

Chad Kopach, Esq.



Preserving Construction Lien Rights in Ontario

The construction industry in Ontario, Canada, continues to be a multibillion-dollar-per-year industry. Ontario's imports amount to billions of dollars per year, more than half of which come from the United States. If U.S.-based businesses sell to the construction industry, there's a good chance that they will be selling into Ontario.

As in most jurisdictions, Ontario has a lien mechanism by which suppliers can obtain security for unpaid materials and services. In Ontario, liens are governed by the *Construction Lien Act* (CLA). As is the case in most states, there is a set of very technical rules governing liens, so Ontario lien claimants must be aware and well-informed in order to advance his or her rights.

A general description of liens in Ontario is discussed below, including what work can be the subject of a lien, who can advance a lien (and against whom it can be advanced) and, most importantly, when to preserve the lien. Properly advancing a lien claim is a two-step process: first preservation, then perfection. Both steps are mandatory. Discussed here is preservation. Perfection will be the subject of a future article.

ment, but also the supply of rental equipment with an operator, and the supply of designs, plans, drawings or specifications (as long as those designs/plans/drawings/specifications enhance the value of the land).

Supply of materials means the supply of moveable property that becomes part of the improvement, is intended to become (but does not in fact become) part of the improvement, is used directly in making the improvement, or is used to facilitate the improvement. It also includes the supply of rental equipment without an operator.



Improvement

Under the CLA, an improvement means any alteration, addition or repair to land, as well as any construction, erection or installation on land. It includes not just the "construction" portion of a project, but also the demolition or removal of any building, structure or works.

Much judicial ink has been spilled in Ontario over the last decade as to where the "improvement" line is drawn. Constructing the building to house an automotive assembly line, for example, is fairly obviously an improvement. Installing the assembly line itself, though, is less obvious. The CLA was amended about five years ago to expand the definition of "improvement" so that it includes installation of equipment that is "essential to the normal or intended use of the land, building, structure or

The lien remedy is in addition to any contractual rights for payment of money.

The Lien in Ontario

The lien remedy is in addition to any contractual rights for payment of money. In advancing a lien claim, the lien claimant is not giving up its contractual enforcement rights. The lien encumbers title to the owner's property, preventing the property from being sold or mortgaged until the lien is dealt with. Ultimately, if a lien is not dealt with, a lien claimant can have a property sold, and the proceeds used to pay the debt.

There are three requirements that a party must establish in order to be entitled to a lien in Ontario. First, the party must supply services or materials. Second, the supply must be to an improvement. Third, the supply to the improvement must be for an owner, contractor or subcontractor.

Supply of Services and Materials

Under the CLA, supplying services includes not only services supplied by individuals directly to an improve-

works.” It seems that the intention of the legislature was that if the improvement is the construction of a new assembly plant, then almost all of the services and materials supplied to get the line up and running would be lienable.

Supply to Owner, Contractor or Subcontractor

Under the CLA, a “contractor” is someone who has a contract directly with the owner. A “subcontractor” is someone whose contract is not with the owner but is with a contractor, or someone below the contractor in the construction pyramid.

If an improvement is being made at the request of a tenant, then the tenant’s interest will be subject to a lien.

The term “owner” is broadly defined, and includes more than the registered owner of a property. Determining who is an owner on a particular project is a fact-driven exercise, and can include individuals with unregistered interests. Also, special considerations are applicable when the land is owned by the federal or provincial government, or the land is a public road or railway. While an exhaustive review of who is an owner is not possible here, because of the number of construction projects that are done as tenant improvements, it is worth highlighting one scenario, that of the landlord/tenant.

Supply to a Tenant

If an improvement is being made at the request of a tenant, then the tenant’s interest will be subject to a lien. This means that the tenant’s interest (i.e., the lease) can be subject to sale at the end of the lien claim process. While lease interests can be valuable, they are typically significantly less valuable than the landlord’s interest in the lands.

