CARSWELL

CONDUCT OF LIEN, TRUST AND ADJUDICATION PROCEEDINGS

2021

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PREFACE

Welcome to the eighteenth edition of this text — the third under its new title *Conduct of Lien, Trust and Adjudication Proceedings* and the first (and I hope last) to be issued during a time of global pandemic.

During the COVID-19 pandemic, most of the construction industry has soldiered on as an essential service. Courts and counsel have adapted to remote hearings and electronic submissions. Where procedures regarding construction liens have been affected, I have endeavoured to identify and explain the changes. For example, in the chapter on vacating liens from title, you will find an interim procedure for vacating liens during the pandemic. Practice Directions regarding lien procedures have been summarized in an appendix.

This edition also marks one full year following the implementation of all major changes to the *Construction Act*, although the former *Construction Lien Act* continues to govern in many cases. Cash flows in most cases are subject to the province's prompt payment regime. The first adjudications have taken place. On October 1, 2020, Ontario Dispute Adjudication for Construction Contracts ("ODACC") released its first annual report. The ODACC fiscal year ended on July 31, 2020, and as of that date, thirty-two notices of adjudication had been submitted. Of the thirty-two notices of adjudication in the Report, only three resulted in a determination by the adjudicator. The number of adjudications will no doubt increase as more projects will become subject to the new regime.

As in past editions, this edition benefits significantly from the input of numerous practitioners who have taken the time to write me with questions, comments, or observations about case law and local practice. I thank all of you for taking the time to do so. It makes this book better every year that you do.

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CHAPTER 1

INTRODUCTION: A TALE OF THREE ACTS

1.0

The implementation of the sweeping reforms enacted by the *Construction Act* is now complete. On December 12, 2017, the *Construction Lien Amendment Act, 2017* received Royal Assent. Many housekeeping and non-substantive amendments came into force that day. The modernization portion of the *Act*, repealing and replacing much of Part VIII and with a new set of regulations, came into force on July 1, 2018. Finally, prompt payment and adjudication came into force on October 1, 2019. Subject to transition provisions, Ontario's statutory prompt payment regime is now mandatory on the vast majority of projects in this province.[1] These transition provisions continue to generate debate as to what version of the *Act* applies to certain improvements.

Section 87.3 of the *Act* provides as follows:

> **87.3** (1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,
>
> (a) a contract for the improvement was entered into before July 1, 2018;
>
> (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
>
> (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improve-

[1] Section 1.1(2.1) provides that prompt payment does not apply with respect to any portion of a project agreement that provides for the operation or maintenance of the improvement by the special purpose entity, or to any portion of an agreement between the special purpose entity and the contractor or any other subcontract made under the project agreement that pertains to the operation or maintenance of the improvement by the special purpose entity.

ment was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19(1) of Schedule 8 to the *Restoring Trust, Transparency and Accountability Act, 2018* came into force.

Same

(2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

Exception, municipal interest in premises

(3) Despite subsection (1), the amendments made to this Act by subsections 13 (4), 14 (4) and 29 (2) and (4) of the *Construction Lien Amendment Act, 2017* apply with respect to an improvement to a premises in which a municipality has an interest, even if a contract for the improvement was entered into or a procurement process for the improvement was commenced before July 1, 2018.

Non-application of Parts I.1 and II.1

(4) Parts I.1 and II.1 do not apply with respect to the following contracts and subcontracts:

1. A contract entered into before the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* came into force.

2. A contract entered into on or after the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.

3. A subcontract made under a contract referred to in paragraph 1 or 2.

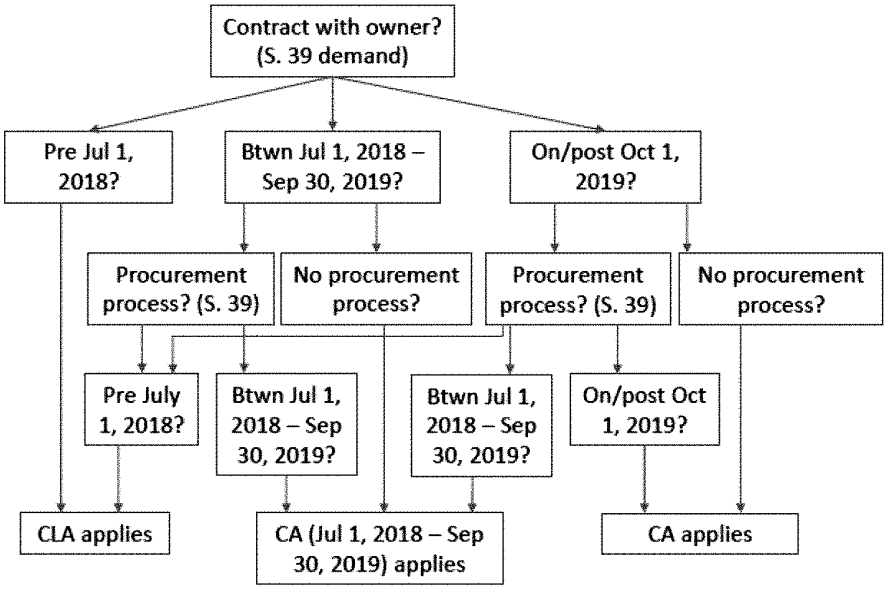
There are now three possible versions of the *Act* that may apply to an improvement:

1. The *Act* as it read before July 1, 2018.

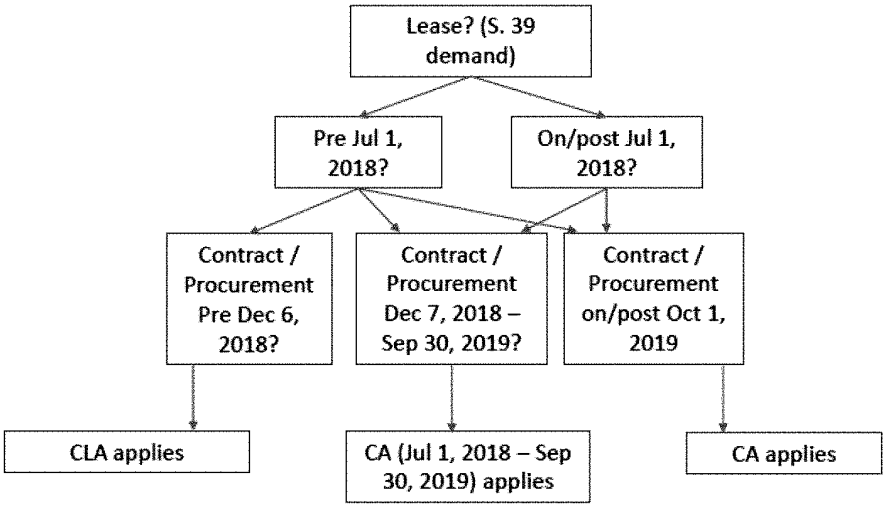
2. The *Act* as it read between July 1, 2018, and September 30, 2019.

3. The *Act* as it reads as of October 1, 2019.

The following flowchart may assist in determining what version of the *Act* applies in any given fact situation:



Where the premises are subject to a lease, the following chart applies:



It may be prudent and necessary, if time permits, to use demands for information under s. 39 of the *Act* to determine the relevant dates.[2]

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[2] Demands for information are discussed in chapter 2.11.

The construction masters in Toronto have indicated that in the absence of evidence to the contrary, the court will presume that the new *Act* applies.[3]

There is no transition period with respect to the changes affecting municipalities: the *Act* as it reads as of October 1, 2019, applies.

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[3] Master Donald E. Short and Master Todd Robinson, "Tips for a Successful Hearing Before a Construction Court Master", Presentation to the Advocates' Society, April 30, 2019, reproduced with permission of the masters as Appendix XII.

CHAPTER 2

PRESERVING A LIEN

2.0

2.1 Guide

Liens still "arise" upon the mere supply of lienable services or materials to an improvement,[1] and "expire" by mere passage of time. Only liens that have "arisen" can be preserved. Only liens that have been "preserved" can be "perfected". Liens have effect from the moment they "arise", even before they are "preserved".[2] After a lien has "arisen" by the mere doing of work or supply of materials, it "subsists" until it expires by passage of time,[3] unless it is "preserved" in accordance with the statutory provisions in that regard.[4]

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1 *Construction Act*, R.S.O. 1990, c. C.30, **s. 15**.

2 Some of the rights that accrue are the right to demand information under the *Construction Act*, R.S.O. 1990, c. C.30, **s. 39**, or to gain priority under **s. 78** in some narrow circumstances, and the prohibition relating to mortgages taken by lien claimants to secure a priority over other lien claimants is said to render the mortgage void whether it was given before or after that lien arose (**s. 80(2)**).

3 *Construction Act*, R.S.O. 1990, c. C.30, **s. 31(1)**.

4 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(1)**.

Liens are usually perfected by commencement of a lien action *and* registration of a certificate of that action. If the lien has been vacated from title or where the lien was preserved by service, timely commencement of a lien action and service of the statement of claim is sufficient and no certificate of action need be registered. In some limited circumstances a preserved lien can be perfected by "sheltering" under the perfected lien of another claimant,[5] whether the sheltering lien was preserved by registration or by service.

