Common Errors in Construction Litigation - Best Practices to Avoid Them and What to do When They Occur

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Introduction

This paper discusses common errors that occur in construction litigation, reviews best practices to avoid them, and provides some advice about what to do when errors occur.[2]

I. Does Your Client Have a Lien in the First Place?

(a) "Lienable Supply"

Under the *Construction Lien Act*, the first threshold to be met is whether the supply of services or materials gives rise to the right to a lien. Thereafter there are time frames for preserving and perfecting the lien, and setting the action down for trial that can be pitfalls for the unwary practitioner.

The jurisprudence considering lienable supply is far from crystal clear. Further, the definition of "improvement" has recently been amended in the Ontario *Construction Lien Act*, RSO 1990, c.C-30, as amended (the "*Act*").

Forty years ago the Supreme Court in *Clarkson Co Ltd v Ace Lumber Ltd*[3], Ritchie J. sought to define the limits of who could be considered a "lien claimant". In *Clarkson*, the creditor company supplied the debtor company form work for concrete floors. The Supreme Court of Canada held a strict interpretation is required when determining whether a person's work constitutes a lienable claim. Applying an earlier Ontario Court of Appeal decision, Ritchie

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[2] Other authors have written on this topic. See H. Kirsh, "Errors and Omissions in Construction Lien Litigation" (1995), 19 CLR (2) 160, and H. Kirsh and M. Alter, "Problems with Liens" forthcoming in the 2011 *Journal of the Canadian College of Construction Lawyers*

[3] [1963] SCR 110, under the then "*Mechanics Lien Act*".

J. made reference to *Hubert v. Shinder*, which held that a claim for attaching laundry machinery to water and sewage systems already installed in the building was not part of an improvement to a building that could give rise to a lien.[4] Two Ontario decisions dealt with this question: in *310 Waste Ltd*, a majority panel of the Divisional Court upheld lien rights, whereas in *Kennedy Electric* a majority of that same Court denied lien rights. *Kennedy Electric* was affirmed at the Court of Appeal, and the further appeal in *310 Waste Ltd* [2006] OJ No 3656, released September 15, 2006) was dismissed as moot.

Justice Ellen MacDonald, for the majority in *310 Waste Ltd v Casboro Industries*, held that the removal of tires was both an "alteration" and "repair" to land, and was therefore an "improvement" under the *Act*.[5] The issue in *310 Waste* was whether lien rights arise when environmental waste is removed following a Ministry of Environment order.[6] In holding that the motions judge was correct in concluding that the removal of waste was sufficient to give rise to a lienable interest, E. MacDonald J. said:

> Weekes J. concluded that the work performed in removing the tires constituted both an alteration and a repair to the land. As such it constituted an improvement and not maintenance. Maintenance does not give rise to a construction lien. Weekes J. found the removal of contaminated tires to have clearly enhanced the value of land. It was not argued otherwise before him.
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> We agree with this analysis. Accordingly, we would dismiss this appeal.

Hence, the focus in *310 Waste* was whether the work enhanced the value of the land.

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[4] *Hubert v Shinder*, [1952] OWN 146 at para. 8.

[5] *310 Waste Ltd v Casboro Industries Ltd et al* (2005), 79 OR (3d) 75 (Ont SCJ) [*310 Waste*]; s1(1) of the *Act*.

[6] *Ibid.* at para. 1.

In *Kennedy Electric v Rumble Automation Inc* the Ontario Divisional Court affirmed a trial decision as to what constitutes an improvement.[7] Kennedy and its subcontractors assembled offsite components of an assembly line for the manufacture of truck frames. In the lower court decision, the trial judge referred to the Attorney General's Advisory Committee's Report on the draft *Construction Lien Act*.[8] In this Report, the committee emphasized the underlying rationale of the *Act* which was to protect the interests of those persons who contribute their services or materials towards the making of improvements to premises. Further, the Report suggested that the definition of "improvement" was drafted in order to restrict lien entitlement to the construction and building repair industries. The portability of the components of the assembly line was key in the trial judge's holding, and the higher court's affirmation, that the work of Kennedy did not amount to a lien claim.[9] O'Driscoll J. stated:

> "Except for the usual wear and tear that occurs with the passing of time, the land and the building that housed the assembly line would be the same as it was before the assembly line was installed. The assembly line is all about machinery and equipment and has nothing to do with "improvements" *to the land and/or the buildings* of the St. Mary's plant." [italics added]

Also, the majority focussed on their view of the salient facts which were: (1) the new building addition was intended to accommodate a new assembly line but was not an integrated construction project; (2) the additional building was clearly subject to the Act but the assembly line was not; (3) the work performed by Kennedy was exclusively related to the assembly line and not the existing building or building addition; (4) the assembly and installation of the assembly line apparently occurred months after the building addition had already been

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[7] (2006), 208 OAC 156 (Ont SCJ) [*Kennedy Electric*], affirmed [2007] OJ No 3657 (CA).

[8] *Kennedy Electric Ltd v Rumble Automation Inc* (2004), 73 OR (3d) 530 (Ont SCJ).

[9] *Supra* note 6 at para. 31.

completed; (5) an assembly line of significant size could be readily disconnected from the additional building with nominal damage; (6) based on credible evidence, the owner had demonstrated a history of moving some of its assembly lines from one factory to another; (7) there were two other equipment lines in the building addition that were constructed entirely independently of the Kennedy work. [10]

The dissent of Justice Chapnick, in *Kennedy Electric*, empahsized different facts and differed in her application of an earlier Court of Appeal decision, *Hubert v Shinder*, referred to above. She did not take *Hubert v Shinder* to stand for the proposition that the installation or repair of machinery within a building did not amount to an *improvement*. [11] She saw the issue on appeal as an issue of law to which a correctness standard of review applied. Justice Chapnick decided the trial judge had placed undue emphasis on the portability of the assembly line and ignored important factors showing that the parties viewed the project as an integrated whole. Justice Chapnick found that because the additional building appeared to have been designed and built specifically to accommodate the assembly line, the trial judge and the majority were wrong to view the building as a generic type of industrial building. The installation of the massive assembly line "enhanced the value of the premises" (the language in the *Act* dealing with "improvement"), whereas the trial judge emphasised that it could be disconnected and used elsewhere.

In fairly short reasons, the Ontario Court of Appeal affirmed the judgment of the Divisional Court. Justice Armstrong wrote that in the absence of palpable and overriding error,

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[10] *Supra* note 6.

