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EXPECT THE BEST

Construction Lien Act Amendments – Benefit or Burden?

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In this issue we draw to your attention four specific amendments to the *Construction Lien Act* ("CLA") brought forward under the *Open for Business Act, 2010* omnibus Bill 68 (which received Royal Assent on October 25, 2010) that will have impact on the construction industry. The first amendment listed below, which expands the definition of improvement under the CLA, is already in force. The next two amendments speak to procedure. The final amendment discussed will be of significance to condominium developers, builders and general contractors alike, as it adds an additional statutory requirement for notice to trades and suppliers. These latter amendments come into force on July 1, 2011.

Expanded Definition of "Improvement"

The definition of "improvement" under the CLA has been expanded to expressly include "the installation of industrial, mechanical, electrical and other equipment" where the equipment installed is *essential* to the *normal* or *intended use* of the land, building, structure or works.

This change is particularly significant to contractors who work in the electrical and mechanical sectors and suppliers of machinery in manufacturing facilities. Under the old definition, it was difficult to predict if the CLA would apply to a project where equipment was to be installed for use by a business, particularly if the equipment was portable and capable of removal from a building. That the item or equipment was supplied and installed in a building (such as an assembly line), was not necessarily sufficient to qualify the installation as an "improvement" giving rise to lien rights under the old definition.

Under the new definition, to determine if a contractor or equipment supplier has lien rights, one must consider whether the installation of the equipment is essential to the characteristic use of the lands or building and is intended to form an integrated whole with the lands or building. It will be interesting to see how the terms "installation", "essential" and "normal use" are interpreted by the Court in the future and if the broader definition will have the intended effect of clarifying what is and is not lienable in Ontario.

Affidavit of Verification no longer required

As of July 1, 2011, a claim for lien will no longer have to be verified by an affidavit of the person claiming the lien or of an agent or assignee of that person. The requirement became procedurally challenging after the introduction of Ontario's electronic registration system and needed to be changed to reflect the reality of electronic registration.

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Also, prior to this amendment, any person who had sworn an affidavit of verification and preserved a claim for lien could be cross-examined on the affidavit without an order at any time, irrespective of whether an action had been commenced. Since an affidavit of verification will no longer be required, those persons who may be cross-examined on a claim for lien will be the lien claimant, an agent or assignee of the lien claimant and a trustee of the workers' trust fund, where applicable.

Sheltering Liens

A lien claimant's rights expire unless preserved and perfected within the time required and in accordance with the requirements of the CLA. Once preserved, lien rights must be perfected by commencing a lawsuit to enforce such rights and, where the lien attaches to the premises, registering a certificate of action against title to the property. "Sheltering" is an exception to the requirement that a lien be properly perfected by allowing a lien claimant to perfect its preserved claim for lien by "sheltering" under an action commenced by another lien claimant. However, an issue arises when the other lien is vacated by court order. What happens to the claim of the sheltering lien claimant? In order to protect the rights of a sheltering lien claimant, the CLA has been amended to permit a sheltering lien claimant to proceed with an action to enforce its lien as if the order vacating the original lien was never made.

Notice of Intention to Register a Condominium

This CLA amendment has a particular impact on condominium developers and builders. The amendment creates a new notice system for the benefit of contractors who may want to register a lien claim against a developer's condominium property before the condominium units are conveyed to the end user or "home buyer". The operative provision of the amendment is subsection 33.1(2) of the CLA which requires owners of land intended to be registered as a condominium to publish a notice of impending registration in a construction trade newspaper at least five days and no more than fifteen days, excluding weekends and holidays, before the description is submitted for approval to the municipal authority.

Once a condominium is registered and the individual condominium units have been created as separate parcels in Ontario's land registration system, a lien claimant can no longer conduct a search and lien the property as a whole, except by searching each unit and registering a lien against each unit in that particular condominium. This type of registration against all units in the project can be problematic where a particular unit or units has been transferred to the home buyer, as these interests are not properly the subject of the lien claim. The CLA protects home buyers from lien claims that should be properly brought against the developer/builder. Under the CLA, the end user home buyer is not the 'owner' with an interest in the property who made the request for the contractor's work, therefore the home buyer is not a person whose interest can be the subject of the lien claim.

Further, in order to lien the common elements of the condominium, the contractor must lien each condominium unit as each such unit enjoys its appurtenant interest in the common elements with all other units. So even if the claim relates only to, or the lien claimant prefers only to lien the common elements (rather than a particular unit or units) to avoid the excessive search and review costs, this is not possible, as there is no longer a separate parcel (or register) for the common elements of a condominium. Therefore, the lien must be registered against individual units, but only the units sitting in the developer's inventory should be subject to the lien. Units that have been transferred to the end user homebuyers should not be included. Pulling the land registration records for each unit in the condominium to ascertain whether ownership in any unit has been transferred out to a home buyer can be a lengthy and expensive process for the lien claimant, especially in the case of a large development. As the intent of the new amendment is to provide early notice to contractors who may have a lien claim that their ability to lien the development as a whole and before condominium registration is about to expire, this notice does benefit the lien claimant by alerting it to the impending registration, so that it may determine whether or not to register a lien claim prior to condominium registration and transfer out of the condominium units.

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It is important to note that the legislature chose to place this obligation on the "owner" as defined in the CLA - rather than on the "declarant" as that term is defined in the *Condominium Act*, *1998*. Therefore, all parties considered owners under the CLA are caught under this new provision. This may include mortgagees, general contractors and investors in addition to the developer/builder. The contents of the notice are also specified in the amendment, with a standard format to follow by Regulation. The notice must include: (a) name and address of the owner; (b) description of the property (eg. municipal address, project name) including the legal description; and (c) the names and addresses of any contractors, who in the owners' knowledge, have supplied materials or services during the 90 days before the description is submitted for approval.

The consequence of an owner not publishing a notice is that the owner will be liable to any lien claimant who suffers damages as a result of the owner's failure to notify. This liability provision raises many questions, for example, what damages would flow, particularly where lien rights have a statutory expiry date that is, in the normal course, strictly interpreted? Does this amendment affect the strict interpretation of Part V of the CLA with respect to expiry and preservation of a lien? How will this requirement be monitored for compliance, and by whom? How will a lien claimant know when the clock starts to run on the required notice period? Will a developer/builder have all of the subcontractors names to add to the list, or is there additional enquiries to be made of the contractor, and what if the information is not supplied in a timely fashion? What happens if a trade is not included in the list – is this fatal to the notice? While aiming to target an area of admitted frustration for lien claimants and developers alike, this amendment may result in a more complicated process given that it does not include a corresponding obligation on the contractor to provide missing information, and within a certain time, for the developer/builder to be able to properly and fully comply.

Notwithstanding the concerns noted, we advise developers to assemble the required information and publish the notice in the time required to do so, in order to comply with the CLA and avoid any potential negative consequences.

The Ministry of the Attorney General is considering additional proposals to reform the CLA, including, (i) the automatic release of project holdback funds for completed work once the statutory holdback period has expired, unless a lien has been preserved or perfected that may be claimed against that holdback, (ii) the continuation of all parties' lien rights through to 45 days after substantial performance unless there has been early release of the holdback, and (iii) the deemed division of contracted services of an architect into two parts; supply of services up to and including commencement of the improvement and supply of services thereafter. The Province is currently in consultation with the construction industry in this regard and we will continue to monitor the status of these proposals and provide an update in a future issue. ■