2.2 Do you have a lien?

One of the first questions to ask in preparing a lien for a client is whether the relevant work, services or materials supplied is "lienable" under s. 14 of the *Act*. Section 14 simply provides that if a person has "supplied services" or "materials" to an "improvement", that person has a lien against the interest of the "owner" in the "premises" improved for the "price" of the "services or materials". There are seven defined terms in this simple statement and a considerable body of case law on each.

In order to be entitled to a lien, a person must have supplied services or materials to an improvement for an owner, contractor or subcontractor.[6] Any alteration, addition or repair to the land, any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, as well as the complete or partial demolition or removal of any building, structure or works on the land is defined as constituting an "improvement" for the purposes of the *Act*.

Determining whether or not a service falls within the definition of

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5 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(3)**. See chapter 2.15.3 on sheltering.

6 *Construction Act*, R.S.O. 1990, c. C.30, **s. 14(1)**. For an exhaustive review of the concept of lienability, see *Toronto Dominion Bank v. 450477 Ontario Ltd.*, 2016 ONSC 4908, 2016 CarswellOnt 12434 (S.C.J. [Commercial List]).

"improvement" is a fact-finding exercise.[7] The court is looking for tangible benefit to the property. The interest has to be an interest in land; it cannot be a right of a personal nature, nor can an interest in the improvement by itself constitute a lienable interest.[8]

Services that do not enhance the inherent value of the land, such as snow clearing,[9] or ploughing, sanding and salting,[10] for example, do not give rise to lien rights. There is divergent authority on the issue of whether the removal of environmental contaminants creates lien rights.[11]

Just as the supply and installation of moveable items such as office furniture or appliances does not create lien rights,[12] mere attachment of goods to the land does not always create lien rights. Courts have held that water cooling towers, for example, even though physically attached to the premises, do not give rise to a lien,[13] while an air conditioning unit has been held to be lienable, even though easily re-

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7 *Kennedy Electric Ltd. v. Rumble Automation Inc.*, 2007 CarswellOnt 6120, 64 C.L.R. (3d) 33 (C.A.); leave to appeal refused 2008 CarswellOnt 1079, 2008 CarswellOnt 1080 (S.C.C.).

8 *Pankka v. Butchart*, 1956 CarswellOnt 127, [1956] O.R. 837 (C.A.); *Graham Mining Ltd. v. Rapid-Eau Technologies Inc.*, [2002] O.J. No. 1549 (C.A.).

9 *G. Newman Aluminum Sales Ltd. v. Snowking Enterprises Inc.*, 1980 CarswellOnt 551, 13 R.P.R. 275 (H.C.).

10 *Canadian Imperial Bank of Commerce v. Repac Construction & Materials Ltd.*, 1983 CarswellOnt 723, 1 C.L.R. 143 (S.C.).

11 See *310 Waste Ltd. v. Casboro Industries Ltd.*, 2004 CarswellOnt 2615, 71 O.R. (3d) 732 (S.C.J.); affirmed 2005 CarswellOnt 6441 (Div. Ct.); affirmed 2006 CarswellOnt 5521 (C.A.); and *Park Contractors Inc. v. Royal Bank*, 1998 CarswellOnt 2331, 38 O.R. (3d) 290 (Gen. Div.) to the effect that such services are lienable and *Tillsonburg Foamtec Inc. v. Poulton*, 2004 CarswellOnt 8709 (S.C.J.) to the opposite.

12 *3726843 Canada Inc. v. 879115 Ontario Ltd.*, 2005 CarswellOnt 1386, 42 C.L.R. (3d) 220 (S.C.J.); additional reasons 2005 CarswellOnt 2275 (S.C.J.); *Hubert v. Shinder*, 1952 CarswellOnt 197, [1952] O.W.N. 146 (C.A.); *Thornton Appliances Ltd. v. Westmount Developments Ltd.*, 1994 CarswellNB 132, 150 N.B.R. (2d) 229 (Q.B.).

13 *Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc.*, 1993 CarswellOnt 829, 16 O.R. (3d) 324 (Gen. Div.); reversed 1996 CarswellOnt 1583, 30 O.R. (3d) 159 (C.A.).

moved.[14] Pre-2010 case law to the effect that even the supply and installation of massive machines or entire plants may not create lien rights if they were neither a component of the building nor consumed in the construction of the building[15] has to be read in light of the 2010 amendment to the definition of "improvement" in the *Act* to include such installations.

The question of lienability of construction management services has not been answered consistently. A claim for lien by the general manager of the defendant contractor for services in setting up a sales office, applying for building permits, negotiating with trades and municipal officials and assisting site superintendents with making decisions was disallowed, since those services, which were performed offsite, were not directly related to the improvement.[16] *Presidential Developments* has been held to stand for the proposition that project management work does give rise to a lien.[17] Other decisions have held that *Presidential Developments* does not stand for such a broad proposition and merely disallows a lien for management services where those services were not sufficiently linked to the improvement. Conversely, those cases support a lien for construction management services, whether performed onsite or offsite, as long as they contributed in a direct and essential way to the construction of the improvement.[18] *Presidential Developments* has been distinguished where the

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14 *Stacey Heating & Plumbing Supplies Ltd. v. Tamasi*, 1988 CarswellOnt 775, 65 O.R. (2d) 481 (H.C.); reversed on other grounds 1991 CarswellOnt 810, 6 O.R. (3d) 341 (C.A.).

15 See, for example, *Kennedy Electric Ltd. v. Rumble Automation Inc.*, 2007 ONCA 664, 2007 CarswellOnt 6120; leave to appeal refused 2008 CarswellOnt 1079, 2008 CarswellOnt 1080 (S.C.C.).

16 *697470 Ontario Ltd. v. Presidential Developments Ltd.*, 1989 CarswellOnt 698, 69 O.R. (2d) 334 (Div. Ct.).

17 *Lewis Builds Corp. v. Printing Factory Lofts Inc.*, 2008 CarswellOnt 9436, [2008] O.J. No. 5889 (S.C.J.); *Tamma Construction Co. v. Brault*, 1995 CarswellOnt 953, 24 C.L.R. (2d) 124 (Gen. Div.), which also relied upon *Franro Property Development Ltd. v. Heritage Glen North Ltd.*, 1993 CarswellOnt 2572, Kirsh's C.L.C.F. 47.15 (Gen. Div.).

18 *Marino v. Bay-Walsh Ltd.* (May 29, 2002), Doc. 98-0469, [2002] O.J. No. 2211 (S.C.J.); *Torold Management Inc. v. 1317621 Ontario Inc.*, 2007 CarswellOnt 10003, [2007] O.J. No. 5435 (S.C.J.); *B.I.L.D.O.N. Construction (801) Inc. v. Project 801 Inc.*, 2011 CarswellOnt 6581, [2011] O.J. No. 3177 (S.C.J.).

claimant also performed work that clearly constituted it a contractor under the *Ontario Act*.[19]

In addition to suppliers of services, the *Act* also gives lien rights to suppliers of materials. "Materials" include every kind of movable property, (a) that becomes, or is intended to become, part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement, or (b) that is equipment rented without an operator for use in the making of the improvement. Materials are supplied to an improvement when they are placed on the land on which the improvement is being constructed, or are incorporated into or used in making the improvement.[20] It is not necessary that the material actually be consumed in construction;[21] it is necessary that the material reach the site or a designated lay-down area in the immediate vicinity of the site.[22] It is not necessary that a supplier intend that the material sold be for the purposes of a known and identified improvement before a lien arises.[23]

2.3 First meeting with the client

In many cases, the first meeting with a lien client may be nothing more than a telephone call or exchange of emails or facsimile transmissions. This first meeting usually happens towards the end of the statutory preservation period because the client will have been doing everything within its power to collect the outstanding debt without having to lien.

A lawyer's first reaction in the urgent circumstances of many lien

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19 *Centrum Renovations & Repair Inc. v. Ditta*, 2006 CarswellOnt 7390, [2006] O.J. No. 4667 (S.C.J.); additional reasons 2007 CarswellOnt 2992 (S.C.J.); affirmed 2009 CarswellOnt 8700 (Div. Ct.); additional reasons 2009 CarswellOnt 6650 (Div. Ct.).

20 *Construction Act*, R.S.O. 1990, c. C.30, **s. 1(2)**.

21 *Kalbfleisch v. Hurley*, 1915 CarswellOnt 208, 34 O.L.R. 268 (C.A.); *Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.*, 1996 CarswellOnt 1325, 27 C.L.R. (2d) 184, Kirsh's C.L.C.F. 1.21.9 (Gen. Div.).

22 *417482 Ontario Ltd. v. Al-Con Precast Ltd.*, 1985 CarswellOnt 838, 13 C.L.R. 117 (H.C.).

23 *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 CarswellOnt 1450, 87 C.L.R. (3d) 163 (C.A.).

claims may be to take everything the client says at face value, accept the retainer, open the file, and press on with the preservation of whatever lien the client claims. Time may permit only a cursory subsearch of title. Some lawyers will find and copy the most impressive looking legal description on another registered lien, and instruct a clerk to use this description to "fill out the form", have the lien executed by the client, and register it on title. Time might be so tight that the lawyer may be asked to sign the claim for lien on behalf of the lien claimant. In some geographically remote jurisdictions this practice appears to have been adopted out of necessity, given the enormous distances involved.[24] With electronic registration this expedient should no longer be necessary.

