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AN OVERVIEW OF THE CONSTRUCTION LIEN ACT

THE REMEDY GIVEN BY THE CONSTRUCTION LIEN ACT AND THE METHOD BY WHICH IT IS ASSERTED

As has been pointed out by the Courts on many occasions, the remedy given to the lien claimant is entirely a creature of statute. Accordingly, in order for the lien claimant to avail himself of the remedy given by this Act, he must bring himself within the strict wording of the Statute. If he is unable to do so, he will be unable to prosecute a claim for lien.

There are two remedies given to a lien claimant under the Construction Lien Act. Firstly, he is given a lien upon the land which has benefited from the supply of his materials or services. Secondly, he is given a lien on the money which has been allocated in one way or another to pay for the improvement being carried out on the owner's property.

The purpose of the Construction Lien Act has been expressed by the Courts on several occasions to be to prevent owners of land from getting the benefit of services and materials which have been supplied for the purpose of enhancing the value of the owner's land, without the owner being responsible in any way for paying for such services or materials. The Act gives to persons who supply material or services in connection with the improvement the right to place a lien upon the owner's land, if they are not paid. This results in the lien claimant enjoying certain preferences over other creditors of the debtor. For example, if the debtor is the owner of the property in question, the lien claimant's claim against the land will have priority over the interest of the Trustee in Bankruptcy of the owner in the event that he becomes insolvent. Similarly, if a subcontractor files a claim for lien against a bankrupt contractor, the subcontractor will have a prior claim to the owner's holdback, (and any other monies owing by the owner to the contractor) in priority to the ordinary creditors of the contractor's bankrupt estate. In the absence of this legislation, the supplier of materials and services could only file a claim against the bankrupt estate and would share in whatever assets there were in the estate, along with all other creditors of the bankrupt.

In certain circumstances, the lien claimant is given priority over other persons who have claims against the owner's land, such as mortgagees or execution creditors. Regardless of the amount advanced under a mortgage which is registered before the work starts, that mortgagee may only have priority over liens subsequently filed to the extent of the actual value of the land when the work started. Liens will have priority over advances made under a mortgage after the mortgagee has been given written notice of a claim for lien, or after the registration of a lien claimant's lien. In the event that a mortgage is registered after the work starts, or is expressed to have been given for the purpose of financing the

construction, the mortgagee will be liable to lien claimants for any deficiencies in the owner's holdback. These priorities will be more fully dealt with by Mr. Moldaver in his paper entitled "Critical Issues for Mortgagees".

The lien must be asserted against the land upon which the work was done, or the materials or services were supplied. This is accomplished normally by the registration of a claim for lien against the title to the land. In some cases, however, it would be against public policy to permit registration of a lien, the ultimate remedy of the claimant being the right to sell the land in question. In such circumstances, the lien is served upon the owner, but is not registered. Mr. McLauchlin will be dealing with claims for lien against streets, roads and public projects where the claim for lien is served, rather than registered, in his paper entitled "Rights and Remedies of Claimants: Protecting the Claim". In the case of projects of this nature, the lien becomes a charge on the holdbacks which are required to be maintained by the owner, rather than a charge or lien on the owner's land.

THE SYSTEM OF HOLDBACKS UNDER THE CONSTRUCTION LIEN ACT

The owner's liability to persons asserting claims for lien against him under the Construction Lien Act is not an unlimited liability, except perhaps in the case of the general contractor. Section 24 of the Act requires the owner to retain a holdback equal to 10 percent of the value of the services or materials supplied under his contract with the general contractor until all liens that might be claimed against his holdback have expired, or they have been satisfied, discharged or provided for under Section 44 of the Act (relating to the vacation of liens by the posting of security therefore). So long as he fulfills this obligation, and in the event of a dispute, pays that amount into Court for distribution among the lien claimants, his liability under the Act has been satisfied.