[11] *Ibid* at para. 67.

the trial judge was entitled to deference.[12] The finding of the assembly line's portability was open to the trial judge on the evidence. In rejecting each ground of appeal, the Justice stated repeatedly that the determination of what constitutes an "improvement" is a fact finding exercise. Although a trial judge must apply the statutory definition of the term to the evidence, and therefore must engage in deciding a question of mixed fact and law, the factual determination was said to be the "far more significant element of the exercise".[13] Leave to appeal to the Supreme Court was refused.[14]

Recent amendments to the *Act's* definition of "improvement", via Bill 68 passed by the Ontario Legislature and given Royal Assent in October, 2010 clearly enlarge the definition, and appear to have reversed the result in *Kennedy Electric*. Now the definition expressly includes "the installation of industrial, mechanical, electrical or other equipment", where the equipment installed is *essential* to the *normal or intended use* of the lands or building and is of a kind reasonably likely to be sold *together* with the building or land.[15] This renders the portability question irrelevant, and focuses the analysis instead on whether the installation of equipment is (1) essential to the characteristic use of the lands or building and (2) is intended to form an integrated whole with the lands or building, in the sense they are likely to be sold together. No doubt we will see cases percolate upward on issues as to whether, say roof-top equipment, or conversely equipment installed may be more or less valuable, relatively easily portable, but nonetheless "installed". The concept of "installation" is new to the definition of "improvement"

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[12] *Kennedy Electric Ltd v Dana Canada Corp,* [2007] OJ No 3657 (CA).

[13] *Ibid.* at para. 52.

[14] [2007] SCCA No 560.

[15] Bill 68, Schedule A, s2(2).

in the *Act* and appears to connote a sense of attachment and integration, at least for the useful life of the equipment. The Divisional Court's and Court of Appeal's views with an emphasis on portability is also present in *3726843 Canada Inc (cob DBA Group) v 879115 Ontario Ltd.*[16] In this case, the plaintiff was a vendor and distributor of interior wall and furniture systems. Glithero J. focussed on the degree of attachment of the material to the building:

> "There are many cases that have considered the degree of annexation of the material to the building and whether or not that made the material lienable. I think those cases make it clear that the use of a few screws to fasten material will generally not be determinative, nor will electrical wiring. Rather one must consider the circumstances of the particular case, the nature of the material, the application of the material within the particular business and the particular building, and determine whether in all of those circumstances the materials were intended and acted as an improvement to the building, or on the other hand, as an improvement and integral aspect of the business conducted therein.
>
> In my opinion the moveable walls/furniture system supplied here did not constitute a lienable improvement. I accept Benninger's evidence that he intended it to be a portable piece of his real estate business office plant. While the plaintiff seeks to stress the effort and expense that would be required to disassemble and move it, it was sold in part based on those features. The onus of proving that the material supplied constituted a lienable improvement lies on the plaintiff. I am not so satisfied, and find the opposite to be the case". [17]

Thus, the portability of the office furniture was determinative in assessing whether there was a lienable claim. Arguably, office furniture is inherently more portable than an assembly line, and not necessarily likely to be sold with the lands or building itself.

The installation of a portable shuttle car *Wolfedale Electric Ltd v RPM's Systems Automation & Design Quality in Motion Inc*, a Superior Court of Justice decision, did create a lienable interest where the work appeared to have no other valuable purpose outside of the

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[16] (2005), 42 CLR (3d) 220 (Ont SCJ) [*3726843 Canada*].

[17] *Ibid.* at para. 25, 26.

context of the construction in question.[18] In this case, the parties contracted for the performance of electrical work on the installation of a scrap shuttle car. The defendant in *Wolfedale Electric* argued that the plaintiff only provided a service and/or materials and these services were not a lienable interest because they did not constitute "an improvement" as defined by the *Act*. Sections 14 and 15 of the *Act* state (in part):

> 14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials…
>
> 15. A person's lien arises and takes effect when the person first supplies services or materials to the improvement."

Kruzick J. held that the end result was "an improvement" because the shuttle car operation would have no purpose and could not have functioned in the absence of the improvements provided by the plaintiff.[19]

A recent example of a supply that was too remote to create a lienable interest was the provision of financial consulting services for a developer to obtain funding for the development of land. [20] The financial consulting was not directly related to the purpose of enabling the owner to proceed with construction. A claim for lien registered to support an unpaid account was ordered to be vacated. Similarly, in *940691 Ontario Inc v Phillips Services Inc*, transporting contaminated soil and other non-hazardous solid waste materials from various sites to a transfer

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[18] *Wolfedale Electric Ltd v RPM's Systems Automation & Design Quality in Motion Inc* (2004), 47 BLR (3d) 1 (Ont SCJ).

[19] *Ibid.* at para. 30.

[20] *1353025 Ontario Inc v Walden Group Canada Ltd*, 2006 CarswellOnt 2583 (Ont SCJ).

station was not a lienable supply.[21] Arguably this case differs from *310 Waste Ltd*, because the lienable supply (transporting) was not an alteration or repair "to any land."

Together, these decisions illustrate the continued difficulties in applying the jurisprudence as to what constitutes a lienable supply. There does, however, appear to be the beginnings of an approach that focuses on the potential of the work to increase the inherent value of the land, as in *310 Waste*, and the degree of attachment of the work to the underlying operation and the portability of the work, as illustrated in *Kennedy Electric.* I would argue this is precisely what has occurred in the amended definition of improvement.

In contrast to the inconsistency relating to what constitutes a lienable supply, an issue that is more consistent in the jurisprudence is the question as to the quality of notice required to create a lien on a landlord's interest. Nonetheless, errors continue when dealing with leasehold interests.

(b) Liening a Landlord's Interest

Defining the quality of notice needed in order to lien the interest of a landlord is important to construction transactions where the principal party is a tenant. The *Act* sets out the requirements for liening a landlord's interest in s.19(1):

> 19. (1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made. [22]

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[21] (2006), 50 CLR (3d) 204 (Ont SCJ).

[22] *Supra* note 4 [*Act*] at s19(1).