This approach may be necessary in a truly "11th hour" emergency,

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24 See: *Graham Mining Ltd. v. Rapid-Eau Technologies Inc.*, 2000 CarswellOnt 5205, 7 C.L.R. (3d) 279 (S.C.J.); additional reasons 2001 CarswellOnt 674 (S.C.J.). The affidavit of verification had been completed by a lawyer who stated: "1. I am the agent of the solicitor of the lien claimant named in the attached claim for lien. 2. I have informed myself of the facts stated in the claim for lien, and I believe those facts to be true." The moving parties' position was that the lien, not having been verified by the affidavit of an agent or assignee, as required by s. 34(6) of the *Act*, but by an agent of an agent of the lien claimant, did not strictly comply with the *Act* and was invalid. The court accepted that it was clear that Section 6 could not be used to cure the defect (*Venditti v. Petriglia*, 1989 CarswellOnt 689, 33 C.L.R. 1 (C.A.)). The real issue came down to the scope or true character of an agent. A solicitor, acting on behalf of a client, is an agent. Thus, a law firm purporting to act on behalf of a lien claimant by attending to the registration of the claim for lien with accompanying affidavit of verification is an agent, and as an agent can delegate its authority to a sub-agent if necessary *if*: (1) The acts of a sub-agent whose appointment was authorized by the principal bind the principal as if they had been performed by the agent himself. (2) The relation of principal and agent may be established by an agent between his principal and a sub-agent if the agent is expressly or impliedly authorized to constitute such relation, and it is the intention of the agent and of such sub-agent that such relation should be constituted. The affidavit of verification contained the essential averment that the deponent had informed himself of the facts set out in the claim, and further contained the necessary statement that he believed the facts to be true, which, even though neither statement was true, *formally* complied with the *Act*. The argument to the effect that to permit a third person to be the affiant would interpose that person between the lien claimant and the contractor or other person exercising the right to cross-examine pursuant to s. 40 was not seen as affecting the validity of the affidavit of verification.

but it is not recommended practice. If the lien proves to be grossly exaggerated, patently out of time, or otherwise invalid, will the client remember the urgency of the matter? What if there is a slander of title action, or a punitive order in costs?[25] The better practice is to follow the steps set out below.

2.4 Client identification and verification

The Law Society of Ontario's By-Law 7.1 incorporates client identification and verification obligations. The following information must now be obtained from corporate clients:

- full name;
- business address and telephone number;
- incorporation or business identification number and the jurisdiction that issued the number;
- description of the general nature of the type of business or activities in which the client engages;
- name, position and contact information for the individual providing instructions; and
- if the lawyer is to be involved in receiving, paying or transferring funds or securities on the client's behalf, verification of identity by obtaining additional information about the organization, its ownership structure, its directors and controlling owners, and the individual providing instructions, including reviewing independent source documents.

The following information must be obtained from individual clients:

- full name;
- business address and phone number;

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25 There are many dispiriting examples: see, for example, *Yorkdale Drywall Co. v. Schulberg*, 1993 CarswellOnt 851, 8 C.L.R. (2d) 100 (Gen. Div.), where a contractor's work and actions were so far below any acceptable standard that the Court allowed a crossclaim against it and awarded $100,000 in punitive damages.

- home address and phone number;
- occupation;
- if the lawyer is to be involved in receiving, paying or transferring funds or securities on the client's behalf, verification of the client's identity by reviewing original government-issued identification that is valid and has not expired; and
- if the lawyer is required to verify the identity of an individual the lawyer is not meeting face-to-face, the lawyer must obtain an attestation from a commissioner of oaths or guarantor or must have an agent verify identity on the lawyer's behalf.

The identification and verification requirements do not apply if the client is a financial institution, a public body, or a reporting issuer, as defined in the by-law.

2.5 The retainer

Each lawyer will have their own version of a retainer letter. If yours works, keep it. Apart from the usual commercial arrangements as to hourly rates, billing cycles, payment terms, interest on overdue accounts, finality of monthly accounts, reporting requirements and the like, the lawyer in a lien matter can use a retainer letter to have the client acknowledge, in writing, exclusive client responsibility for the accuracy of information provided to the lawyer and upon which the lawyer relies. An indemnity may be appropriate in a "last minute" lien situation.

The Law Society of Upper Canada has published a sample retainer letter and guidelines on establishing the retainer. Essentially, the letter sets out the scope of the retainer, the requirement for a deposit, the fee and billing arrangement, the hourly rates, and the confirmation that the lawyer is authorized to represent the client as per the terms of the retainer. If it is practically impossible to verify the timeliness, lienability or quantum of the client's lien, the retainer should be expressly qualified in that regard, otherwise the lawyer assumes a degree of professional responsibility for these matters to the client, in addition to the unavoidable statutory responsibility the lawyer has to the court and third parties.

The retainer should affirm the lawyer's reliance upon the client's

information and documentation. Some lawyers make it a condition of their retainer that any withholding of documentation by the client is sufficient to entitle them to terminate the retainer at any stage of a proceeding. Terms of a retainer expressly allowing the lien claimant's lawyer to withdraw are subject to the *Rules of Professional Conduct* in that regard.[26]

2.6 The "last minute" lien

As noted above, the "last minute" lien usually begins with a telephone call to the lawyer on the afternoon of the 59th day next following publication of the certificate of substantial performance. A lien has to go on. There is no time to verify amounts, names, corporate status or legal description. Still, a lien must be preserved or it will be irretrievably lost.

Do you take the retainer? LawPro counsels against getting involved in "11th hour" transactions where there is obviously insufficient time for the lawyer to conduct the due diligence necessary to properly advise the client.[27]

Assuming that you accept such a retainer, on which side do you err: registration or non-registration? Do you lien for too much, or too lit-

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[26] See **Law Society of Upper Canada *Rules of Professional Conduct*, Rule 2.09(1)**, "Withdrawal From Representation": "**2.09(1)** A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances." The Law Society's Commentary to this Rule reads as follows: "Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. No hard and fast rules can be laid down as to what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or Rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril." Finally, the new client ID and verification requirements of the Law Society of Upper Canada's By-law 7.1 must be met.

[27] See: "Lawyers Take Note of Trends in Claims", *Law Times*, June 14, 2004, at page 10.

tle? Do you lien more land, or less? Do you rely on available data and lien only for that which is clearly substantiated, against land that is clearly lienable, or lien for the client's highest and best claim, against all of the land that could possibly be liened?

The "best practice" in these circumstances seems to favour preserving the client's highest and best claim against the most land that could *reasonably* be lienable. In taking such instructions, it will help to have an appropriately worded retainer, excluding liability to the client for the contents of the lien or the timeliness of its preservation and having the client agree to indemnify the lawyer if any information provided by the client results in liability to the lawyer.

Some lawyers in a last minute lien situation have their clients execute and escrow a registerable release of lien at the same time as the claim for lien is executed, together with written authority to register same as they may in their discretion think fit. This enables the lien claimant's lawyer to quickly mitigate damages in the event that the lien proves to be fundamentally flawed (non-lienable, out of time, or grossly excessive).

When accepting a retainer for a last minute lien from an unknown client, the lawyer should be aware of the fact that unscrupulous parties may be well aware of the power of the remedy and willing to abuse it. Unfounded liens have been registered, for example, for the sole purpose of obtaining temporary leverage in commercial negotiations. Unfounded liens have been registered fraudulently against titles on land upon which absolutely no work has been done in order to create a requisition on title to frustrate an improvident purchase and sale in a rising real estate market.

2.7 Some practices to avoid

As a general rule, lawyers should avoid signing a claim for lien on the client's behalf. A lawyer who signs a lien exposes themselves to cross-examination in which case they would become a witness in the cause and unable to continue as counsel. A lawyer executing a lien may by doing so waive privilege with respect to any matter reasonably arising from the preservation of the lien.

One can only imagine the embarrassment of hearing a transcript of your own cross-examination being put to a witness at trial. But what does a lawyer practicing in a remote jurisdiction, or acting for a for-

eign client, do: sign, or simply let the lien expire? Once again, e-registration will solve a lot of these problems,[28] but for the time being, lawyers acting in anything but a truly last-minute situation should demand that their client have an appropriate person available to execute the lien.

2.8 Some practices to adopt

Some items to review with a client at a first meeting to prepare a claim for lien would include the following:

1. What is the client's correct corporate name and status?

   a. Order a corporate search on the client itself, in all names provided.

   b. Is the client licensed? If so, confirm the validity of the licence.

   c. Who is the correct person within the client's organization to sign the lien? Confirm their availability.

2. With whom did the client contract?

   a. Ask to see the contract or subcontract. Take a copy.

   b. Ask to see the client's actual invoices (all of them). Take a copy. Note the name used. Do another corporate search/style search on any new name.

   c. Ask to see the client's receivables ledger (or customer in the case of a running supply account). Take a copy.

   d. What is the correct state of account, as reflected in the client's invoices and ledger?

   e. Has any part of the claim not been invoiced and why not?

   f. What about the delay or loss of productivity claim? Is it a claim for general damages, or a claim for incremental costs actually incurred?

