

Fundamentals Of Construction Liens

by Elliott Goldstein, B.A., LL.B.*

Imagine this situation. You own a business which installs, services, or monitors alarm systems, card access systems, or surveillance systems, (or any combination of the three). You contracted to supply labor and materials to a new building or to upgrade an existing site. You performed and delivered as agreed and expected payment within the time specified in your contract. Unfortunately, you were not paid. Time has gone by and the business with whom you contracted (owner, general contractor, or subcontractor) has ignored your numerous invoices, statements of account, final demand letters, and phone calls for full payment. Sound familiar? It has happened to many of us. What do you do?

The solution is simple; you call a lawyer, explain the facts, give the lawyer all the relevant documents (contracts, invoices, demand letters, dates of start and completion of the work, etc.) and seek advice on whether to register a lien against the building on which you performed the work.

A lien is a statutory right given to persons who supply services and/or materials in connection with the improvements of lands and premises. In some provinces the statute is named the *Construction Lien Act* (e.g., Ontario); in other provinces, the *Builders Lien Act* or the *Mechanics Lien Act*. These various statutes give you the right to register a lien on the lands and premises of the "owner" who ordered the work. The owner is defined as a person who has an interest in the lands and premises and includes registered owners, tenants, and mortgagees (e.g., banks or trust companies who have taken possession of the property because the owner defaulted on his mortgage payment).

It is extremely important that the lien be registered within the time period specified in the Act, or the lien claimant will lose the right to lien. In Ontario the time period is 45 days. Just when that 45 day period starts running (the "start date"), depends upon whether the lien claimant is the (general) contractor (i.e., the person who deals directly with the owner) or another person (sub-contractor). For example, the "start date" could be the date when the contract is completed or abandoned, the date on which the last

supply of services or materials was made, or some other date. Your lawyer will assist you in determining the "start date".

Equally important is the fact that the lien must be registered in the registry office of the jurisdiction where the building, lands, and premises are located. For example, if the work is done on a building in Scarborough, Ontario, which is a city within the Municipality of Metropolitan Toronto, then the appropriate registry office is Toronto. The fact that your business is in Mississauga or that the contract was signed at the owner's office in Pickering is not relevant.

Once the lien is "preserved" it must be "perfected". To perfect the lien, the lien claimant must commence an action (start a lawsuit against the owner and general contractor, etc.) and he must register a certificate of action on the title to the lands and premises. Both must be done within the appropriate time period. In Ontario, the time period is 45 days from the last day on which the lien claim had to be registered. Therefore, the last day on which the lien could be perfected is 90 days (45 + 45) from the "start date". The action is commenced by issuing a statement of claim in the jurisdiction in which the lands and premises are situated.

In your statement of claim you ask the court to sell the owner's interest in the lands and premises if the owner is unable to satisfy the judgment. In other words, the property will be sold and your lien paid from the sale proceeds. Also, you may claim damages for breach of contract against the person who contracted with you.

If you are contracting with a tenant for an improvement to leased (rented) premises, you may only assert your lien claim against the leasehold interest of that tenant, and you will have no claim against the interest of the landlord of the premises. As a result, any judgment which you obtain can only direct the sale of that leasehold interest (the lease itself which may be of little value. However, if, prior to commencing the supply of services and materials, you give *written* notice to the landlord of the improvement to be made, the landlord's interest in the property may be subjected to the lien.

The aforementioned written notice must identify the premises to be improved, describe the improvement that is to be made, and specify the date of the contract between you and the tenant. Either enclose a copy of the contract with the notice or indicate where and when a

copy can be inspected by the landlord.

In Ontario, the *Construction Lien Act* provides that the landlord will *not* be responsible for the improvement to the tenant's leased premises, if the landlord gives you a written notice declining such responsibility within 15 days after receiving the your written notice. If the landlord fails to give such notice, then he is deemed responsible for the improvement and the property can be liened.

The lien claim is a very powerful remedy because it permits the supplier of materials and labor to sue the owner of the building on which work was performed, even though there may be no contract between you and the owner. For example, the owner contracts with a general contractor, who contracts with a subcontractor, who contracts with you. Ordinarily, you could sue only the subcontractor. You could not sue the general contractor or the owner. If the subcontractor went bankrupt or became insolvent, you'd be out of luck! However, under the provincial lien legislation, you can sue the owner and the general contractor for the holdback amounts (10% of the contract price).

There are also other advantages to using the lien remedy. For example, the *Construction Lien Act* in Ontario gives the lien claimants a decided advantage over the ordinary creditors of a general contractor. In the event of bankruptcy of the general contractor, the amount owing by the owner to the bankrupt contractor, or at least an amount sufficient to satisfy the claims of the person who supplied services and materials on the particular project to that contractor, does not form part of the bankrupt estate. Lien claimants are deemed to be secured creditors under the federal *Bankruptcy and Insolvency Act* and may proceed to collect the amounts owing to them directly out of the owner's holdback. In the absence of this legislation, suppliers of materials and services (i.e., you) could only file claims against the bankrupt estate and would share in the assets of the estate along with other creditors of the bankrupt. (Most often this means you would receive nothing from the bankruptcy).

This article highlights only some of the provisions contained in lien provincial legislation, and the reader is strongly urged to consult a lawyer to obtain a more complete understanding of the purpose and effect of this remedy.

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July
1995

Vol. 17 No. 4

OUR COVER: Unlike the superficial photograph, the deep facial thermogram shown here is unique to the individual and cannot be counterfeited, according to the inventors of this identity verification breakthrough. Even identical twins have different patterns. (See page 24).

CANADIAN SECURITY

is published seven times per year by
SECURITY PUBLISHING LIMITED

P.O. Box 430, Station "O"

Toronto, Ontario

Canada M4A 2P1

Telephone (416) 755-4343

Fax (416) 755-7487

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Jack W. Percival

I.S.S.N. 0709-3403

Canadian Publications Mail Sales

Agreement Number 474-355

Printed in Canada

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Editorial contributions are welcomed and Canadian writers will be given primary consideration. Unsolicited contributions should be accompanied by a stamped self-addressed envelope if return is desired. CANADIAN SECURITY assumes no responsibility for loss of material supplied.

Subscriptions: Canada \$30 per year plus G.S.T. \$2.10 = \$32.10; \$75 three years plus G.S.T. \$5.25 = \$80.25. U.S. destinations add \$5.00 per year. Foreign destinations add \$10 (surface) or \$30.00 (airmail) per year. Single copies: Canada \$5, U.S.A. \$6, Overseas Airmail \$10. Annual Directory issue: Canada \$55 plus G.S.T. \$3.85 = \$58.85, Elsewhere \$65. Annual Directory is included in regular subscription.

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CANADIAN SECURITY, June/July 1995

CANADIAN SECURITY

The Journal of Protection & Communications

SECURITY • COMMUNICATIONS • FIRE
SAFETY & EMERGENCY SERVICES

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