The recent case of *1276761 Ontario v 2748355 Canada Inc* addresses the critical issue of formulating the components of sufficient notice to a landlord.[23] In *1276761 Ontario*, a tenant retained a contractor to build a new restaurant in the landlord's premises and, because of additional work required by the subtenant, the contract price increased. The landlord was aware the work was being done, in part through a written memorandum. Also, it was argued that the landlord was aware of "notice events" including details of the work, participated in meetings with the contractor, reviewed and approved the plans and drawings for the work, and was generally aware of the construction costs. However, the landlord was not provided with a copy of the contract nor "warned" of the fact the tenant would look to the landlord for payment if the tenant defaulted.[24] The initial motion decision, by Bryant J., applied *Vinneri Engineering Ltd v Zonenward Leasex Management Inc* [25] where Master Sandler set a high standard for sufficient notice to a landlord:

> At a minimum, the "notice" must contain the basic elements of Form 2, being the name of the landlord and a reference to his capacity as landlord, the details of the contract, a description of the improvement to be made, a sufficient description of the premises, a reference to the contractor and the tenant by name and by capacity, and words sufficient to make it clear that the contractor is looking to the landlord's interest in the land, in addition to the tenant and his interest in the leasehold, to be responsible for payment of the improvement to be made, and additional words sufficient to make it clear that the landlord must give written notice back to the contractor within a certain time, if it wishes to disclaim responsibility for the improvement to be made, and additional words sufficient for the landlord to know when the 15 day period, within which he may disclaim liability, commences. Of course the safest procedure is for the contractor to use Form 2, in which case there can be no question of the adequacy of the notice. Failing that, each case must be looked to on its facts as I am doing in the present case.[26]

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[23] 2006 CarswellOnt 5392 (Ont SCJ) [*1276761 Ontario*].

[24] *Ibid.* at para. 3.

[25] *1276761 Ontario Ltd v 2748355 Canada Inc* (2005), 44 CLR (3d) 284 (Ont SCJ).

[26] [1994] OJ No 1649 (Ont Master) at para. 39 [*Venneri Engineering*].

On appeal, the unanimous Divisional Court upheld the result, and had no quibble with a best practice of using Form 2 under the *Act*. If Form 2 is not used, the notice must be in writing, and "notice events" are not sufficient in and of themselves to constitute notice in the absence of a writing. The notice must "be sufficiently distinct and memorable to allow the landlord to know when the 15 day period, within which he may deny liability, commences". A leave application to the Court of Appeal was dismissed (Endorsement, September 22, 2006).

II. There is a Lien but…

Once the threshold question of entitlement to a lien has been determined, mistakes may still occur when attempting to preserve or perfect the lien. The *Act* contains a curative provision which has been interpreted broadly, once a determination has been made as to whether the supply of services or materials gives rise to a lien. S.6 of the *Act*, with a headnote titled "minor irregularities," indicates that no pertinent lien document ("certificate, declaration or claim for lien") is invalidated by a failure to strictly comply with certain enumerated provisions, including the preservation of lien claims (subsection 34(5)) unless a person has been prejudiced, and then the invalidity is only to the extent of the prejudice suffered.[27] Subsection 34(5) states:

> **"Contents of claim for lien-**
> (5) Every claim for lien shall set out,
>
> (a) the name and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which those services or materials were supplied;
>
> (b) a short description of the services or materials that were supplied;
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> (c) the contract price or subcontract price;
>
> (d) the amount claimed in respect of services or materials that have been supplied; and
>
> (e) a description of the premises,

[27] *Supra* note 4 [*Act*] at s.6.

> (i) where the lien attaches to the premises, sufficient for registration under the *Land Titles Act* or the *Registry Act*, as the case may be, or
>
> (ii) where the lien does not attach to the premises, being the address or other identification of the location of the premises.

S.6 of the Act may cure common mistakes that occur in the preparation and registration of such lien documents provided that no prejudice is suffered by another party. Various case law has demonstrated the utility of s.6 of the *Act.*

(a) Time Stated for Work Performed Misstates the Date

An incorrect date of last supply is not necessarily fatal to a lien claim. This is illustrated in *Michelin Group Inc v Forsan Construction Ltd.*[28] The date of last supply may be crucial to determining whether a lien has expired. In *Michelin Group*, the plaintiff made a motion at trial to amend its claim for lien to a later last date of last supply of services. Carnwath J. dismissed the motion, and held that:

> If a lien claimant swears in an affidavit required by the Act that certain services were performed to and including a specific date, other interested parties should be able to rely on that date; to find otherwise would require the point to be litigated in every instance to establish the last date work was performed or materials delivered.[29]

Even though it was recognized that a claim for a lien can be amended by the trial judge to extend the actual date of last supply, the lien claimant was not successful in *Michelin Group* because the claim for lien was valid (ie. had been registered within 45 days of last supply), but the action to perfect the lien was commenced out of time (ie. more than 90 days from last supply), and section 6 was held to have no application since the claim for lien itself was not invalid, the claim for lien was valid, but the lien was then improperly perfected.

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[28] (1994), 18 OR (3d) 523 (Gen Div) [*Michelin Group*].

[29] *Ibid.* at 526.

Demik Construction Ltd v Royal Crest Lifecare Group applied the same principle as *Michelin Group* to a different result, in part, because the motion to dismiss the lien was brought before trial under section 45 of the *Act*. The lien claimant successfully defended the pre-trial motion to declare that the lien had expired.[30] In dismissing the defendant's motion to challenge the lien, the court referred to the statement of claim which corrected the date from the affidavit of verification as to when the materials and services were last provided. Further, because the lien in *Demik* was a contractor's lien, and not a sub-contractor's lien, the motions judge declined to find the "date of last supply" to be the last date set out in the lien. Under the *Act*, and subject to published substantial completion certificates, a contractor's contract is deemed complete only when completed or abandoned, whereas a subcontractor's lien is subject to additional statutory language deeming sub-contract completion as of the "date of last supply" if earlier.

If a lien claimant is able to correct the date of last supply on the evidence, and the lien has not otherwise been improperly perfected, then the mistake in the date may be treated as a minor irregularity.

(b) Failure to Name Person to Whom Material and Services were Supplied

Failure to state the correct person for whom the work is done is another common mistake. Provided that the owner has been named, the authors of *Construction Builders' and Mechanics' Liens in Canada* state that incorrectly naming, or omitting to name, the person for whom the work was done is curable.[31] Failure to state the name of the owner is fatal since the purpose of a

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[30] [1994] OJ No 2536 (Gen Div) [*Demik Construction*].