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28 In *Petroff Partnership Architects v. Mobius Corp.*, 2003 CarswellOnt 2260 (S.C.J.), the court held that an electronically registered lien was valid in the absence of a sworn paper affidavit of verification. The Master held that under s. 24(1) of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, evidence could be submitted electronically, without an additional paper affidavit being required.

g. How much is owed to subtrades, which ones and why?

h. How are trust funds accounted for within the organization, if at all? Is there any vulnerability on this score?

i. Is the client a contractor or a subcontractor? The consequences are serious when it comes to calculating the timeliness of a lien.

j. Ask whether there is a labour and material payment bond. Get out an immediate demand under **s. 39** of the *Act* for a copy of any relevant labour and material payment bond.

3. Have the client describe the property and the project.

a. What is/are the municipal address(es)? If there is a supply to many premises (e.g., lots in a subdivision), you may have a general lien.

b. Is the "owner" a tenant, such as in the case of leasehold improvements, or store or restaurant fitting out? Take down all trade or other names, so that you can list them in the lien (particularly important if you are liening a leasehold interest);[29]

c. What lands are "used and enjoyed" by the owner with the lands upon which the client worked, such as parking lots, even if adjacent or across the road, supply depots, lay down areas and the like? A search of all of these premises should be ordered.

d. Are there other liens? Make a list of the names of the lien claimants, amounts and responsible lawyers if possible. Use this to start creating your lien worksheet.

e. Have the client "tell their story", make detailed notes and listen for any information that would indicate that the "owner" is someone other than or in addition to the registered owner.

f. Be careful with Tarion plans. Do not rely on them without checking any relevant "R" plans.

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29 *Williams & Prior Ltd. v. Taskon Construction Ltd.*, 2003 CarswellOnt 474, [2003] O.J. No. 498 (S.C.J.).

4. Was there a payment certifier?

   a. Ask to see all progress payment applications and certificates. Take a copy.

   b. Has there been a certificate of substantial performance?

   c. Was it published? When? Where?

   d. If this information is unavailable, it can be searched by direct enquiry to the Daily Commercial News.

5. When was the client last on the job? When was the last supply?

   a. Is this documented? How?

   b. Was there a "prevenient arrangement" (i.e., one that allows a continuous supply, on client demand, so that you do not have to lien after each supply).

   c. What is the exact description of the work done during this last attendance?

6. What work, services or materials did the client supply?

7. Are there any bankruptcy or insolvency rumors with respect to either the owner, or the client's payer?

The answers to these questions will help you make some preliminary decisions about timeliness, lienability, and quantum and will allow you to conduct the necessary searches. You will want to remain personally involved in the lien registration process, if at all possible. Delegation can be a good thing but in lien proceedings, particularly last minute lien proceedings, delegation can lead to problems with the "ought to have known" component of **s. 35** of the *Act*. This is an objective standard and it will not help to say that the work was delegated.[30]

It is seldom possible to visit the site with the client and have them describe exactly what work was done and where, but it is a highly recommended practice where it is possible. Also as a matter of best practice, it is good to get the relevant R-plan out, have the client draw a coloured line around and initial the limits of the improvement, and

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30 Per the Attorney General's Advisory Committee Report: "A solicitor is an officer of the court as well as an advocate. He is under a duty to protect the legal system from abuse . . ."

have the client describe what work was done and where keeping this document as a record in your file. Lands "used or enjoyed therewith" may be liened and this exercise should reveal if there are such lands.

2.9 Securing the records

At the outset of lien litigation, lawyers must advise the client of the client's obligation to preserve, disclose and produce relevant documents. There are three unique obligations at law for the client with respect to both paper and electronic documents:

1. An obligation to preserve potentially relevant documents;
2. An obligation to disclose all relevant documents in an affidavit of documents; and
3. An obligation to produce copies of relevant documents that are not privileged.

This chapter focuses on the first obligation, the necessity of preserving potentially relevant documents.[31]

In 2006, the Ontario Bar Association and The Advocates' Society established a joint E-Discovery Implementation Committee ("EIC") to best practices with respect to electronic discovery. To date, the EIC has released 11 Model Documents on E-Discovery, all of which are available at http://www.oba.org/EIC/Model-Precedents. Model Documents three and four give guidance to counsel as to advising corporate and individual clients with respect to documentary discovery.

The preservation obligation is described as follows:

> Every party to litigation must implement a litigation hold (also known as a preservation hold) promptly as soon as litigation is reasonably anticipated, in order to preserve potentially relevant documents. This preservation obligation applies to a broader range of documents than does the obligation to disclose and the obligation to produce. The Company is required to preserve, in their original format, all documents that could reasonably be expected to be potentially relevant to the litigation, until such time as their actual relevance to the litigation can be determined.

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31 The issues surrounding the second and third obligations will be discussed in s. 6.3 of chapter 6, Discovery in lien actions.

More specifically, the EIC proposes the following steps:

a. ensure that potentially relevant documents (including electronically stored information) are not destroyed, lost or relinquished to others, either intentionally, or inadvertently such as through the implementation of an ordinary course document retention/destruction policy;

b. ensure that potentially relevant documents are not modified — an issue that arises particularly in the case of electronically stored information (which may be modified by the simple act of accessing the information); and

c. ensure that potentially relevant documents remain accessible — again, an issue that arises particularly in the case of electronically stored information, which may require particular forms of software or hardware to remain readable.

The obligation to preserve documents extends to electronic documents. The EIC comments as follows:

> Importantly, as noted, the category of "documents" includes "data and information in electronic form". The obligation to produce documents extends to all electronically stored information, stored on any kind of electronic media.
>
> The possible forms of electronically stored information include not only emails and word processing documents, but also spreadsheets and other accounting data, the contents of databases, electronically-stored voice mail records, archived and deleted files, auto-recovery files, web-based files such as internet history logs, temporary internet files and "cookies", and metadata. The media where electronically stored information may be stored include not only computer hard drives and servers, but also backup media, USB storage devices, CDs and DVDs, laptop computers, and personal digital assistants (including devices like Blackberries or Palm Pilots), among others.
>
> Electronically stored information bears important differences from paper documents, and the obligation to produce electronically stored information often will not be satisfied by producing a printout. For example, some records, such as spreadsheets, may not be meaningful without access to the electronic formulae used to generate the data. Other records, such as databases, need to be accessed electronically in their original electronic form in order to view the data in their proper context. In some cases, the metadata associated with an electronic record may be relevant, and metadata is not accessible in the printed version of an electronic record. At the preservation stage, therefore, it is essential to ensure that potentially relevant electronic records are preserved intact and unmodified in their origi-

> nal electronic form, until counsel has had an opportunity to assess the relevance of the records and the appropriate means of production of the records to opposing parties.

You may want to send a letter to opposing counsel confirming the obligation of the opposing party to take the preservation steps outlined above,[32] or send a similar letter directly to the opposing party together with the statement of claim.[33]

The importance of obtaining and reviewing original documentation cannot be overstated, but clients can be reluctant to part with original documents. This reluctance does not dilute the lawyer's obligation to locate and identify all such documents, secure them, mark them with unique identifiers, and review them as soon as possible after being retained.

Most liens are registered towards the end of a project, therefore turnover or warranty work may yet be underway. This may require ongoing client access to original documents. The client may have more confidence in its own filing system than in its lawyer's (and is often correct in that assessment).

All categories of relevant documents, wherever they are located, should be reviewed by the lawyer who is to have conduct of the lien action. Someone should attend at some point the client's place or place of business to see all original documents, learn where they are, understand how they are kept and stored and what there by way of inventory. One does not want to hear at discovery or trial some well-meaning witness will say, "Oh, yeah, we had a bunch of those reports (diaries, test reports, inspection certificates, photographs, etc.) in the old trailer we had down at the site, but nobody ever asked for them, and I think they're all thrown out by now."

It is in the nature of the construction industry that important documentation may be found at many locations, including site trailers, consultant's offices, supervisor's vehicles, homes and on all manner of digital devices. All of these sources have to be combed for documents in order to have any confidence that a complete set of original source documents has been assembled.

Custodians such as senior personnel and engineers should be asked

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32 See EIC Model Document # 5, <http://www.oba.org/EIC/Model-Precedents>.

33 See EIC Model Document # 6, <http://www.oba.org/EIC/Model-Precedents>.

where they keep electronic or paper files. Chances are there has been some form of reporting involving minutes or executive summaries. Most senior project personnel will have a place where they keep notes, diary entries and the like for future reference. They will say that these files are their personal property and not subject to production in a corporate lawsuit, but they are wrong.

All electronically stored information has to be downloaded, hard-copied, and reviewed.

2.10 Document management consultants

The use of a professional document management consultant and document management software will be most helpful in large lien cases. In a typical multi-party construction dispute, each side will produce and rely upon thousands of documents. Examinations for discovery will occupy weeks, if not months, ranging over many documents, transcripts and exhibits. This mass of material can overwhelm even the most determined and organized lawyer. A professional document management consultant can assist both lawyer and client with the expertise and manpower necessary to organize massive documentary databases, transcripts, Scott Schedules and trial exhibits.

Some guidelines in the selection of a document and/or file management consultant are as follows:

1. Due diligence: Get a reference from someone who has actually taken a case through to trial with the document management consultant, or used a database management software that you are considering. User experience is everything. Carefully check references in your jurisdiction. Meet with the actual people that interfaced with the consultant if you can. Pay attention to the personnel that were used on any successful project and arrange for their involvement in your assignment. The market for such services is international.