The amount which the owner will be holding back at any given time will increase as the work progresses until the completion of the contract. Additions to the work in the form of extras will also result in an increase in the value of the work which, in turn, will increase the amount of the owner's holdback. If portions of the work are deleted, that will result in a reduction in the contract value which must also be taken into account when arriving at the owner's holdback.

In certain circumstances, the owner must increase the amount of the holdback beyond the requisite 10 percent. If he receives notice in writing of a lien under Section 24(2) of the Construction Lien Act, he must retain out of future payments to his contractor, an amount equal to that which has been claimed in the written notice. This amount must be retained in addition to the regular 10 percent holdback.

The owner is obliged to retain this holdback until 45 days after a certificate of substantial performance has been published, or in the absence of a certificate, until the contract with his general contractor has been completed or abandoned. Forty-six days after the publication of a certificate of substantial performance, the owner may release the holdback to the general contractor on the work which has been performed up to the date certified as the date of substantial performance in the certificate. Section 22(2) requires the owner to retain a second holdback, equal to 10 percent of the value of the work yet to

be done in order to completely finish the contract. once again, this holdback must be retained until 45 days after the completion of the contract, the term "completion" will be discussed later.

If claims for lien are registered within either of these 45 day periods, the owner may not release the holdback to the contractor until those claims for lien have been disposed of, or the registration of the claims has been vacated. The method by which the registration of the lien may be vacated is discussed by Mr. Reynolds in his paper entitled "Surety Bonds". If security is posted with the Court for the claim for lien and an order taken out and registered vacating the lien, the owner may deal with the holdback as though the lien no longer existed.

The Act not only imposes an obligation on the owner to maintain a holdback, but also requires all other persons who are making payments on a construction contract under which a lien may arise, to retain a holdback equal to 10 percent of the price of the services or materials being supplied. On a large construction project, this results in a pyramid of holdbacks being maintained. The owner maintains one holdback at the apex of the pyramid out of payments being made to his general contractor. The general contractor, in turn, will be employing a number of subcontractors on the next tier in the pyramid and he will be maintaining several holdbacks, one on each of those subcontracts. On the next level, we will find a number of sub-subcontractors employed by various subcontractors. Each subcontractor must maintain a holdback on his contract with each of his sub-subcontractors.

If we look at the holdback situation in a straight line, it may be compared to the rungs of a ladder. The owner on the top rung is maintaining a holdback equal to 10 percent of the value of the services and materials supplied by his general contractor. He is maintaining that holdback for the benefit of the subcontractor engaged by the general contractor. The subcontractor is two rungs down the ladder. In turn, the general contractor is maintaining a holdback from the subcontractor equal to 10 percent of the value of the services and materials supplied by that subcontractor on his subcontract. This holdback is being maintained for the benefit of the sub-subcontractor on the fourth rung of the ladder, two rungs down from the general contractor. In turn, the subcontractor may be retaining a holdback from his sub-subcontractor if liens may arise under that sub-subcontract. For example, the sub-subcontractor may be employing workers and may be purchasing material. These labour and material suppliers would be entitled to claim a lien against the sub-subcontractor for their services and materials. The subcontractors holdback is, therefore, being maintained for the benefit of those suppliers of services and materials to the sub-subcontractor.

It is important to note that each holdback is being maintained for the benefit of persons below the party maintaining the holdback in the pyramid or on the ladder. Again, each of the various parties in our example who are required to maintain holdbacks, must retain them until 45 days after all liens that may be claimed against the holdback he is maintaining have expired, or have been satisfied, discharged or vacated.

It should be noted that the obligation to increase the amount of the holdback in the hands of a contractor or subcontractor on receipt of a written notice of lien is the same as that imposed on the owner.

In general, there are two sets of holdbacks which must be maintained. The first relates to the work done up to substantial completion of the contract. The second relates to work done subsequent to the substantial completion of the contract in order to finish the contract. The Act specifically provides that the expiry of a person's lien for work done prior to substantial completion of the contract will not affect his right to claim a lien for finishing work.