[31] DI Bristow, DW Glaholt, RB Reynolds, and HM Wise, *Construction Builders' and Mechanic' Liens in Canada*, 7th ed (Toronto: Thomson Carswell) [Looseleaf] at para. 6.3.4.

lien is to attach an owner's interest, either freehold or leasehold. Failure to give such notice in the claim for lien defeats the purpose of the lien.

Petroff Partnership Architects v Mobius Corporation supports the proposition that the failure of the lien claimant to properly name the owner in the claim for lien may be a minor or technical irregularity, which can be cured by s.6 of the *Act*.[32] In *Petroff*, in addition to failing to have a paper affidavit the lien claimant architect did not specifically name the client/tenant but named the landlord/owner. The saving provision was the actual description in the e-reg lien of the following statement: "The lien claimant claims a lien against the interest of every person identified as an owner of the premises *described in the said PIN to this lien*" and the client/tenant's lease was a 25 year lease registered on title.[33] The architects' lien was struck as against the landlord; but the lien claimant had apparently not intended the lien to attach to that interest in any event (having not sent a section 19 notice). Since the client/tenant hired the lien claimant to perform the work, Master Sandler stated that he did not find any prejudice.[34] Furthermore, the lien claimant's claim was clarified when it started its action naming the correct client/tenant as a defendant.

A substitution of a different entity as a lien claimant will likely invalidate a lien[35], while a misnomer of the lien claimant may not.[36]

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[32] (2003), 65 OR (3d) 118, OJ No 2434 (Master Sandler) [*Petroff Partnership*].

[33] *Ibid.* at para. 22.

[34] *Ibid.*

[35] *573521 Ontario Inc v Waldman* (1996), 31 CLR (2d) 305 (Superior Court) and *Accent Design Inc v Walton Place* (1994), 15 CLR (2d) 33.

[36] *GC Rentals Ltd v Falco Steel* (2000), 132 OAC 70 (Div Ct).

Failing to correctly set out the status of the correct lien claimant in the affidavit of verification may be a curable error. For example, in *Carlo's Electric Ltd v Metropolitan Separate School Board*, the general contractor brought a motion to vacate the claim for lien because the lien claimant had made an error in the affidavit of verification.[37] The deponent in the affidavit of verification was not the lien claimant. Master Saunders found that the affidavit of verification was only a matter of form, rather than substance, since the moving party was not misled by the deviation of form. In the decision, reference was made to s.27(d) of the *Interpretation Act* which states:

> 27. In every Act, unless the contrary intention appears…,
>
> (d) where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not vitiate it.[38]

The focus is on whether the other party is misled, and if so, the extent of the prejudice, and s.6 of the *Act* then enables the court to excuse the irregularity.

(c) Cumulative Effect of the Errors

Situations may arise where there is more than one error. S.6 of the *Act* does not restrict curative provisions to only one error. The French version of s.6 suggests this interpretation. In determining whether a claim should be invalidated, the determinative issue in the application of s.6 appears to be whether the opposing party has been prejudiced rather than the number of errors present.

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[37] [1990] OJ No 867 (Master Saunders) [*Carlo's Electric*].

[38] RSO 1980, c219, s27(d).

(d) Affidavit of Verification No Longer Required

The *Act* has been amended to do away with the need for a paper affidavit of verification where the lien attaches to the premises.[39] This was already the case for some years with respect to electronically registered liens.[40] Once the amendments to the *Act* are brought into force on a date to be proclaimed by the Lieutenant Governor, s.35 will read as follows:

> **How lien preserved**
>
> **34.** (1) A lien may be preserved during the supplying of services or materials or at any time before it expires,
>
> (a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and
>
> (b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien.

The amendment therefore deletes the phrase "together with the affidavit of verification required by subsection (6)". Accordingly, subsection (6), containing the requirement for an affidavit of verification will repealed in its entirety, when the section is proclaimed in force. As of December 22, 2010, the section has not yet been proclaimed into force.

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[39] See Bill 68, Open For Business Act, which received Royal Assent on Oct. 25, 2010.

[40] A paper affidavit of verification for a claim for lien is no longer technically required where there is a system of electronic verification. This issue was addressed in *Petroff Partnership* where Master Sandler held that a paper affidavit outside of the electronic format was not required. A more recent case, *1230027 Ontario Inc v Jones*, (2005), 2005 CarswellOnt 8677 (Ont SCJ) [*1230027 Ontario*] also enunciates this same principle. In *1230027 Ontario*, the lien in question was registered electronically by the plaintiff in accordance with procedures under *Land Registration Reform Act.* It was argued by the defendant that in order to comply with s.34 of the *Act*, which requires that a claim for lien "shall be verified by an affidavit" of the person claiming the lien, a paper affidavit was required. Quigley J. followed *Petroff Partnership* by holding that an "Affirmation of Facts" in the electronic Construction Lien Form is sufficient to comply with s.34 of the *Act.* Once the recent amendments to the *Act* come into force, there will be no need to make such arguments as an affidavit of verification will no longer be required.

Even though it may not be required, it is a best practice to have a paper affidavit of the client in the file.[41] Should a question arise, a paper affidavit is available and represents contemporaneous evidence with respect to the other matters addressed by subsection 34(5).[42]

The amendments to remove the requirement for an affidavit of verification also apply in respect of Crown lands (and pubic highways), where the lien instead constitutes a charge upon the holdbacks required to be retained under Part IV of the *Act*, and is not registered on title. The amended provision will state only that "the claim for lien shall be given", to the Crown office, thus deleting the language "the claim for lien *and affidavit*" must be sent to the Crown agency.[43] Section 87 of the *Act* defines "given" (the language required by the *Act*), as being "sent by certified or registered mail addressed to the intended recipient". No amendments will be made to s.87 as a result of Bill 68.

In *John Bianchi Grading Ltd v Belrock Design Build Inc*, the Divisional Court upheld the decision of Master Sandler finding the registration of the lien invalid against the Crown agency, George Brown College[44]. It appears that the solicitor registering the lien sent a photocopy of the electronically registered claim for lien but not a paper affidavit of verification. Where the lien does attach to the premises (ie. non-Crown landowners), such registration in the proper land

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[41] One author states it should be interesting to cross examine on an "unsworn document", however effectively the registration form under the {*Electronic Registration Act* }contains the required averments. See, under the old Act, for example the decision of Master Sandler in *Petroff Partnership*. D. Debenham "What's New in Construction Liens, Vol 25, No. 1, *Nuts and Bolts*, October 2010

[42] Solictors should consider requiring that a paper affidavit of verification be sworn by the client. Roger J. Gillott, "Teranet, the Internet, and Liens: Electronic Registration Meets Construction Law" (2001), 6 CLR (3d) 228.