2. Client hire: The responsible client representative should be involved in selecting the document management consultant. This will be a big investment, and once the decision is made by the client it is, for all practical purposes, irrevocable. The client, not the lawyer, should contract with the document management consultant.

3. Improvise, customize: The document management system must fit the case, not the other way around. Document management consultants should be knowledgeable in document exchange protocols and assist in crafting a case appropriate protocol.

4. Privilege and commercial sensitivity: some documents cannot be released under any circumstances, such as weld X-rays. You will want a "claw-back" agreement to protect you in the event of inadvertent disclosure. This will entail the ability to conclusively segregate all sensitive documents.

2.11 Demands for information

What is the status of payment under the head contract? Are there payment bonds? Is there an agreement of purchase and sale? When does the sale close? Answers to these important questions can be obtained early in the process using **s. 39** of the *Act*.

Contractual relationships on construction projects form a pyramid of interconnecting rights and obligations, with the owner and its financiers at the apex, and the workers and suppliers at the base, with several contractual tiers in between. It is not realistic to expect a subcontractor or material supplier to bargain for contractual rights to obtain information from an owner or financier, let alone bargain for protection in the event that no information or wrong information was provided.

Section 39 is available to lien claimants, trust claimants, mortgagees, and trustees. It makes special provisions for trustees of worker's trust funds, allowing the inspection of the payroll records of all workers who are beneficiaries of the fund.

The philosophy underlying the section is to require disclosure of only that information which facilitates the enforcement of rights under the *Act*, and to establish time limits for compliance. There have been only a handful of motions or claims for costs for breach of the requirements of **s. 39**.

Section 39 is one of the few sections of the statute that creates a statutory cause of action for its breach **(s. 39(5))**. The section contains

its own internal interlocutory process for enforcement.[34] Section **39(6)** contemplates a motion for the enforcement of a "request" for information and gives the court a wide discretion as to costs of such a motion. A court could impose terms beyond mere costs. But can you enforce a **s. 39** demand against a party in default? What if summary judgment has been obtained? It would seem that these are the most likely times that you would need an order to enforce compliance with **s. 39**, to obtain a payment bond, for example, but these questions remained unresolved. **Section 39(6)** speaks specifically of a "motion . . . whether or not an action has been commenced . . .." If the motion can be brought *before* an action has been commenced, it may be that the motion can be brought *after* default in defence or even after the issues between the parties have merged in a default judgment. What is the measure of damages be in an action under **s. 39(5)**? This issue is also undecided. Where you have obtained default judgment against a party, for **example, what further damages would you** have if they had also failed to comply with an order under **s. 39(6)**? Where the demand was for disclosure of the existence of a labour and material payment bond, there may be a case in which the time for notice to the surety has passed, but that court has the power to relieve from forfeiture in those circumstances in any event.[35] There is much scope here

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34 *Maple Leaf Homes & Cottages v. Zoellner Windows (1982) Ltd.*, 1989 CarswellOnt 692, 34 C.L.R. 6 (H.C.).

35 See *Elance Steel Fabricating Co. v. Falk Brothers Industries Ltd.*, 1989 CarswellSask 297, 1989 CarswellSask 469, [1989] 2 S.C.R. 778 and the discussion of that case in *Scott and Reynolds on Surety Bonds*, Vol. 2 (Toronto: Carswell, 1993) at 11.11(d)(v). See *Bravo Cement v. University of Toronto*, 1991 CarswellOnt 790, 46 C.L.R. 207 (Div. Ct.) at p. 211 [C.L.R.] [Holland J.]; additional reasons 1991 CarswellOnt 6595, 52 O.A.C. 107 at 110 (Div. Ct.), where it appears that lien claimants relied on each other's searches and registrations: "I am satisfied that the discretionary power of the Court under the CLA s. 6 does not extend to permit the Court to validate a claim for lien where the wrong lands are named. Naming the wrong lands in the claim for lien is a fatal flaw which the Court is not empowered to correct under the present Act." See also *Ken Gordon Excavating Ltd. v. Edstan Construction Ltd.*, 1984 CarswellOnt 734, 1984 CarswellOnt 806, 9 C.L.R. 12 (S.C.C.), which deals with the issue of whether liens should have been preserved by service or registration, and the lien claimants followed one another, both to success and in other cases to complete failure. With regard to the second group of lien claimants, which had registered the liens in the normal way but had failed to give notice to the Crown as owner, Estey J. held as

for development of the remedial policy of the *Act*.

These provisions are all part of a modern view that transparency at every level of the construction process, from tendering to turnover, is of public benefit. We see this policy at work, for example, in the standard form CCDC 2 contract that permits and requires ongoing financial disclosure throughout the course of a project.[36]

2.12 Routine searches

A common misconception about lien searches is that the only routine search that is required is a subsearch of title. A subsearch of title is necessary but not sufficient, as discussed below. Not every lawyer will agree that "routine" searches are in practice, but, if they do not, they should be. These searches help avoid later problems with joinder and jurisdiction.

2.13 Search #1: Title

It must be remembered that the lien attaches to the "interest of the owner in the premises improved", and "premises" is given an expanded definition by the statute to include both **the** "improvement" (i.e., the product of the construction work under way), "all materials supplied to the improvement" (i.e., such obvious materials as building materials incorporated into the actual construction and some less obvious "materials", according to the statutory definition, as rental equipment), *and* "the land occupied by the improvement, or enjoyed therewith".[37]

The inclusion of the words "or enjoyed therewith" means that some

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follows: "The learned trial judge decided that although the project was a public work, the ten claimants, by registering their lien claims, held valid liens against OHC, notwithstanding the failure to comply with then s. 21a, that is, the failure to give notice in writing to OHC. With respect, I must join the Court of Appeal in reversing this conclusion. The ten claimants who did not give the notice have no claim under the Act against the interest of OHC because their failure to give such notice is not cured by the registration of the lien claim, nor can reliance be placed in such circumstances upon s. 18."

36 See CCDC 2 — 2008, GC 5.1.

37 *Construction Act*, R.S.O. 1990, c. C.30, **s. 1(1)**.

thought must be given to the nature of the improvement.[38] Is it adjacent to a dedicated parking structure? If so, that parking structure must be subsearched and may be liened if it is "enjoyed therewith", regardless of who the registered owner may be. Is there an adjacent recreational facility, storage yard, marshalling yard, equipment shed, generator house, or transformer stations that could be said to be used or enjoyed with the improvement itself? If so, then these properties should be subsearched, as they may be subject to a valid lien. Lands "enjoyed therewith" often get missed in practice, but this omission does not often matter in the long run because the amount of land that is liened is usually sufficient to answer for the holdback obligation of the owner. If there is a legitimate case to be made that lands are "enjoyed therewith", then they should be liened.

A search of title to the premises being liened and premises "used or enjoyed therewith" should be conducted prior to the preservation of every lien by registration. That is true, even if other liens are already registered against the same premises. It is not enough to rely on the legal description contained in a previously registered lien. The practice of relying on the descriptions of land contained in earlier liens has become more common, and that is problematic. Mistakes become viral and can fail spectacularly.[39]

Title should be searched by a lien claimant's lawyer at least four times during the course of a lien proceeding. The first search of title is conducted immediately prior to the preservation for a claim for lien. The purpose of this search of title is to obtain an accurate, registerable legal description of the property to be liened, to discover the existence of other, possibly prior encumbrances on the premises, and

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38 See *Riverside Glass Ltd. v. Charron's Quality Market Ltd.*, 1993 CarswellOnt 824, 11 C.L.R. (2d) 150 (Gen. Div.); additional reasons 1993 CarswellOnt 1975 (Gen. Div.), *Phoenix Drywall v. Mississauga Rest Home Two Inc.*, 1988 CarswellOnt 766, 31 C.L.R. 1 (H.C.), *Alarm Group Ltd. v. Bloor-Madison Realty Inc.*, 1995 CarswellOnt 3260, [1995] O.J. No. 1784 (Gen. Div.); additional reasons 1995 CarswellOnt 4671 (Gen. Div.); additional reasons 1995 CarswellOnt 4772 (Gen. Div.), *Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.*, 1996 CarswellOnt 1325, 27 C.L.R. (2d) 184 (Gen. Div.), *Beaver Materials Handling Co. v. Hejna*, 2005 CarswellOnt 2803, 45 C.L.R. (3d) 242 (S.C.J.).

39 See *Bravo Cement*, *supra* note 35.

to enable the delivery of timely demands for information under **s. 39**.

A second search (subsearch) of title may be conducted in support of a motion to refer the case to the master, to be sure that all persons are properly served under **s. 58(1.1)**.

A third search (subsearch) should be conducted before service of a notice of settlement meeting or notice of trial. All parties served with the notice of trial become parties to the action by operation of **s. 6(1)** of O. Reg. 302/18. This subsearch is usually required to be filed at the first lien pre-trial to satisfy the court that there has been proper service of the notice of trial.

A fourth and final search (subsearch) should be performed immediately prior to the first day of the evidentiary portion of a lien trial, so that counsel can update the court as to the state of the title and establish sufficiency of the service of notice of trial. As the trial will finally dispose of all claims related to the improvement, the judge or master will want to be sure that all parties with a lien are present at trial, or at least have notice of trial.[40] Unless all liens have been bonded off title prior to the trial or reference, the filing of a certified copy of abstract pages or property parcel register is also required in most jurisdictions at the opening of the trial or reference itself, so as to allow the court to determine whether all proper and necessary parties are on notice. In most instances, an affidavit from a conveyancer, backed up by uncertified photocopies of property parcel register pages, will be received into evidence in this regard.