SALE, THE ULTIMATE REMEDY OF THE LIEN CLAIMANT

If the owner is unable to fulfill his obligations under the Construction Lien Act, the final judgment in the action will provide that the owner's premises are to be sold. The proceeds of sale are then paid into Court and distributed as the Court directs in order to satisfy the owner's obligations in this regard. The judgment at trial usually directs the owner to pay into Court the amounts for which he has been found liable, and states that if he does not do so within a specified period of time (usually about 20 days), the lien claimants will be at liberty to apply for an Order for sale. The property may be sold in any manner satisfactory to the Court. The sale takes place under the supervision of the Court. The Rules of Civil Procedure, which apply to Court ordered sales, apply equally to sales of property pursuant to a judgment in a construction lien action.

THE TRUST FUND

Part II of the Construction Lien Act creates various trust funds. In effect, this part of the Act gives the lien claimant a second string to his bow. A trust claimant may assert his claim, even though his right to a lien has expired. Whereas a lien claimant looks for payment to the person two rungs above him on the ladder in our holdback example, the trust claimant can only assert his claim against the person with whom he had privity of contract, that is, the person on the rung of the ladder immediately above him. The Act creates trust funds out of any monies payable by the owner to his contractor, by the contractor to his subcontractor, by the subcontractor to the sub-subcontractor, and beyond that if necessary. In effect, monies payable under the various contracts are subject to a trust in the general contractor, he enters into direct contracts with various trades, each of whom are general contractors under this definition.

A subcontractor is defined in Section 1 of the Act as "a person not contracting with, or employed directly by, the owner or his agent, but who supplies services or materials to the improvement under an agreement with the contractor, or under him with another subcontractor." It follows from this definition that on any large project, there will be a number of subcontractors hired by the general contractor who in turn purchase services or materials from sub-subcontractors. As previously noted, there will probably also be sub-subcontractors who purchase services and materials from others.

Persons who supply services or materials alone are also entitled to assert claims for lien. These persons may be claiming under the contractor, subcontractors or sub-subcontractors.

Any person who contributes to the enhancement of the value of the improvement in question may claim a lien, whether he supplies services and/or materials directly, or engages others to fulfill the terms of his contract as a contractor or subcontractor. One exception to this statement, however, is provided for in Section 3(3) of the Act. That section states that an architect or the holder of a certificate of practice under The Architects' Act and the employees thereof, may not claim a lien. Section 1(I) of the Act provides that even where a planned improvement is not commenced, a person who supplies a design, plan, drawing or specification, that in itself enhances the value of the owner's interest in the land, is deemed to be supplying a services for which he has a claim for lien. This section would not apply to an architect, however, Section 17 of the Construction Lien Act limits the quantum of the claim for lien of a contractor or subcontractor, to the amount owing to him in relation to the particular improvement against which he seeks to assert his lien. Section 4 of the Act provides that any person who supplies services or materials to an improvement may not waive his rights under the Construction Lien Act. Section 5(1) of the Statute provides that all contracts or subcontracts are deemed to be amended insofar as it is necessary to be in conformity with the Act.

THE DUTIES AND RESPONSIBILITIES OF OWNERS AND CONTRACTORS

In addition to the duty of owners and contractors to maintain the two holdbacks previously mentioned, and to fulfill their obligations under the trusts created by Part II of the Act. They each have further obligations to lien claimants under Sections 32, 33 and 39 of the Construction Lien Act. These obligations relate to the giving and publication of certificates of substantial performance, certificates as to the completion of subcontracts, and the furnishing of information which is required by lien claimants in order to properly prosecute their claims.

Where progress payments are made under the contract on the certificate of an architect, engineer or other person, certificates of substantial performance of the general contract are normally issued by him. It is the obligation, however, of the contractor to request that he issue the certificate. On projects on which there is no "payment certifier", it is the obligation of the owner and the contractor jointly to issue certificates of substantial performance.

