of Claim was issued)

What Happens if a Deadline is Missed?

- The deadlines to preserve and perfect a construction lien, and to set a lien action down for trial are strict and must be complied with
- If a deadline is missed, a lien claimant will lose their lien rights and will not be entitled to assert or enforce a construction lien
- Accordingly, it is crucial that those seeking to exercise their lien rights are aware of the construction lien deadlines and seek legal assistance in a timely manner

5. ARE ERRORS IN CONSTRUCTION LIENS FATAL?

The Requirements of a Construction Lien

- The Act specifies that the following information must be included in a claim for lien:
 - the name and address for service of the person claiming the lien;
 - the name and address of the owner of the premises;
 - the name and address of the person to whom the services or materials were supplied;
 - the time within which the services or materials were supplied;
 - a short description of the services or materials that were supplied;
 - the contract price or subcontract price;
 - the amount claimed in respect of services or materials that have been supplied; and
 - a description of the premises

Will an Error Invalidate a Construction Lien?

- To protect lien claimants from losing lien rights due to a failure to strictly comply with the form and content requirements of a construction lien, the Act includes provisions that allow minor errors in construction liens to be cured
- A claim for lien will not be invalidated if the required information contains a minor error or irregularity unless, in the opinion of the Court, a party has been prejudiced as a result of the error
- If the error has caused prejudice, then the claim for lien is only invalidated to the extent of the prejudice suffered

Will an Error Invalidate a Construction Lien?

- The Act states that, provided no prejudice has been caused, the following errors will not invalidate a claim for lien:
 - a minor error or irregularity in,
 - the name of an owner, a person for whom services or materials were supplied or a payment certifier,
 - the legal description of a premises, or
 - the address for service; and
 - including an owner's name in the wrong portion of a claim for lien

6. OWNER'S OPTIONS TO ADDRESS LIENS

What Options are Available to an Owner to Address Construction Liens?

- Once the lands or the holdback funds are encumbered with a construction lien, the owner's ability to sell the lands, obtain a mortgage or funding advance, or pay out the holdback will be negatively impacted
- There are two ways in which a construction lien can cease to attach to the subject lands or the holdback:
 - Construction lien is vacated
 - Construction lien is discharged

Vacating a Construction Lien

- By posting security (in the form of cash, letter of credit or lien bond) at Court
- Replaces the security provided by the lands or the holdback funds with the posted security
- The amount of security = amount of lien, plus the lesser of \$250,000 or 25% of the amount of the lien in respect of costs (if 2018 Act applies)
- Once lien is vacated, the owner can sell the lands, obtain financing or pay out the holdback funds without difficulty since the lands or the holdback funds are no longer encumbered with the construction lien

Discharging a Construction Lien

- Typically, a construction lien is discharged once it has been settled or proven to be invalid
- It is essentially “cancelled”, meaning that it ceases to exist
- Any rights and security associated with the lien are also extinguished
- NOTE: once a lien is discharged, it is final and the lien is incapable of being reinstated or replaced at a later date
- A lien claimant should not discharge a construction lien unless and until they are absolutely certain that they wish to give up their lien rights

QUESTIONS?

Wilson Vukelich LLP can help ensure that your construction matters are handled effectively and efficiently, and in manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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