

BEST PRACTICE tools for CONSTRUCTION LAW

1. Construction Liens and Related Issues

Right to Lien

What is a construction lien?

A **construction lien** provides a form of security for people or companies who supply services or materials for a construction project and who are not paid, but before a determination by a court that the amount is owing.

The construction project can be residential or a corporate/commercial project. A lien is registered on title to the property. This gives the person who registered the lien an interest in the property (and not just an interest against the party that owes the money), similar to how a bank registers a mortgage against a property.

A lien can be registered only for the value of the services or materials for an improvement. In Ontario, construction liens are governed by the *Construction Act*, R.S.O. 1990, c. C.30.

Acquiring Lien Rights

You acquire lien rights when you first supply services or materials for an “improvement” to a property. The *Construction Act* defines “improvement” very broadly, and includes alterations, additions, capital repairs, construction, and demolition. The *Construction Act* now expressly provides that the “supply of services” includes the supply of a design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land. This will apply if the project is residential or a corporate commercial project.

You acquire lien rights whether you work directly for the owner of the project, or you are working for a general contractor or subcontractor. In order to have lien rights, the materials or services must actually be delivered to or provided for the benefit of the project.

Calculating the value of a Lien

Under the *Construction Act*, you can register a lien for the amount owing in relation to the improvement. This covers amounts owing for labour, materials, and other services agreed to in your contract or otherwise provided.

Since you can only lien for amounts owing, paid invoices cannot be included in the lien amount. You also can only lien for the value of the actual unpaid goods and services, including direct delay costs, but you cannot include interest in your lien. It is important to be accurate in the value of your lien. If you register a false or exaggerated lien, you may be liable if it causes harm.

Timing of Lien Rights

Transition rules post-July 1, 2018

It is an interesting time for the construction industry in Ontario because the legislation was significantly changed on July 1, 2018. Your construction lien will be governed by one or the other, depending on the timing of certain events in your construction project.

Your lien will be governed by the pre-July 1, 2018 legislation if the contract for the improvement for which you supplied goods or services was entered into before July 1, 2018, or a procurement process for the improvement for which you supplied goods or services was commenced by the owner before July 1, 2018, or the property is leased and the lease was entered into before July 1, 2018 and the improvement was commenced between July 1 and December 6, 2018.

This guide refers to the rights and timelines contained in the *Construction Act*, as it is the version that is currently in force. However, you may need to seek legal advice as to which Act applies to your contract and lien, since there are important differences that affect your rights.

Deadlines for preserving or perfecting a Lien

The timing of your lien rights depends on whether you are a contractor or a subcontractor. You are a **contractor** if you enter into a contract directly with the owner of the project. You are a **subcontractor** if you enter into a contract with another party (i.e. a general or prime contractor) who has entered into a contract with the project owner.

The *Construction Act* establishes strict deadlines for expiry of lien rights, so you must act quickly if you intend to make a lien claim.

If you are a **contractor**, and you have supplied materials or services on or before the date of substantial performance of the contract, your lien rights expire 60 days (**45 days if under the pre-July 1, 2018 regime**) after the **earliest** of:

- ▶ the date on which substantial performance is published; and
- ▶ the date the contract is completed, abandoned, or terminated.

If you are a **contractor**, and you have supplied the materials or services after the substantial performance date, or there is no substantial performance date, your lien rights expire 60 days (**45 days if under the pre-July 1, 2018 regime**) after the **earliest** of:

- ▶ the date the contract is completed; and
- ▶ the date the contract is abandoned or terminated.

If you are a **subcontractor**, and you supply services or materials before the substantial performance date in your contract, your lien rights will expire 60 days (**45 days if under the pre-July 1, 2018 regime**) after the **earliest** of:

- ▶ the date on which the certificate or declaration of substantial performance is published;
- ▶ the date on which you last supply services or materials;
- ▶ the date on which your contract is completed, abandoned, or terminated; and
- ▶ if you supplied services or materials under a subcontract, the date the subcontract was certified to be completed.

If you are a **subcontractor**, and you supply services or materials after the substantial performance date in your contract, or there is no substantial performance date, your lien will expire 60 days (**45 days if under the pre-July 1, 2018 regime**) after the **earliest** of:

- ▶ the date on which you last supply services or materials;
 - ▶ the date the contract is completed, abandoned, or terminated; and
- if you supplied services or materials under a subcontract, the date the subcontract was certified to be completed.