Section 32 obliges the contractor to publish the certificate of substantial performance, once, in a construction trade newspaper. Section 32(3) of the Act makes a person who fails, or refuses to certify the substantial performance of a contract, liable to anyone who suffers damages as a result. Section 32(4) of the Act makes a payment certifier, who fails to deliver a copy of the certificate of substantial performance to the owner and to the contractor, liable to anyone who suffers damages as a result.

Section 33 attempts to deal with one of the problems which arises on a large project where a subcontractor completes his work long before substantial completion of the entire project has been accomplished. The owner must maintain his 10% holdback on the entire value of the work until 45 days have elapsed following the publication of a certificate or declaration of substantial performance. The general contractor, however, is obliged to pay out his 10% holdback on completed subcontracts long before that day arrives. Theoretically, the owner's 10% holdback is equal to the sum of all of the general contractor's holdbacks on all of the subcontract he has entered into, plus 10% of the general contractor's profit, overhead and any labour supplied by him. The net result in this situation is that the general contractor is obliged to pay out 10% of the subcontractor's contract price without being compensated therefore by receiving a like amount out of the owner's holdback.

Fortunately, the Legislature has provided a remedy in Section 33(1). This provides that, "upon the request of the contractor, the payment certifier on the contract, or the owner and the contractor jointly, may determine whether a subcontract has been completed, and where he or they so determine, he or they may certify the completion of the subcontract ... in the form prescribed by the Act. When such a certificate is issued, the subcontract is deemed by Section 33(2) to have been completed on the date of certification. Section 33(3) provides that if any services or materials are supplied under or in respect of that particular subcontract, after the date upon which it has been certified to have been completed, they will be deemed to have been last supplied on the date of certification. Section 33(4) requires that a copy of the certificate of completion of that subcontract be given to the subcontractor in question. If the certificate has been issued by a payment certifier, he is required to give a copy of it to the owner and the contractor as well.

The effect of issuing the certificate is that it starts the time for registering a lien running against not only the subcontractor in question, but anyone who supplied materials or services to that subcontractor.

Section 25 of the Act provides that after the expiration of 45 days from the date upon which the subcontract was certified to be substantially performed, the subcontractor is entitled to receive his holdback from the general contractor, or the subcontractor who employed him, provided any liens in respect of that subcontract have been satisfied, discharged, or provided for under Section 44. The Section further provides that if those conditions have been met, the owner may pay the general contractor an amount equivalent to the holdback on that subcontract out of his overall 10% holdback. The owner thus reduces his 10% holdback by an amount equal to the amount which his contractor is obliged to pay out to the subcontractor.

Section 39 of the Act requires owners and contractors to provide the information described therein upon demand, and at least within 21 days of receiving the request for the information. In general, they are required, upon receiving a written request therefore, to provide particulars of the contract, and a copy of any labour and material payment bond in respect of the contract. A contractor must also, by Section 39(4) of the Act, and

upon written request, furnish particulars of the publication of the certificate of substantial performance.

In certain circumstances, the court may compel the owner or the contractor to comply with the request for information, and award costs against him for his failure to provide it. In addition, Section 39(5) provides that an owner or contractor who provides false information, or who refuses to provide information, will be liable to any person who suffers damages as a result. Mr. Howard Wise will be discussing this section in more detail later today.

SUBSTANTIAL PERFORMANCE

Section 2(1) of the Construction Lien Act defines the term "substantial performance". It should be noted that since the definition refers to the "contract" throughout, and since that term is defined in Section I of the Act as the contract between the owner and the contractor, substantial performance does not apply to the contracts of subcontractors. Substantial performance occurs when two conditions are met. Firstly, the improvement to be made under the contract, or a substantial part thereof, must be ready for use, or must be being used, for the purposes intended. Secondly, the improvement must be capable of being completed, or where there is a known defect, corrected, at a cost of not more than 3% of the first \$500,000 of the contract price, 2% of the next \$500,000 of the contract price, and 1% of the balance of the contract price. Both of these conditions must be met before the contract can be certified to be substantially performed.