[43] *Supra* note 4 [*Act*] at s34(6).

[44] *John Bianchi Grading Ltd v Belrock Design Build Inc,* [2005] OJ No 2972.

registry office invokes application of s.24(1) and (2) of the *Land Registration Reform Act*.[45] Liens that do not attach to the premises constitute a charge against the holdbacks under s.34(1)(b) of the *Act*, and such liens against Crown agencies cannot be saved by these LRRA sections. In the result, the lien was ordered discharged and the security posted to vacate the registration of the claim for lien was released.[46] Again, the relevance of this sort of case law is diminished by the recent amendments to the *Act* removing the requirement for an affidavit of verification.

Where public highways, Crown lands (ie. not federal Crown lands) or where the owner is a Crown agent, the lien is "given" rather than registered. It appears to be an open question as to whether proof of receipt of a given lien is required, or only sworn evidence that it was sent, but there is support in the case law that the latter is sufficient.

(e) Bid Mistakes

Another mistake that occurs frequently in the construction industry is a mistake in the bid. In 2005, the Ontario Court of Appeal in *Toronto Transit Commission v Gottardo Construction Limited* overturned a trial decision, and allowed the appeal of the Toronto Transit Commission. A bidder who makes a mistake in its bid remains bound unless the mistake is plain on the face of the tender.[47] In April 2006, an application for leave to appeal to the Supreme

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[45] RSO 1990, c o4.

[46] The *John Bianchi* case applies the pre-electronic registration caselaw of *Venditti v Petriglia* (1989) 33 CLR 1, (Court of Appeal) to the effect that an affidavit of verification without a *jurat* is a nullity. Hence, a claim for lien without a sworn affidavit of verification would be a nullity, but for the deeming effect of certain sections of the LRRA. Of course, given the amendments to the *Act*, the deeming effect of sections in the LRRA or other statutes may not be needed.

[47] 257 DLR (4th) 539 (Ont CA).

Court of Canada was dismissed.[48] In *Gottardo*, the TTC had called for tenders for the construction of a bus garage. Shortly after the bids were opened, Gottardo contacted the TTC saying it had made a mistake in the bid. Gottardo refused to submit additional documents to the TTC requested of it and two other low bidders, except for an explanation for its costs breakdown error. The TTC said no error was visible on the face of the tender, and, therefore, Gottardo was bound to perform the work at the bid price. Gottardo refused. The TTC contracted with the next lowest bidder and sued Gottardo and its bonding company for the difference.

Both parties relied on the Supreme Court of Canada cases of *R v Ron Engineering* and *MJB Enterprises Ltd v Defence Construction*, as to whether Gottardo was bound to perform.[49] In *TTC*, the trial judge held that the failure to submit additional documents was material, stating that the non-compliant bid could not have been accepted. The Court of Appeal took a different view, affirmed by the Supreme Court of Canada, which declined to grant leave to appeal. Further, the Court of Appeal overruled the arguably *obiter dicta* of the trial judge that equity should grant rescission of the bid contract because Gottardo made a mistake. The Court of Appeal said where the TTC was unaware of the mistake, and did not act fraudulently or contribute to the error, equity ought not to intervene. Both the defaulting bidder, Gottardo, and its bonding company were held liable for the owner's damages.

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[48] *Toronto Transit Commission v Gottardo Construction Ltd.* (2006), 2006 CarswellOnt 2545 (SCC) [*TTC*].

[49] [1981] 1 SCR111 [*Ron Engineering*]; *MJB Enterprises Ltd. v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 [*MJB Enterprises*].

(f) Language of Prayer for Relief

An Ontario decision, *1610898 Ontario v Dinardo*[50], shows that a failure to abide by the usual language in the prayer for relief is not fatal to a lien.[51] The defendant argued that the plaintiff failed to perfect its lien because there was nothing in their prayer for relief that alleged it was an action to enforce its lien. However, Baltman J. held that even though the statement of claim did not refer to the lien in the prayer of relief, there were numerous references to a lien elsewhere in the claim. Thus, the court dismissed the defendants' motion to discharge the plaintiff's lien. *1610898 Ontario* suggests a more flexible approach where not complying with strict language does not undermine the plaintiff's claim. In contrast, it appears there is little flexibility, on the part of the court, with regard to setting down a matter for trial within the specified time period, under s.37 of the *Act*.[52]

(g) Failure of a Lawyer to Set Down the Matter for Trial

A lien claimant's solicitor plays a gatekeeper role to the statute and has a personal responsibility to all persons who might suffer damage as a result.[53] S.37(1) of the *Act* indicates that a perfected lien expires two years after the commencement of the action that perfected the

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[50] (2006), 2006 CarswellOnt 1495 [*1610898 Ontario*].

[51] In an action commenced to perfect a lien, the prayer for relief typically includes very specific language that claims: (1) in default of payment of the said sums claimed plus interest and costs, an order that all of the estate and the interests of the defendants (owners) in the lands which are the subject matter of this action be sold and the proceeds applied in payment of the plaintiff's claim pursuant to the *Act*, and in the alternative, payment of the said sums on the basis of unjust enrichment, restitution and quantum meruit; (2) an order that all proper directions be given, inquiries be made and accounts be taken; (3) a pleading in the body of the claim, that the "defendant owner was at all material times an owner within the meaning of the *Act"*; (4) a pleading in the body of the claim that in the event the sums adjudged to be owing are not paid forthwith that the plaintiff is entitled to an order requiring the sale of the said lands, and payment of the claim from the sale proceeds pursuant to s.62(5) of the *Act*

[52] *Supra* note 4 [*Act*] at s.7.