If liens are being vacated from title upon money or security being paid into or out of court, or if an application is being made to appoint a receiver/manager, under **s. 68**, another subsearch of title may be required.

2.13.1 Search #2: Corporate

Lawyers would be well advised to conduct a corporate search of their own client and the party with whom the client supposedly contracted, under any name they do business, including any trade or style

40 *Construction Act*, R.S.O. 1990, c. C.30, **s. 51**.

names.[41] For a lien lawyer, this includes the name used by the entity that actually retained you, the name used by your client on any (or various) versions of the contract, purchase order or subcontract, and the name or names used by your client on their invoices, letterhead, business cards, or other documentation. This recommendation applies even to well-known clients.

The consequences of an error in naming a corporate party are largely fact dependent. One frequently sees "Inc." for "Incorporated", or "Ltd." for "Limited", or some other combination of this same error.[42] Less often, one sees liens that are registered by proprietorships or partnerships that have adopted and carry on business under a corporate style, but without having been incorporated. A lien by an entity with no legal existence is invalid, and, if the lien period has expired, this is fatal to the lien claim. True misnomer, on the other hand, is easily corrected, either by interlocutory order, or at the trial or reference itself. True misnomer has no substantive significance.[43] True non-joinder, on the other hand, where the entity named in the lien has absolutely no legal status, can have serious consequences, including the invalidation of the entire lien and dismissal of the entire

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41 Amendments to By-law 7.1 of the Law Society of Upper Canada established rigorous client ID and verification requirements for Ontario lawyers and licensed paralegals. These amendments came into effect on December 31, 2008.

42 See *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 10.

43 *G.C. Rentals Ltd. v. Falco Steel Fabricators Inc.*, 2000 CarswellOnt 1040, 132 O.A.C. 70 (Div. Ct.): "In my view, the Master was in error when he found the lien claimant to be a nullity. In my view, it was a misnomer, not a nullity. There is no evidence that anyone was misled, prejudiced or acted to his, her or its detriment. 'G.C. Rentals & Repairs' is a legal entity that was/is capable of suing or being sued. It is not 'nonentity.' The amendment sought by the lien claimant did not involve substituting a new party but merely correcting the plaintiff's name. The defendants were not misled nor prejudiced by the error. The defendants knew that claims were being made against them by the 'other party' to the contract. What occurred was a misdescription of the lien claimant's name. In my view, the lien claimant is entitled to the relief sought in the wording and in the spirit of s. 6 of the *Construction Lien Act*." See also *Stubbe's Precast Commerical Ltd. v. King & Columbia Inc.*, 2018 ONSC 995, 2018 CarswellOnt 2163 (S.C.J.); appeal quashed *Stubbes Precast v. King & Columbia*, 2018 CarswellOnt 18402 (Div. Ct.).

lien and personal action.[44]

When a corporation is struck from the record by the Ministry of Consumer and Commercial Relations for having failed to file corporate returns, and has not been reinstated, a lien registered by that company before reinstatement is invalid and cannot be revived if the lien period has otherwise expired.[45]

A careful lawyer will search all corporate registries, all partnerships registries and all style or trade names that appear anywhere on the record.

Where a company is federal, i.e., registered in more than one Canadian jurisdiction, the corporate records in the initial jurisdiction and/or federal records with Industry Canada should also be searched to reveal the current status of the corporation. If a corporation was originally registered in British Columbia, for example, obtained federal status by further registration in Ontario, and subsequently was dissolved in British Columbia, this company no longer legally exists in either British Columbia or Ontario. However, this status change often is not reflected in the provincial corporate records for the secondary registration.

2.13.2 Search #3: Bankruptcy

A search with the Superintendent of Bankruptcy should also be conducted against the name of the lien claimant's "payer", at the very least. The personal judgment component of the lien action is stayed against a bankrupt party.[46] It is not always possible to get an order to proceed to fix the problem.[47] Bankruptcy searches are easily con-

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44 *Triple "R" Demolition Inc. v. 1186468 Ontario Ltd.*, 1998 CarswellOnt 859, 37 C.L.R. (2d) 125 (Gen. Div.).

45 *Skyaramic Development Inc. v. Zotalis*, 1996 CarswellOnt 4508, 33 C.L.R. (2d) 323 (Gen. Div.). *Delview Construction Ltd. v. Meringolo*, 2004 CarswellOnt 2245, 71 O.R. (3d) 1 (C.A.).

46 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 69.

47 *Smoky River Coal Ltd., Re*, 1999 CarswellAlta 743, 12 C.B.R. (4th) 116 (Q.B.). See also *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] O.J. No. 1257 (S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (C.A.); leave to appeal refused 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.).

ducted through the office of the Superintendent of Bankruptcy.[48]

A lien action against a bankrupt party cannot be commenced without prior leave of the bankruptcy court. Leave can be obtained readily prior to the expiration of the time for perfection of a lien. Arguably, an action *in rem* claiming only declaratory relief, such as a declaration of lien or trust, would not be affected by the *Bankruptcy and Insolvency Act* stay.[49]

The involvement of a trustee in bankruptcy entails significant procedural consequences. Bankruptcy will affect priorities among lien claimants.[50]

A stay may also be in place under the *Companies' Creditors Arrangement Act*.[51] The order appointing the monitor in such circumstances usually provides that no action can be commenced without leave of the court and there is some authority to the effect that a lien action commenced to perfect a lien, but without prior leave, cannot be cured *nunc pro tunc*.[52]

2.13.3 Search #4: Licensing

If your client is a corporation registered in a Canadian province other than Ontario, it may carry on business in Ontario without obtaining a licence. Foreign corporations, however, must be registered in Ontario under the *Extra-Provincial Corporations Act* before they may register a claim for lien which preserves an interest in real property in the province.[53]

If your client is a municipally regulated trade, such as a renovator,

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48 For more information, see <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home>.

49 *Rockland Chocolate & Cocoa Co., Re*, 1921 CarswellOnt 4, 50 O.L.R. 66 (S.C.). This case mainly stands for the proposition that a lienholder need not obtain an order from the Bankruptcy Court permitting it to continue the action.

50 *Construction Act*, R.S.O. 1990, c. C.30, **s. 85.**

51 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

52 *Smoky River Coal Ltd., Re*, 1999 CarswellAlta 743, 12 C.B.R. (4th) 116 (Q.B.).

53 *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E.27. See, for example, in a repair and storage lien context, *Inland Northwest Leasing Inc. v. 463812 Ontario Ltd.*, 1995 CarswellOnt 2680, [1995] O.J. No. 2200 (Gen. Div.), and in a non-lien setting, *Success International Inc. v. Environmental Export*

plumber or electrician, the existence of the appropriate municipal licence should be verified before the lien is preserved. There is a body of case law on the effect of "illegality" in circumstances where work that required a municipal licence was performed by an unlicensed trade.[54] Where a person, corporate or otherwise, requires a licence to perform its work, such as a renovator in the City of Toronto, and does not have such a licence, the lien of that person may still be valid in part.[55] This was not always the case. It is only due to recent decisions of the Court of Appeal that the severe consequences of unlicensed work by trades have been moderated somewhat.[56] Trade licences are

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International of Canada Inc., 1995 CarswellOnt 25, 23 O.R. (3d) 137 (Gen. Div.).

54 *Morrell v. Cserzy*, 2002 CarswellOnt 658, 14 C.L.R. (3d) 94 (S.C.J.) (unlicensed renovator entitled to recover amount owing), *Kocotis v. D'Angelo*, 1957 CarswellOnt 108, [1958] O.R. 104 (C.A.) (unlicensed electrical contractor not entitled to recover), *Monticchio v. Torcema Construction Ltd.*, 1979 CarswellOnt 169, 26 O.R. (2d) 305 (H.C.) (contract with unlicensed contractor not necessarily void, and even if void, *quantum meruit* claim may succeed), *All Canada Plumbing & Heating Co. v. Gottlieb*, 1981 CarswellOnt 507, 18 R.P.R. 109 (Div. Ct.) (claim for value of work disallowed, but claim for material supplied allowed), *C. Battison & Sons Inc. v. Mauti*, 1986 CarswellOnt 649, *(*sub nom. *C. Battison Inc. v. Mauti)* 58 O.R. (2d) 82 (Div. Ct.) (unlicensed contractor's claim allowed), *Calax Construction Inc. v. Lepofsky*, 1974 CarswellOnt 504, 5 O.R. (2d) 259 (H.C.) (no action lies on illegal contract), *Agasi v. Wai*, 2000 CarswellOnt 2903, [2000] O.J. No. 3087 (S.C.J.) (unlicensed renovator allowed to recover). See D.I. Bristow, M. Prelevic, "Illegal Contract With Unlicensed Contractor is Legally Enforceable" (2002) 18:6 *Construction Law Letter* 1.

55 See *Morrell v. Cserzy*, 2002 CarswellOnt 658, 14 C.L.R. (3d) 94 (S.C.J.). But see *688558 Ontario Ltd. v. Morgan*, 1995 CarswellOnt 463, 21 C.L.R. (2d) 1 (Gen. Div.).