Section 2(2) of the Act recognizes that in some cases there will be unforeseen delays in the work which would prevent the release of the holdback for an inordinate length of time. In such circumstances, this delay would create a severe hardship on the contractor. That Section provides that where the first condition has been met, and the improvement, or a substantial part thereof, is ready for use, or is being used for the purpose intended, but the remainder of the improvement cannot be completed expeditiously for reasons which are beyond the control of the contractor, the value of the services or materials which remain to be supplied, and which are required to complete the improvement, may be deducted from the contract price in applying the percentages under the second condition. The Section also provides that where the owner and the contractor agree not to complete the improvement expeditiously, the value of the services or materials remaining to be supplied may be deducted from the contract price in this way. This means that if the first condition has been met, the contract price is reduced by the value of the work which cannot be completed expeditiously, and the percentage set out under the second condition, is applied to the lesser amount.

Section 32(1) of the Act provides that the date set out in a certificate of substantial performance is deemed to be the date on which the contract was, in fact, substantially performed. This means that even if the persons signing the certificate are wrong about the date, insofar as the rights and obligations created by the Construction Lien Act are concerned, the date in the certificate will govern.

The date set out in the certificate will also determine the amount which may be claimed by any lien claimant who preserves his lien, both before or after the publication of the certificate or declaration. The claimant's lien will be restricted to the value of the services or materials supplied up to the date set out in the certificate or declaration as the date of substantial performance. But it is not effective until it is published.

WHAT STEPS MUST BE TAKEN TO PRESERVE, PERFECT AND ENFORCE THE LIEN?

(a) Preservation

A lien arises as of the date when services or materials are supplied to an "improvement" by a contractor or subcontractor for an owner, contractor or subcontractor. Unless otherwise provided for in the Construction Lien Act, R.S.O. 1990, Chapter 30, the lien is a charge against the interest of the statutory owner in the premises up to the value of the services and materials supplied. (Section 14).

A claim for lien may be preserved in one of two ways. Where a lien claimant claims a lien against the interest of the owner in the premises, the lien is preserved in accordance with s.34(1)(a) of the Construction Lien Act by registering a claim for lien in the prescribed form under the Act in the Land Registry Office where the lands are located.

Section 16 of the Construction Lien Act provides that in restricted circumstances, a lien does not attach to the interest of an owner in the premises.

Where the subject premises are owned by the Crown, or the premises are composed of a public street or highway owned by a municipality, or a railway right-of-way, the claim for lien is not registered against the title to the subject premises but rather written notice of the claim for lien is served in accordance with s. 34 on the representative or office as described in the regulations to the Construction Lien Act.

(b) Perfection of a claim for lien

A preserved claim for lien is perfected under s. 36 of the Construction Lien Act also in one of two ways depending on whether or not the lien attaches to the interest of the owner in the premises.

In situations where the claim for lien attaches to the interest of the owner in the premises, the preserved lien is perfected by issuing a statement of claim in the office of the local registrar of the regional court where the premises are located and by issuing and registering a certificate of action against the title to the subject premises in the Land Registry office where the lands are located. Where the registration of the claim for lien has been vacated by court order, it is not necessary to register the certificate of action against the title to the subject lands.

Where the claim for lien does not attach to the interest of the owner in the premises, the preserved claim for lien is perfected by issuing a statement of claim in the office of the local registrar of the regional court where the lands are located.

(c) Enforcement of a lien

Once the preserved lien has been perfected, the statement of claim must be served upon the parties named as defendants within 90 days of the date of issuing the Statement of Claim. (Section 53)

GETTING THE INFORMATION YOU REQUIRE

(a) Lien form (Form 8)

The proper contents of the claim for lien are governed by the provisions of s. 34 (5) of the Construction Lien Act subject to the correction of limited irregularities in accordance with s. 6. All information necessary to complete a claim for lien in the prescribed form should be obtained from the client as follows:

Name of Lien Claimant:

The full legal name of the lien claimant who supplied the services or materials to the premises is required.