Substantial Performance

Substantial performance refers to a point in time when the contract (whether residential or corporate/commercial) is mostly, but not entirely, completed. There are two factors determining whether your contract will be considered to be substantially performed:

- ▶ the improvement for which you were providing materials or services (or a substantial part of the improvement) is be ready for use or is already being used for the purposes intended; and
- ▶ the improvement is able to be completed, or any outstanding issues with the improvement can be easily corrected at a cost of no more than the following formula: is 3% of the first \$1,000,000 of the contract price, 2% of the next \$1,000,000 of the contract price and 1% of the remainder of the contract price. **(This calculation is different than the pre-July 1, 2018 regime).**

Preserving and Perfecting Liens

What are the deadlines for preserving and perfecting my liens?

Preservation of your lien refers to the process of either registering the lien on title to the property, or if the lien does not attach to the premises, by giving the owner a copy of the lien. In order to properly preserve your lien, you must register or serve it within 60 days **(45 days under the pre-July 1, 2018 regime)** after your lien rights arise, based on the triggering events described above. Preservation is a very important step because you lose your lien rights if you do not preserve your lien within 60 days **(45 days under the pre-July 1, 2018 regime)**.

You do not receive your unpaid amounts by simply preserving your lien on title. You must also perfect your lien by commencing a lawsuit in court based on the lien and registering a Certificate of Action on title to the property. You must perfect the lien within 90 days **(45 days under the pre-July 1, 2018 regime)** of the last day that your lien could be preserved, based on the triggering dates above.

However, the act of preserving and perfecting a lien will not guarantee judgment. The lien claimant then needs to prove its entitlement to court. The lien attempts to secure payment before there is a determination on entitlement.

Leasehold Improvements

If you supply materials or services for an improvement for a tenant under a lease (residential or corporate/commercial), and not the owner of the property, you can still protect yourself with a lien. If the improvement for which you provided materials or services is accounted for under the lease or a renewal of that lease, or the improvement is accounted for in any other related contract to which the landlord is a party, the lien attaches to the landlord's interest in the property.

Condominiums

There are special considerations if you have supplied materials or services that relate to the common elements of a condominium building. You must provide a written notice of lien to the condominium corporation and to every unit owner.

However, this is not necessary if you are supplying goods or services for a specific condominium unit owner. In that scenario, you are only required to provide written notice of lien to the owner of that unit.

Holdback: What is it and when is it released?

Each payer of a contract or subcontract in a construction project must retain an amount equal to 10% of the price of the services or materials supplied. This is called "holdback". Holdback acts as a form of protection, ensuring there is a pot of money available to try to satisfy lien claims. Holdback applies to all projects. Holdback must be retained until all liens that may be claimed against that payer have expired or are resolved.

Once this time passes, the holdback is released the contractors and subcontractors that are owed it. For larger projects, there are mechanisms for early holdback release, as contractors and subcontractors may otherwise be required to wait a long time until all potential liens expire or are resolved. It is important to note that holdback requirements flow through the construction pyramid.

If you enter into a subcontract with a subcontractor below you (meaning you are the payer), you must hold back 10% of the amount you owe to the subcontractor.

Trust Claims

The *Construction Act* establishes statutory trusts to protect those who provide materials and services for an improvement. If you enter into a contract directly with an owner, all amounts received by the owner for the financing of the improvement are held in trust by the owner for you as a contractor providing materials or services.

If you enter into a contract with a contractor or subcontractor, all amounts received by the contractor or subcontractor on account of the improvement are held in trust for you. This is a powerful security because it even applies to amounts that the contractor or subcontractor has not yet been paid, but are owing to it.

It is important to note that these trust provisions run both ways - if you enter into a subcontract where you are the payer, you hold the amounts in trust for the subcontractor.

Section 39 “right to information” requests

As a lien claimant or a beneficiary of a trust, you have the right to request information from any party above you relating to the improvement, including the owner, and any contractors or subcontractors or landlord.

You can request information including the parties to the contract, the price of the contract, the state of accounts, any performance bonds that may exist, and certain payment terms. You must make the request in writing, and the party that you requested the information from must provide a response within 21 days.

If you have supplied materials or services to an owner of a home that is being sold, you can also request information about the sale.

Case Studies

- 1 You have a contract with a homeowner who is renovating their home. Under the contract, you are to provide design services and materials, and the owner is to pay you an hourly rate with interest on any arrears. You completed the work and provided one invoice for all of your services. The owner paid a portion of the invoice, but disputed some of the charges on the invoice and has refused to pay the remaining amount. Can you register a lien and if so, what can you include in the lien?