56 See *Commercial Life Assurance Co. v. Drever*, 1948 CarswellAlta 88, [1948] S.C.R. 306 (unlicensed real estate agent's claim for remuneration illegal), *Kocotis v. D'Angelo*, 1957 CarswellOnt 108, [1958] O.R. 104 (C.A.) (contract with unlicensed electrician unenforceable), *Monticchio v. Torcema Construction Ltd.*, 1979 CarswellOnt 169, 26 O.R. (2d) 305 (H.C.) (while following *Kocotis*, court held that contract with unlicensed drain contractor not necessarily void with regard to sale of material), *All Canada Plumbing & Heating Co. v. Gottlieb*, 1981 CarswellOnt 507, 18 R.P.R. 109 (Div. Ct.) (follows *Monticchio* in the case of an unlicensed plumbing contractor, i.e., claim for work disallowed, claim for material allowed).

usually provincial[57] or municipal.[58] The language of the regulation or by-law must be examined carefully to determine the effect on lienability of a failure to comply with the licensing law.

2.13.4 Search #5: Executions

The purpose of an execution search against the registered owner of the premises, in the jurisdiction where the liened premises are situated, is to determine the existence of any competing claims by judgment creditors to proceeds of sale of the land itself, should the lien action actually proceed to sale, which is a very rare case indeed.

The first execution search is usually conducted just prior to the perfection of the lien to allow the appropriate parties to be named and priorities to be claimed in the statement of claim.

A search of executions is mandatory at the time of service of notice of settlement meeting[59] and notice of trial[60] if there are liens that have not been vacated and are still on title.

In practice, however, the first execution search is usually conducted immediately prior to service of notice of trial. That search is then updated before the opening of the trial and *may* be filed with the court as part of plaintiff's counsel's opening filings.[61] In the master's office in Toronto, the issue of execution searches and service of notice of trial on execution creditors is not dealt with until the end of the reference, when it can be known whether a sale of the land will be required.

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57 See, e.g., the *Ontario College of Trades and Apprenticeship Act, 2009*, S.O. 2009, c. 22.

58 See, e.g., *Toronto Municipal Code*, c. 545, Licensing, which requires licences for, among others, drain contractors, drain layers, electrical contractors, heating contractors, plumbing contractors, chimney repairmen, building cleaners.

59 O. Reg. 302/18, s. 9(2).

60 O. Reg. 302/18, s. 9(4).

61 Generally speaking, the Master will not be interested in execution searches unless and until it becomes necessary to sell the underlying land. For most purposes, the execution search is useful to the lawyer and need not be filed with the court.

2.14 Completing the form of lien

2.14.1 Blank #1: Naming the lien claimant

As mentioned above, a corporate search should be performed on your client prior to liening, even if your client is well known to you.[62] Embarrassing, even fatal naming errors can be avoided in this way. Many pitfalls are avoided by a timely corporate search. If a contract is made on behalf of a company yet to be incorporated, a lien in the name of the subsequently incorporated entity may be void from the beginning.[63] In the case of pre-incorporation contracts, the issue is one of fact: did the lien claimant enter into the contract in the name of or on behalf of a corporation? If the answer is "yes", then ss. 21(1) and 21(2) of the *Business Corporations Act* apply, and the contract can be adopted by the corporation. If the answer is "no", and the lien and the lien action have been commenced by a corporation and not by the individual, they may be invalid.[64]

If a corporate lien claimant has been dissolved for failure to file corporate returns, and at the time the lien rights expire has not been revived under s. 241(5) of the *Business Corporations Act*,[65] the lien rights of the claimant will have expired as well and cannot be revived.[66]

A simple mistake as to corporate capacity can lead the lawyer into other errors, such as completing the balance of the form as if it were on behalf of an unincorporated entity as opposed to an incorporated

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62 See chapter 2.13.1.

63 *Triple "R" Demolition Inc. v. 1186468 Ontario Ltd.*, 1998 CarswellOnt 859, 37 C.L.R. (2d) 125 (Gen. Div.).

64 For an excellent discussion of the issues, and an example of the severe consequences if the essential fact cannot be made out, i.e., that the contract was made "in the name of or on behalf of" the corporate claimant, see *Vinpat Construction Ltd. v. Henze Holdings Inc.*, 2002 CarswellOnt 2274, 18 C.L.R. (3d) 307 (S.C.J.), citing *Sherwood Design Services Inc. v. 872935 Ontario Ltd.*, 1998 CarswellOnt 1739, 39 O.R. (3d) 576 (C.A.) and *Netmar Inc. v. Aquilina*, 1999 CarswellOnt 769, [1999] O.J. No. 790 (Gen. Div.).

65 *Business Corporations Act*, R.S.O. 1990, c. B.16.

66 *Delview Construction Ltd. v. Meringolo*, 2004 CarswellOnt 2245, 34 C.L.R. (3d) 48 (C.A.), *Skyaramic Development Inc. v. Zotalis*, 1996 CarswellOnt 4508, 33 C.L.R. (2d) 323 (Gen. Div.).

entity, in which case the lien may also be invalidated.[67]

The situation is different if the lien is claimed by a legal entity that is in existence, but incorrectly named. For example, if a numbered company was to register a lien for work contracted for and performed under a coined name or unregistered style name, this would be a mis-

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67 *573521 Ontario Inc. v. Waldman*, 1996 CarswellOnt 3623, 31 C.L.R. (2d) 305 (Gen. Div.), *Accent Design Inc. v. Walton Place (Scarborough) Inc.*, 1994 CarswellOnt 941, 15 C.L.R. (2d) 33 (Gen. Div.) and note well that *Edgecon Construction Inc. v. All Saints Church Homes for Tomorrow Society*, 1995 CarswellOnt 3501, 18 C.L.R. (3d) 254 (Gen. Div.) disagrees with *Accent Design*. In *Edgecon*, Master Sandler followed Master Saunders' decision in *Carlo's Electric* and held as follows (at 260-1): "This issue has already been decided in the case of *Carlo's Electric Ltd. v. Metropolitan Separate School Board*, 1990 CarswellOnt 661, 40 C.L.R. 26 (Master), by Master Saunders. There, Master Saunders held that the so-called curative section, section 6 of the Act, which permits the court to excuse minor irregularities, does not apply to section 34(6) and its requirements for an affidavit of verification. In this, he followed the judgment of the Court of Appeal in *Venditti v. Petriglia*, 1989 CarswellOnt 689, 33 C.L.R. 1 (C.A.), to the same effect. But, he further held, also following *Venditti*, *supra*, that the then equivalent of the current section 2(9) of Ontario Reg. 175/90, above-quoted, is permissive, and the affidavit of verification need not comply with Form 9, so long as all the essential averments are stated, regardless of the way those averments are expressed. Master Saunders found that the defect of using part A rather than part B of the affidavit of verification was only a matter of form, not of substance, and he relied on what is now section 28(b) of the *Interpretation Act*, R.S.O. 1990 c. I.11, which provides that 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", to find that the particular deviation there from the prescribed form did not vitiate the document, and he dismissed the general contractor's effort to discharge the lien under section 47. In this case, Mary Campisi is shown on page 1 of the claim for lien to be the president of Edgecon Construction Inc., so her statement that she is "the lien claimant" rather than "the agent of the lien claimant" expresses the averment that she has some close connection to the lien claimant. And her statement that "The facts stated in the claim for lien are true." expresses the essential averment that she believes the facts set forth in the claim for lien to be true. I thus agree fully with *Carlo's* case, especially as it is based directly on the ruling in *Venditti*, *supra*. Counsel for the moving party here argued that Carlo's case was wrongly decided, and that I should not follow it, and rather, should hold that the affidavit of verification here, being on its face contrary to the mandatory provisions of section 34(6), is so defective as to invalidate the lien. I disagree with this submission and follow *Carlo's* case."

nomer and would be correctable, barring some demonstrated prejudice.[68]

There is varying practice in Ontario regarding claims for liens involving union members. Some lawyers list the actual names of the workers on the claim for lien or on an attached schedule, while other lawyers refer only to the person claiming the lien as "agent for the affected members" of the particular union. It has been held in *Ontario Provincial Council of Carpenters Benefit Trust Funds (Trustee of) v. RES Canada Construction (Ontario) L.P.*[69] that the latter practice is sufficient for the purposes of the *Act*, and that where the person making the claim for lien is identified as a trustee of the union, and as agent for the affected workers of the union, the workers are sufficiently identified.

2.14.2 Blank #2: Naming the owner

Title must be subsearched to determine the correct legal name of the registered owner. A corporate search on the registered owner should also be conducted. A document that misnames the registered owner will not be certified following e-registration. If the lien period has run and e-registration has not been certified for this reason, this could prove fatal to the lien.

It is difficult to conceive of prejudice arising from a simple misnomer of an owner, particularly if the registered claim for lien is subsequently served on the registered owner of the property. The lawyer will consider whether the owner of the land is an agency of the federal or provincial crown, or if the land includes or is a public street or highway owned by a municipality, or a railway right-of-way, in which case the steps taken in preservation of the lien will be different.