[53] Duncan W Glaholt, *The Conduct of a Lien Action,* (Thomson Carswell, 2004) at 15.

lien, unless on or before the second anniversary, an order is made for the trial of an action in which the lien may be enforced, or an action in which the lien may be enforced is set down for trial.[54] Also, s.46(1) stipulates that where a perfected lien has expired under s.37(1), upon the motion of any person, the court shall declare that the lien has expired and shall make an order dismissing the action to enforce the lien and vacating the registration of a claim for lien and the certificate of action in respect of that action.[55] Moreover, if a solicitor is responsible for prejudicing or delaying an action, costs can be awarded against him/her pursuant to s.86(1)(b) of the *Act*:

> 86. (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 any 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) 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 58 to, a master, case management master or commissioner. [56]

In *Pineau v Kretschmar Inc*, the plaintiff commenced a lien action against the defendant and had brought an *ex parte* motion to have the lien matter set down for trial. When the matter had reached the pre-trial stage, the Master determined, however, that the lien had expired

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[54] *Supra* note 4 [*Act*] at s.37(1).

[55] *Ibid.* at s.46(1).

[56] *Ibid.* at s.86(1).

through the plaintiff's solicitors' failure to use proper procedure to set the matter down for trial.[57] It was argued by the former solicitors that a finding of bad faith was required before an order could be made against the solicitor pursuant to R.57.07(1) of the *Rules of Civil Procedure*:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;
>
> (b) directing the solicitor to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> (c) requiring the solicitor personally to pay the costs of any party.

Specifically, it was argued by the former solicitors that R.57.07 sets a lower standard of behaviour. However, Master Sandler rejected this argument and did not find R.57.07 to be inconsistent with the s.86(1)(b) of the *Act*.[58] Accordingly, even though it was not their intention, it was found that the conduct of the former solicitors prejudiced and delayed the conduct of the action and they were held to be jointly and severally liable with their client to pay the costs for each of the defendants.

Sadly, after winning the issue on "lienable supply" *310 Waste Ltd v Casboro Industries Ltd (No. 2)* is an example where the Ontario Superior Court of Justice invoked s.37(1) and s.46 of the *Act* to declare the plaintiff's lien expired by reason of lapse of the two year limitation period.[59] Quigley J. focussed on the failure of the plaintiff to show that they had set the matter down for trial within the two year limitation period. It was argued that *310 Waste Ltd (No. 1)*

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[57] (2004), 42 CLR (3d) 37 (Master Sandler) [*Kretschmar*].

[58] *Ibid.* at para. 56.

[59] [2006] OJ No 101 [note: appeal heard on September 15, 2006 and appeal dismissed, reasons to follow] [*310 Waste (No.2)*].

was under appeal and the decision reserved, so to set the matter down for trial while an appeal was pending would have shown contempt for the court:

> As was asserted by counsel for Casboro, the simple reason is that no evidence was advanced by Wastecorp of impossibility. There was no material before the Court to demonstrate that Wastecorp attempted to set the action down for trial within the two-year period and was refused permission to do so by court officials, or that it took any other concrete steps to meet either of the two stipulations set out in s. 37 of the *Act*. Further, Wastecorp advanced no evidence in support of its assertion that to seek to set the matter down for trial during the two-year period, while a fundamental legal issue in the case was subject to appellate review, would have contravened the policy directives that are embodied in the *Act*. The evidence before the Court on this motion thus provides no factual support to Wastecorp's assertion of impossibility. Indeed, the affidavit evidence of Casboro makes clear that no steps were taken or attempted by Wastecorp to advance the litigation during the period when the "lienability" issue before the Divisional Court was under reserve.[60]

Had the lien claimant taken steps to set down the matter for trial or to advance the litigation, and been refused, the court may have been more sympathetic to a failure under s.37. Arguably, however, there is no jurisdiction to extend the period in s.37.

310 Waste (No. 2) and *Kretschmar* illustrate the importance of setting a matter down for trial within the limitation period set out by the *Act.* The other basic and important limitation periods under the *Act* are 45 days to preserve a claim for lien from the date of completion or last supply (or from the date a certificate of substantial performance has been published), and 45 days from the last date a lien could be preserved, to perfect. Don't miss these dates.

(h) Failing to sue under Bond Limitation Periods

It is common in larger construction projects, and particularly those involving public owners, for the project documents to call for labour and material payment bonds to protect subcontractors from a defaulting contractor. A performance bond may also be posted but it protects the owner only. Both bonds have two types of limitation periods. The first requires, as

[60] *Ibid.* at para. 20.

a condition of suing under the bond, that notice in writing be given stating with substantial accuracy the amounts owing, and such notice must be given, typically, within 120 days from the date the claimant should have been paid. Cases have held failure to meet this timeline (which can occur through a late retainer, or ongoing negotiations between the claimant and the contractor) is not fatal. The second is a true limitation period and requires that the action against the surety must be commenced within 1 year of the date of the *contractor's* last work (as opposed to the claimant which may have ceased work earlier). Failure to meet this date is usually fatal to the claim. Payments under the bond are limited to the penal sum of the bond, typically no more than 50% of the contract price, and claimants share pro rata where they exceed the bond, with priority to lien claims also paid under the bond.

Typically notice must go to the contractor (the person who did not pay in the first place), the surety (the bonding company), and the oblige (the project owner).

Make sure you read the terms of the bond. Often labour and material payment bonds restrict their availability to claimants who contract directly with the contractor. In other words, a supplier to a subcontractor is usually not entitled to claim under a labour and material payment bond, while the subcontractor is.

III Limitation Periods and Contribution Issues in Construction Law

(a) Ultimate Limitation Period

The *Limitations Act, 2002* was enacted on December 9, 2002, and came into force on January 1, 2004.[61] The first set of limitation periods expired on January 1, 2006. This act has

[61] SO 2002, c 24 [*Limitations Act*].

established a basic limitation period of two years, a codified discoverability principle where the limitation period does not start to run until the basic claim is, or ought to have been discovered, and sets an ultimate limitation period of 15 years from the event whether or not the claim is discovered. Thus, for events that happen after January 1, 2004, the law is clear that a lawsuit started within 2 years of the event complies with the limitation period, a lawsuit that is initiated after 15 years is statute barred, and an action that is started after 2 years but before 15 years from the date of the event is not statute barred unless the claim was or ought to have been discovered more than two years before the action was commenced. In contrast, if the event occurred before January 1, 2004, the law lacks the same level of clarity, particularly in construction law.