However, the CLA specifically exempts a landlord’s interest from being subject to a lien unless the contractor gives the landlord advance notice that it will be performing the improvement to the landlord’s property. That said, the CLA also has an “out” for the landlord, and it can, within 15 days of receiving notice from the contractor, state that it assumes no responsibility for the improvement to be made. If the owner sends this response, there is no subsequent action the contractor can take to bind the landlord’s interest in the property.

Preserving the Lien—45 Days

Once a material or services supplier has determined that it has a lien, it must take steps to preserve a lien within the strict time limits under the CLA. Failing to preserve properly is usually fatal to a lien claim.

A lien arises when the contractor or subcontractor first starts supplying services or materials. It exists in the ether until it is preserved, or until the time for preservation expires. If the time expires, the lien is gone forever.

Preservation must happen within 45 days. For contractors, the 45-day period begins to run from the earlier of:

1. the date on which a copy of the certificate or declaration of the substantial performance of the contract is published;
2. the date the contract is completed; and,
3. the date the contract is abandoned.

Owners and contractors will occasionally differ in their opinions on when a contract is completed or abandoned, and that issue will, on occasion, have to be judicially determined. However, to determine when the 45-day period starts to run, all the contractor has to be concerned about is his or her own contract with the owner.

For subcontractors, the 45-day period begins to run from the earlier of:

1. the date on which a copy of the certificate or declaration of the substantial performance of the contract (i.e., the contract between the owner and the contractor) is published;
2. the date on which the person last supplies services or materials to the improvement; and
3. the date a subcontract is certified to be completed under the CLA, where the services or materials were supplied under or in respect of that subcontract.

A subcontractor can perform an online search to determine if/when the contract between the owner and contractor has been published. The subcontractor can also (typically) determine his or her own date of last supply. The tricky issue is when a subcontract between parties above in the construction pyramid has had the contract certified as complete.

Preserving the Lien—Claim for Lien

In order to be preserved in time, a lien claimant must, with certain exceptions, register a claim for lien over title to the property. The registration must take place before the expiry of the 45-day period described. For almost 15 years, Ontario has operated under a primarily electronic land registration system. This means that the document can be prepared and registered in a matter of hours. This is a significant improvement, especially for lien claimants who do not have a physical presence in Ontario.

A lien arises when the contractor or subcontractor first starts supplying services or materials.

The lien claimant will have to retain an attorney to register the lien, and the attorney will need certain information, which must be included in the claim for lien document. Having the following information available immediately will cut down on the time that elapses between retaining the lawyer and the lien being registered:

- Property Identification Number for the subject property (or, failing that, the municipal address);

In order to be preserved in time, a lien claimant must, with certain exceptions, register a claim for lien over title to the property.

- Name and address of the owner (leasehold owner and landlord, if applicable);
- Name and address of the person to whom the lien claimant supplied services or materials (if the lien claimant did not supply to the owner directly);
- Date of first supply;
- Date of last supply;
- Total contract price;
- Total amount outstanding (i.e., the amount of the lien);
- Brief (one line) description of the nature of services and/or materials supplied; and
- Name and position of the representative of the lien claimant providing the above information.

This information should be sufficient for an attorney in Ontario to register a claim for lien. Note that liens against government-owned lands, or liens against public streets or railways, are not preserved by registration. These liens are typically preserved by delivering a physical copy of the lien documents to individuals prescribed by the CLA. If supply is made to one of these projects, this is the first piece of information that the lien claimant should give to his or her attorney.

After Registration

Preservation, being the registration of the claim for lien, is only the first step with a tight deadline. Once the lien is preserved, it must then be perfected by, among other things, starting an action to enforce the lien in the Ontario Superior Court of Justice. The deadline for this step is another tight one: 45 days from the last date that the lien claimant had to preserve the lien. ■

Chad Kopach, Esq. is a partner with Blaney McMurtry LLP in Toronto and is certified by the Law Society of Upper Canada as a specialist in Construction Law. Chad can be reached at ckopach@blaney.com, or at 416-593-2985.