Yes, you can register a lien. You supplied services and materials for the owner’s renovations, which constitute an “improvement”. You can include the unpaid amounts for your services rendered and any materials actually supplied for the project. You cannot include the paid amounts of the invoice, the interest, or amounts of materials not directly supplied to the project.

- 2 You have a subcontract with the general contractor of a construction project where you are to design the lobby for a new condo building. You provided monthly invoices to the contractor. The contractor ceased paying your invoices due to cash flow problems, but you continued to work and completed the contract. When and how do you preserve and perfect your lien?

You must preserve your lien by registering on title of the condo building within 60 days of completing the contract. Since you provided services for the lobby, which is a common element, you must provide a written notice of lien to the condo board and all unit owners. To perfect your lien, you must commence a lawsuit in court against the contractor and register a Certificate of Action on title to the property within 90 days.

2. The *Construction Act*: Amendments coming into force on October 1, 2019

Prompt Payment

How do I know if prompt payment applies to my project?

The prompt payment scheme is a new development in the *Construction Act*. It will apply to all contracts entered into on or after October 1, 2019. It ensures that contractors and subcontractors are paid on time. The prompt payment regime is mandatory and is triggered by the delivery of a “proper invoice” (defined below) from the contractor to the owner.

You are a **contractor** if you enter into a contract directly with the owner of the project – this would apply if you are a consultant who contracts with the owner. Prompt Payment applies to residential and corporate/commercial projects.

How does prompt payment work?

The basic prompt payment structure operates on a series of timelines. The timeline for the payment of your invoice depends on your relationship to the other parties in the construction project, i.e. whether you are a contractor, subcontractor, etc.

Prompt payment ensures that everyone who supplies materials or services to an improvement is paid on time. Prompt payment starts when the contractor submits a “proper invoice” to the owner.

It operates on a series of timelines where each position in a construction relationship (i.e. owner, contractor, subcontractors, etc.) must pay those “beneath” it within a designated time period after being paid. If a party wishes to dispute an invoice received, it must submit a notice of non-payment to those it is supposed to pay.

What is a proper invoice?

In order to benefit from the new prompt payment scheme, it is important to submit invoices that meet the standards of a “proper invoice” under the *Construction Act*. A proper invoice must be delivered on a monthly basis, unless the contract states otherwise.

A proper invoice must be a written bill or request for payment and must contain the following information, as well as any other requirements specified in the contract:

- ▶ the contractor’s name and address;
- ▶ the date of the proper invoice and the period during which the services or materials were supplied;
- ▶ information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied;
- ▶ a description, including quantity where appropriate, of the services or materials that were supplied;
- ▶ the amount payable for the services or materials that were supplied, and the payment terms;
- ▶ the name, title, telephone number, and mailing address of the person to whom payment is to be sent; and
- ▶ any other information that may be specified in the *Construction Act* regulations.

Payment Timelines

The timeline for payment depends on two factors: (1) when the contractor delivered the proper invoice to the owner, and (2) your relationship to the other parties in the project.

If you are the contractor, you must deliver your proper invoice directly to the owner. The owner must pay you within 28 days of receiving the proper invoice. If you are a subcontractor, the contractor must pay you within 7 days after receiving payment from the owner. If you are a sub-subcontractor, the subcontractor must pay you within 7 days after receiving payment from the contractor.

An owner can dispute the contractor's proper invoice by submitting a notice of non-payment within 14 days of receiving the proper invoice. If a contractor intends not to pay a subcontractor, either because it was not paid by the owner or it disputes the subcontractor's invoice, the contractor must give notice of non-payment to the subcontractor within 7 days of receiving payment or notice of non-payment from the owner.

If a subcontractor intends not to pay a sub-subcontractor, either because it was not paid by the contractor or it disputes the sub-subcontractor's invoice, the subcontractor must give notice of non-payment to the sub-subcontractor within 7 days of receiving payment or notice of non-payment from the contractor.

If you are not paid, you can refer the matter to adjudication, discussed below, or commence a lawsuit in the court for the unpaid amounts.

Each has its own advantages and disadvantages, and will depend on factors such as the nature of the claim, the unpaid amounts, the relationship between the parties.

Adjudication

What is an adjudication?