This is demonstrated by *York Condominium Corp, No 382 v Jay-M Holdings Ltd and Toronto (City)*, the first case to apply the ultimate limitation period under the *Limitations Act* to a construction law dispute.[62] The plaintiff, YCC 382, did not discover the claim until May 2004, when it learned that the walls of its building were not given a fire rating, and started the lawsuit on June 22, 2005. The defendant, the City of Toronto, argued that the claim should be dismissed since it was statute barred by the ultimate limitation period of 15 years. In response, the plaintiff relied on s.24(5) of the *Limitations Act* and argued that the limitation period did not start running until the effective date of January 1, 2004, since the event took place before the effective date of the Limitations Act. However, arguably a 1978 occurrence discovered in 2003 could proceed as a result of the discoverability principle in the *Limitations Act.* On appeal the motion judge's decision to dismiss the claim based on the expiry of the limitation period was overturned.[63]

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[62] (2006), 49 CLR (3d) 293 (Ont SCJ) [*Jay-M*].

[63] *York Condominium Corp No 382 v Jay-M Holdings Ltd,* [2007] OJ No 240 (CA).

Rather, Justice Weiler employed a purposive and contextual approach which produced the result that that the transition provisions in fact, postponed the commencement of the limitation period to January 1, 2004. She then explained that despite the effect of allowing a 27 year-old claim to go forward, this did not create an absurd result, when viewed with reference to the fact that the claim was still brought within a 30 year period.[64] The Ontario consultation paper for most claims, the period in the prior Bill, and the B.C. legislation all proposed 30 years as the ultimate time for all claims. Furthermore, the Justice remarked that before the passage of the new *Act*, there was unlimited liability for undiscovered claims. Finally, Justice Weiler acknowledged that her interpretation effectively created a seemingly generous 15 year transition provision for undiscovered claims. However, this was said to be part of the *Act's* attempt to ensure access to justice for pre-existing situations while limiting liability on a go-forward basis.[65]

Summary judgment procedures under the new Rules of Civil Procedure may be available to dispose of those claims where the plaintiff was substantially aware of the nexus between the cause of action alleged and the harm.[66]

(b) Contribution and Contractual Limits of Liability

PDC 3 Limited Partnership v Bregman + Hamann Architects, *infra*, and the British Columbia case of *Stanco Projects*, *infra*, are two important decisions involving the issue of

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[64] *Ibid.* at para. 39.

[65] *Ibid.*

[66] See Rule 20.04(2.1) which allows reasonable inferences to be drawn, evidence to be weighed, and the credibility of deponents evaluated. In construction lien actions, leave to bring interlocutory steps must first be sought, under s67 of the *Act*.

contribution among those determined at fault for damages in the context of a construction project.

In *PDC 3 Limited Partnership v Bregman + Hamann Architects*, the defendant architects were hired to provide architectural services at Pearson Airport.[67] Their contract contained a limitation of liability clause capping claims by the owner against them in the amount of $250,000. A similar limitation did not exist in other contracts for construction of the terminal. The issues before Chapnik J. on a pre-trial Rule 21 motion, was whether the limitation in the contract between the plaintiff and the defendant architects would limit any claims for contribution by the co-defendants, and whether the existence of the limited liability clause reduced the amount of damages recoverable by the plaintiff from the other defendants for their joint fault. S.1 of the *Negligence Act* states:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.[68]

Chapnik J. held that joint tortfeasors may not claim contribution from another defendant in an amount in excess of the contractual limits agreed to between the plaintiff and defendant under s.1 of the *Negligence Act.*[69] In the decision, Chapnik J. referred to the Supreme Court of Canada's

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[67] (2000), 40 OR (3d) 722 (Ont SCJ) [*PDC 3*].

[68] RSO 1990, c N1, s1.

[69] *Supra* note 66 at para. 41.

decision in, *Giffels Associates Ltd v Eastern Construction Co.*[70] In *Giffels*, a waiver of liability precluded a contribution claim. Chief Justice Laskin stated:

> [W]here there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case. It is, however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected itself cannot be said to have contributed to any actionable loss by the plaintiff. This result must follow whether the claim for contribution is based on a liability to the plaintiff in tort for negligence or on contractual liability. In either case there is a contractual shield which forecloses the plaintiff against the protected contractor, and the other contractor cannot assert a right to go behind it to compel the former to share the burden of compensating the plaintiff for its loss.[71]

On appeal in *PDC 3*, however, the Ontario Court of Appeal held that the issues were too complex, without an evidentiary foundation, to be decided on a pre-trial Rule 21 motion, and left the same issues for trial.[72] Specifically, Feldman J.A. held that it would be necessary for the court to hear evidence at trial (or by way of a summary judgment motion presumably) in order to make findings as to the damages suffered by the plaintiff and the degree of responsibility of each defendant for the damages caused, or contributed to.

A decision of the British Columbia Court of Appeal, *Stanco Projects Ltd v British Columbia (Ministry of Water, Land & Air Protection)*, dealt with another aspect of contribution.[73] In this case, the Province was found liable for breach of contract in a tendering process and appealed the lower court ruling that it could not seek contribution from the

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[70] [1978] 2 SCR 1346 (SCC) [*Giffels*].

[71] *Ibid.* at para. 14.

[72] *PDC 3 Limited Partnership v Bregman + Hamann Architects,* [2001] OJ No 422 (CA).

[73] (2006), 52 CLR (3d) (BCCA).

engineering consultants who actually conducted the tender on its behalf. The appellate court held that as long as the defendant was part of the cause of the injury, the defendant is liable even though its act alone was not enough to create the injury. Specifically, the court stated:

> In the case at bar, while it is true that it was the Ministry's decision to award the contract to a bidder other than Stanco, Aplin contributed materially to the breach of the duty of fairness owed by the Ministry to Stanco. The Ministry's decision was the culminating event of the process -- but not the only contributing cause. Contrary to the trial judge's suggestion, the Ministry's expertise concerning the tendering process should not operate to shield the consultant from its share of responsibility in the matter.[74]

Hence, even though the Ministry had recognized expertise in the tendering process, the consultants still caused the loss, in part, and were liable to the client to contribute.

IV. Not Recognizing How Lien Actions Differ from other Actions

While a lien action may in many ways resemble any other civil action there are significant differences that one should be aware of. Part IV of the *Construction Liens Act* sets out the rules that govern jurisdiction and procedure. Construction liens fall within the jurisdiction of the Superior Court of Justice. However, the *Rules of Civil Procedure* and the *Courts of Justice Act* apply only where they are not inconsistent with the provisions of the *Act*.[75]

Lien actions are commenced pursuant to s.53 of the *Act*. The action is commenced by issuing a statement of claim in the office of the local registrar of the court for the area in which the premises are situate. Service of the statement of claim must be within ninety days after it is issued, however, the court does have the discretion, upon a motion made either before or after the expiration of the ninety days, to extend the time for service. The time of service allows for a

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[74] *Ibid.* at para. 76.