Address for Service:

The full postal address of the lien claimant being the business address or a home address in cases where the lien claimant is an individual, is required.

Name of Owner:

In most cases, the full name of the registered owner of the premises is required. In addition, the Construction T.ip-n Art defines statutory owners whose interests are also subject to the claim for lien. These include a registered mortgagee, a landlord, a tenant, and joint or common interest holders. The full names of all statutory owners must also be inserted in the claim for lien.

Address:

The full addresses of all owners of the premises are required. A search of title of the subject lands at the Land Registry Office where the lands are located will assist in this regard. Reference should also be made to the contract documents and/or to a search of a telephone directory.

Name of person to whom lien claimant supplied services or materials:

The full legal name of the party with whom the lien claimant contracted to perform work or supply services and materials is required and should be verified by means of corporate, partnership, and business name style searches.

Address:

The full postal address of the party with whom the lien claimant contracted to perform work or supply services and materials is required.

Time within which services or materials were supplied:

From date supply commenced refers to the date upon which the first materials or services were provided to the subject premises. In the event there has been publication of a certificate of substantial performance of the contract, the date of first supply would become the first date after substantial performance when further work or services and materials were provided to the subject premises by the lien claimant.

To date of most recent supply:

The date of last supply of materials or services to the subject premises is required.

Short description of services or materials which have been supplied:

A description of the nature of the work performed by the lien claimant is required.

Contract price or sub-contract price:

This sum is calculated either in accordance with the provisions of the lien claimant's contract, or in instances where the contract has been terminated, on a quantum merit basis.

From date supply commenced refers to the date upon which the first materials or services were provided to the subject premises. In the event there has been publication of a certificate of substantial performance of the contract, the date of first supply would become the first date after substantial performance when further work or services and materials were provided to the subject premises by the lien claimant.

To date of most recent supply:

The date of last supply of materials or services to the subject premises is required.

Short description of services or materials which have been supplied:

A description of the nature of the work performed by the lien claimant is required.

Contract price or sub-contract price:

This sum is calculated either in accordance with the provisions of the lien claimant's contract, or in instances where the contract has been terminated, on a quantum merit basis.

Amount claimed as owing in respect of services or materials that have been supplied:

Requires a calculation of the value of work performed between the date of first and most recent supply less all amounts that have been received by the lien claimant in payment.

The interest against which a claim or charge is claimed:

Where the claim for lien attaches to the interest of the owner in the premises, paragraph A of Form 8 is to be used and paragraph B is deleted. Where the claim for lien does not attach to the interest of the owner in the premises, paragraph B should be used and paragraph A should be deleted. In addition, where paragraph B is used, the municipal address of the property, the names of streets or roads upon which the improvement was made, the town or city in which the lands or street or road is located and if possible, the project name should be inserted under paragraph B.

Execution of the claim for lien:

Where the lien claimant is a limited company or a corporation, the claim for lien may be executed by and should be used and the other two paragraphs deleted. Under s. 40 of the Construction Lien Act, anyone named. In the claim for lien as an owner or as a person to whom services or materials have been supplied is entitled to cross-examine the deponent on the facts that are contained in the claim for lien. In the event the deponent is without personal knowledge of the contents of the claim for lien, a party named in the claim for lien may be in a position to bring a successful motion under Section 47 to have claim for lien discharged by order of the court.

(b) The Contractual Chain

In addition to the information obtained from the client necessary to complete the claim for lien form, all documentation relating to the client's contractual arrangements should be obtained including a copy of the contract or subcontract, all invoices rendered for materials and services provided, payment certificates, any deficiency notices, and a current statement of all payments made to the client.

The names of all parties in the lien claimant's contractual chain up to and including the owner of the authorized signing officer. The name of the officer and his capacity should be shown beneath the signature line together with the words "I have authority to bind the corporation". In addition, the claim for lien may be executed by any individual with authority to execute as agent. In these instances, the name of the individual and an indication that he is an agent together with the full legal name of the corporation, or limited company should be shown.