Adjudication is a new dispute resolution mechanism under the *Construction Act* that will be available to parties as of October 1, 2019. It is intended to be faster and more cost-effective than the courts. This can help resolve disputes while keeping the construction project on track.

How do I know if adjudication applies to my project or dispute?

Adjudication is available for all construction contracts and subcontracts in Ontario entered into on or after October 1, 2019 (unless the procurement process commenced before October 1, 2019). This applies to residential or corporate/commercial project. A party can refer the following types of disputes to adjudication, even without consent of the other party:

- ▶ the valuation of services or materials provided under the contract;
- ▶ payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- ▶ disputes that are the subject of a notice of non-payment under the prompt payment scheme; and
- ▶ payment or non-payment of holdback.

Timeline for Adjudication

If you wish to refer a matter for adjudication, you must deliver a notice of adjudication to the other party to the dispute.

The notice of adjudication must include the names and addresses of the parties, the nature and a description of the dispute, the nature of the redress sought, and the name of a proposed adjudicator to conduct the adjudication.

You must deliver the notice of adjudication to the other party before the date that the contract or subcontract is completed. However, this deadline may be extended by consent of the parties.

Within 4 days of issuing the notice of adjudication, the proposed adjudicator must either consent to or reject the appointment. If the adjudicator does not consent, the

continues

Timeline for Adjudication (*continued*)

[...] overseeing authority will appoint an adjudicator within 4 days, and that adjudicator must consent or reject within 7 days.

Once an adjudicator is appointed, the party initiating the adjudication must send its supporting documents to the adjudicator within 5 days of appointment. The adjudicator must then issue a determination of the dispute within 30 days of receiving the documents.

Who are the adjudicators?

An adjudicator is the person appointed to decide the dispute. A construction adjudication may only be conducted by an adjudicator that is listed in the government registry.

The parties can agree on an adjudicator, or may request that an adjudicator be appointed. However, the parties cannot pre-select an adjudicator in the contract.

Adjudication Outcomes

Construction adjudication generally involves monetary disputes, and an adjudicator is empowered to determine that one party to the adjudication must pay the other.

Payment must be made within 10 days of the determination being issued. If payment is not made within 10 days, the successful party may claim interest, suspend work, register a construction lien (although adjudication is not a prerequisite to registering a lien), and register the adjudicator's decision as a judgment in the court.

If the unsuccessful party wishes to challenge the adjudicator's decision, it can bring an application in the court within 30 days to set the decision aside.

Case Studies

- 1 You have a subcontract with the general contractor of a construction project where you will be paid for design services and materials. You also have a subcontract where you will pay a supplier for the materials.

The supplier provided lower quality materials than provided for in the subcontract, so you acquired replacement materials yourself. You were paid on time by the contractor, but you wish to dispute the invoice of the supplier with respect to those materials. What must you do?

You must submit a notice of non-payment to the supplier within 7 days of being paid by the contractor. If the supplier chooses to dispute the notice of non-payment, it may refer the matter to adjudication.

- 2 You were hired by an architect who was hired by general contractor. The general contractor was hired by the owner of the project. The contractor submitted a proper invoice. Assuming there are no disputes, when can you expect to be paid?

You can expect to be paid within 42 days of the proper invoice being submitted. The owner must pay the general contractor within 28 days. The general contractor must then pay the architect within 7 days. The architect then must pay you within 7 days.

Applicable ARIDO Bylaws and Practice Standards

Section A- Business and Professional Ethics

6. A Member shall make full disclosure of the Member's fees, the services to be performed and the method of determining compensation for those services, and shall maintain appropriate documentation in the form of a written contract or other form to constitute evidence of such disclosure.
14. A Member shall meet the Member's financial obligations to the Association and to the Member's employees, suppliers and other creditors including prompt payment of premiums, insurance, levies, statutory deductions, payroll and accounts.
16. A Member shall to the best of the Member's ability carry out the terms of every contract to provide interior design services that the Member enters into in accordance with the terms thereof.
17. A Member shall not withdraw the Member's services except for a good cause and upon reasonable written notice in accordance with a written agreement, if any. Where the services of a Member are terminated, the Member shall make best efforts to cooperate with other Members or professionals to ensure the continuity of the services.

Section I- Duty to the Association

3. A Member shall maintain an office from which the practice of interior design is carried out and maintain books, records and accounts showing fees and disbursements charged for services, correspondence, copies of certificates, statements, notices and other documents relating to the administration of contracts and copies of all designs, working papers exhibited or used for the practice in interior design projects.

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