[75] *Construction Lien Act* s.67.

lien to be perfected and settlement discussions to proceed before engaging in the litigation process, but it also ensures that they proceed in an a more expeditious manner than regular civil actions which allow for the statement of claim to be served six months after the commencement of an action.[76] With regard to the delivery of a statement of defence there is no difference between lien actions and civil action, as they both require pleadings to be delivered within twenty days after the service of the statement of claim.[77] There is no "notice of intent to defend" available, however.

The procedural rules regarding counterclaims, third party proceedings and joinder are set out in s.55 of the *Act*. Plaintiffs in lien actions are restricted to joinder of causes of action arising under the contract or subcontract. Defendants may counterclaim against the person who named them as a defendant in respect of any claim that the defendant may be entitled to make against that person, and that claim need not be related to the improvement. However, a defendant may only crossclaim in respect of any claim related to the making of the improvement. Third parties may joined, but only where leave of the court has been granted and where it is for the purpose of claiming contribution and indemnity in respect of the claim made.[78]

After the delivery of all statements of defence, or after the time for delivery has expired, any party to the lien action may make a motion to the court to have a trial date fixed or for the holding of a settlement meeting. Where a settlement meeting is ordered, the purpose of the

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[76] *Rules of Civil Procedure*, Rule 14.08

[77] *Construction Liens Act* s.54(1) and *Rules of Civil Procedure*, Rule 18.01.

[78] *Construction Liens Act* s. 56.

meeting is to resolve or narrow any issues to be tried in the action,[79] and it is conducted by either a person selected by the majority of persons present at the meeting or by the person who took the appointment. The results of the meeting are to be reduced to writing in the form of a "settlement statement". This statement sets out the issues of fact and law to which the parties have agreed upon, and it is to be filed with the court as part of the record and is binding upon all parties served with notice of the settlement meeting.

The trial is essentially the same as any other civil trial. The rules of evidence are the same, and the rules of court, as set out in s.67(3) of the *Courts of Justice Act,* are also applicable. Appeals from final orders go first to the Divisional Court, and then to the Court of Appeal.[80] Where the judgment is less than $1,000 there is no right of appeal in a construction lien action. It should also be noted that there is no appeal from an interlocutory order made by the court.[81]

V. Discovery Planning

Because construction lien actions are summary in nature, discoveries and affidavits of documents are not automatic. The *Act* intends that parties will seek the direction and consent of the court before commencing any such costly interlocutory steps that are not already provided for in the *Act*.[82] Recent amendments to the *Rules of Civil Procedure* create a requirement for discovery planning in all actions.[83] In *Lecompte Electric Inc v Doran*, Master C.U.C. MacLeod

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[79] *Construction Lien Act* s. 60(2)

[80] *Construction Liens Act* s. 71.

[81] *Construction Liens Act* s.71(3).

[82] *Lecompte Electric Inc v Doran (Residential) Contractors Ltd,* [2010] OJ No 4949, s.67(2) of the *Act.*

[83] R.29.1.

explained that discovery planning will therefore be required in all construction lien actions where leave for discovery is granted.[84] In that case, the parties had been before the court several times to narrow issues and agree on dates for discovery and production. Although dates were agreed on, there was no actual discovery plan. The plaintiff then brought this motion for a further and better affidavit of documents, and for an order relieving the plaintiff from the obligation to produce until it received the defendant's more "focused" affidavit of documents.[85] The affidavit of documents produced by the defendant complied with the *Rules*.

Master MacLeod dismissed the motion and directed the parties to confer and consider how the action could be focused and streamlined. The Master was not prepared to penalize the defendant for producing an affidavit of documents that complied with the rules. To the contrary, he seemed to scorn the plaintiff for bringing the motion. In particular, the Master urged the parties to determine how production and discovery could be made the most cost effective and efficient. In doing so the Master stressed that the process should be collaborative rather than adversarial.[86] Master MacLeod also reiterated the need for proportionality and noted that in construction actions, there is often an unnecessary and inefficient duplication of documents, as well as overproduction. For instance, both parties will often have site minutes, copies of mutual communications, drawings, construction schedules, progress reports, and change orders to mention "only a few".[87] The parties were urged to agree on a common methodology for the

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[84] *Ibid.* at para. 11.

[85] *Ibid.* at para. 1.

[86] *Ibid.* at para. 20.

[87] *Ibid.* at para. 18.

identifying and numbering of productions, such as electronic production and the use of a searchable database.

Given the recent amendments to the *Rules*, counsel acting in lien actions are well advised to take the obligation to consider proportionality seriously when creating a discovery plan.

VI. What to Do when the Errors have Occurred

When faced with a possible error that may have caused your client damage you should consider two important next steps.

One, report the matter to your professional liability insurer, LawPRO. Seek some independent advice. Some situations may be easily corrected, and no harm is done; others may require intervention. Your professional liability insurer is entitled to notice, and requires that notice to it be provided, as a condition of coverage. Obtain advice and consult with your insurer first, before undertaking any material repairs yourself, or before admitting liability.

Two, the Rules of Professional Conduct require that you not take steps to prejudice your client, and it is important to advise your client of his or her right to independent legal advice if you think an error may have occurred. Typically, such advice may occur at or around the time you disclose the matter to your insurer. Good judgment must be used when matters are time sensitive and need to be acted upon quickly; also not every theoretical error will necessarily be one in actuality.

A lawyer's first duty is to their client and the court, and professional liability insurance responds in those cases where errors cannot be readily rectified.[88]

Conclusions

Construction litigation, and lien actions in particular, can be fraught with perils for the casual practitioner of construction law. When in doubt, consult with colleagues and heed the warnings of ss. 35 and 86 of the *Construction Lien Act*, which cautions against exaggerated or excessive liens. It is also to be remembered that lien rights are in addition to existing contractual rights, and claims for breach of trust. The expiry of lien rights do not affect other legal rights, as set out in s. 38 of the *Act*.

[88] The Rules of Professional Conduct relating to competence do not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. LSUC Commentary Rule 2.01(2). The Rules do require that the client be promptly advised of the need for independent legal advice, and that the lawyer not prejudice the client or the insurance that may respond, Rule 6.09(1).