Description of Premises

Where the claim for lien attaches to the interest of the owner in the premises, the full legal description as disclosed by a search of title of the subject lands should be entered. Lengthy descriptions may be annexed as a schedule to the claim for lien.

Affidavit of Verification (Form 9)

A claim for lien must be verified by a sworn affidavit of the lien claimant or an agent possessing personal knowledge of the particulars disclosed in the claim for lien who can also attest to his belief in the truth of the facts contained in the claim for lien. In addition, one of paragraphs (a) (b) or (c) of Form 9 subject premises should be determined together with the particulars of any labour and material payment bonds

posted by any party in the contractual chain. (see s.69 of the Construction Lien Act in this regard)

(c) Where was work performed and for whom?

The lien claimant should provide the municipal address of the premises for which materials and services were provided and if possible, the lot and plan number of the subject premises.

Thereafter, a search of title of the subject lands should be completed in the Land Registry Office where the lands are situated to confirm the name of the owner and all persons having an interest in the premises including mortgagees and lessees, the proper legal description of the premises and that the subject premises are in fact the lands to which materials and services have been provided by the lien claimant.

HOW MUCH TIME DO YOU HAVE?

(a) Preservation

A claim for lien must be preserved either by registering the claim for lien against the title to the subject premises or by giving written notice of the lien within a 45 day period.

The date from which the 45 day period is calculated is described under s.31 of the Construction Lien Act

and varies depending upon the following factors:

- (i) The date of publication of any certificate of substantial performance of the contract in accordance with Section 32;
- (ii) If acting for a contractor, the date upon which work of a value equal to the lesser of 1% of the contract price or \$1,000.00 remains to be performed; and
- (iii) If acting for a sub-contractor, the date of last work or supply of materials to the subject premises.

Where a certificate of substantial performance has been published, a contractor must preserve a claim for lien within 45 days from the earliest of; date of publication, completion of the contract, abandonment of the contract or declaration of last supply. A subcontractor must preserve a claim for lien within 45 days from the earliest of; date of publication, date of last work or supply of materials to the subject premises,, subcontract certification under Section 33 or declaration of last supply.

Where there has been no certificate of substantial performance published, a contractor must preserve a claim for lien within 45 days from the earliest of; deemed completion of the contract, abandonment of the contract or declaration of last supply. A sub-contractor must preserve a claim for lien within 45 days from the earliest of; date of last work or supply of materials to the subject premises, sub-contract certification under Section 33 or declaration of the last supply.

The publication of any certificate of substantial performance can therefore materially affect the calculation of the lien period-under Section 31 and the timing of the release of

basic holdback funds under Section 22. Where no certificate has been published, the lien period will be extended and the release of holdback funds will be delayed.

In each case, a separate lien period exists on behalf of the contractor and sub-contractor in accordance with Section 31 of the Construction Lien Act for services rendered or materials supplied to the subject premises after the date of substantial performance. In this case, a contractor must preserve a claim for lien within 45 days from the earliest of; deemed completion of the contract, (being the lesser of 1% of the contract price or \$ 1, 0 0 0. 0 0 of work yet to be performed) , abandonment of the contract or declaration of last supply. A subcontractor must preserve a claim for lien in these circumstances within 45 days from the earliest of; date of last work or supply of materials to the subject premises, sub-contract certification under Section 33 or declaration of last supply.

Calculation of the appropriate 45 day period in which to preserve a claim for lien must be precise in that the Construction Lien Act specifically provides for the expiry of a claimant's lien rights at the conclusion of the relevant time period.

Wherever possible, the claim for lien should be preserved in accordance with Section 34 in advance of the expiry of the time periods described by Section 31.

(b)Perfection

Once a claim for lien has been preserved either by registration of a claim for lien or by the appropriate notification of a claim for lien, the lien must be perfected in accordance with s. 36 of the Construction Lien Act within 45 days after the expiration of the time in which a claim for lien could have been preserved pursuant to Section 31 of the Act.

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