There are choices to be made in completing the claim for lien form

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68 *G.C. Rentals Ltd. v. Falco Steel Fabricators Inc.*, 2000 CarswellOnt 1040, 132 O.A.C. 70 (Div. Ct.). See also *3925308 Manitoba Inc. v. Hoffer*, 2010 CarswellOnt 8403, 100 C.L.R. (3d) 246 (S.C.J.); additional reasons 2010 CarswellOnt 9205 (S.C.J.); *Stubbe's Precast Commerical Ltd. v. King & Columbia Inc.*, 2018 ONSC 995, 2018 CarswellOnt 2163 (S.C.J.); appeal quashed *Stubbes Precast v. King & Columbia*, 2018 CarswellOnt 18402 (Div. Ct.).

69 2016 CarswellOnt 6661 (S.C.J.); additional reasons 2016 CarswellOnt 16634 (S.C.J.).

if it is against a tenant's interest in the premises. In *Williams & Prior Ltd. v. Taskon Construction Ltd.*,[70] the lien claimant claimed a lien against the leasehold interest of a party it had not named in the claim for lien form. The master ruled that **s. 34(5)(a)** requires that where a lien claimant claims against a tenant's interest in a landlord's land and building, the name and address of this tenant *must* be set out, and where the lien claimant also claims a lien against the landlord's interest in the land and building, the name and address of this landlord *must* also be set out. If the person against whose interests liens are being asserted is not mentioned anywhere in the claim for lien, the lien is void and will be discharged and vacated on motion and **s. 6** of the *Act* cannot be used to save it.[71]

2.14.3 Blank #3: Naming the person to whom supply has been made

An error in naming the person to whom supply has been made can be corrected, subject to the proof of prejudice due to the error or its correction.[72] Errors of this kind can be corrected simply by taking care in the drafting of the statement of claim at the time that the lien is perfected.

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70 2003 CarswellOnt 474, [2003] O.J. No. 498 (S.C.J.).

71 *Williams & Prior Ltd. v. Taskon Construction Ltd.* is a particularly significant case in this regard. Here, Master Sandler conducted a thorough review and analysis of the development of judicial approaches to s. 6 and concluded that the first question to ask is not whether there has been prejudice caused by a non-compliance with s. 34(5), but whether such non-compliance is a "minor or technical irregularity", thus engaging the section. This approach is consistent with the approach taken by the Ontario Court of Appeal in *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*, 1999 CarswellOnt 2160, 47 C.L.R. (2d) 1 (C.A.). Only if the error is a "minor or technical irregularity" may the court go further to consider the issue of prejudice. If the error is more than minor, then s. 6 has no application. *Guillevin International Inc. v. Enertech Lighting Systems Inc.*, 1995 CarswellOnt 245, 19 C.L.R. (2d) 15 (Gen. Div.) is not followed. See also *Engineered Construction Ltd. v. Arena Entertainment Corp.*, 2006 CarswellOnt 8685, [2006] O.J. No. 5582 (S.C.J.).

72 *City Accoustics Ltd. v. Waterloo Region Roman Catholic Separate School Board*, 1995 CarswellOnt 416, 20 C.L.R. (2d) 156 (Gen. Div.).

2.14.4 Blank #4: Time within which supply was made

If the supply is ongoing, or the work is continuing at the time of the preparation of the claim for lien, the date of "last supply" will be the date of the execution of the claim for lien itself. The timeliness of the lien can be questioned on the basis of the time of last supply stated on the face of the lien, and this stated date will be relied upon by counsel cross-examining on the claim for lien. If the date is made up or false, and known or capable of being known to the lawyer as being so, the lawyer may have participated in the preservation of a lien that had expired and be exposed to costs. **Section 86** imposes stringent costs penalties for such conduct. In short, you have a responsibility to test the information your client gives you about last supply.

The issue of whether an error in stating the period during which supply was made is "curable" under **s. 6** is controversial. Where a period of supply is named and the lien then expires according to those stated dates prior to perfection of that lien, the "curative" section, **s. 6,** cannot be used to revive the lien and it will have expired.[73] This is so, even though it is plain that work went on after the sworn date of last supply.

2.14.5 Blank #5: Short description of supply

Occasionally, a lien will fail on the basis of this seemingly innocuous portion of the claim for lien. If the lien claim describes a supply that is not lienable, the lien may be removed on motion. Describing the services supplied as "construction management" or "property management", for example, may lead to a successful challenge.[74]

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73 *Michelin Group Inc. v. Forsan Construction Ltd.*, 1994 CarswellOnt 952, 18 O.R. (3d) 523, 17 C.L.R. (2d) 202 (Gen. Div.); affirmed 1995 CarswellOnt 243, 17 C.L.R. (2d) 215 (Div. Ct.). See also *Triple "R" Demolition Inc. v. 1186468 Ontario Ltd.*, 1998 CarswellOnt 859, 37 C.L.R. (2d) 125 (Gen. Div.), where similar errors were found fatal. In brief oral reasons in *Michelin Group*, the Divisional Court has indicated that a trial judge may have jurisdiction to allow a claim for lien in such circumstances, provided that satisfactory evidence is led at trial.

74 *697470 Ontario Ltd. v. Presidential Developments Ltd.*, 1989 CarswellOnt 698, 69 O.R. (2d) 334, 34 C.L.R. 224, 35 O.A.C. 294 (Div. Ct.), *Southdale Towers Ltd. v. Carlton Management Group Inc.*, 1994 CarswellOnt 840, 18 O.R. (3d) 233 (Gen. Div.).

Similarly, such descriptions as "recycling",[75] "development consulting", "land use consulting",[76] or "rezoning and development services"[77] may lead to a motion to discharge under **s. 47**. If these are true descriptions of the services provided, the lien should not have been registered in the first place.

2.14.6 Blank #6: Price

Section **14(1)** creates a lien for "the price" of services or material supplied to an improvement for an owner, contractor or subcontractor. Section **1(1)** defines "price" as the price "agreed upon by the parties", or, where no specific price has been agreed upon, the actual value of the services or materials "that have been supplied to the improvement" under the contract or subcontract.[78] "Price" includes H.S.T.[79] If some of the claim presented by the client is not in any sense "supplied to the improvement", then it is not to be included in the value of the lien. It is prudent to record this advice and the client's instructions in a reporting letter at the time the lien is registered.

The 2018 amendments redefined "price" to include any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor is not responsible. "Direct" costs, in turn, are defined as the reasonable costs of performing the contract or subcontract during the extended period of time, including costs related to the additional supply of services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred, but do not include indirect damages suffered as a result, such as loss of profit, productivity or opportunity, or any head office over-

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75 *Fibre Free Technology Co. v. 1062869 Ontario Ltd.*, 1995 CarswellOnt 3147, [1995] O.J. No. 3799 (Gen. Div.).

76 *Kreuchen v. Parc Savannah Development Ltd.*, 1999 CarswellBC 408, 171 D.L.R. (4th) 377 (C.A.).

77 *Oliver v. Muer Construction Ltd.*, 1985 CarswellOnt 833, 12 C.L.R. 1 (H.C.).

78 *Construction Act*, R.S.O. 1990, c. C.30, **s. 1(1)**.

79 *Belmar Sheet Metal Co. v. 849539 Ontario Inc.*, 1995 CarswellOnt 950, 24 C.L.R. (2d) 28 (Gen. Div.); additional reasons 1996 CarswellOnt 297 (Gen. Div.).

head costs.

The prescribed form requires that the lien claimant state the contract price or subcontract price. There are complexities here as well, particularly where the lien claims include "additional compensation", either under the contract or sub-contract, or on a theory of *quantum meruit*.

The argument in such cases is that extra work was performed under the contract as a result of imposed scope change, greater complication, or delay. In such cases the practice is to name as the contract price or subcontract price the same amount that will be eventually claimed in the statement of claim, including all disputed changes, extras and other claims.[80]

But what of "damages" for delay? The *Act* imposes liability for gross over-liening, which can occur when a claim is made for general damages to be assessed for delay or loss of productivity. Liening for such unassessed, unliquidated general damages is sometimes part of a strategy to "go in high, hit hard, and settle fast". This is a risky strategy in a lien proceeding.

Claims consultants may have been employed to develop a claim. These persons will often gather data and assemble a claim while work is ongoing, even going as far as ghost writing letters for the contractor to establish or the owner to rebut a claim.[81] The client may have invested heavily in this work product by the time it comes down to liening. This work product is often regarded by the client as a "gold standard" for the contract price or subcontract price, and some clients demand that their lawyer accept this number unquestioningly.

A lawyer must proceed carefully in such circumstances.[82] Claims consulting is a dark art, and the basis of a consultant's claim calculation must be fully understood by the lawyer before relying upon a consultant's opinion on the value of the claim.

The statement of price in the lien is susceptible to cross-examina-

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80 This has been the law and practice for some considerable time. See *Crestile Ltd. v. New Generation Properties Inc.*, 1976 CarswellOnt 110, 24 C.B.R. (N.S.) 95 (S.C.).

81 See *Potter Station Power Co. v. Inco Ltd.*, 1998 CarswellOnt 4299, 43 C.L.R. (2d) 53 (Gen. Div.); additional reasons 1998 CarswellOnt 4986 (Gen. Div.).

82 *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, 2002 CarswellNfld 124, 213 Nfld. & P.E.I.R. 1 (T.D.).

tion under **s. 40** by any interested person, even before there has been a complete exchange of documents. In such a cross-examination, the consultant-prepared claim document would have to be produced. The headings under which dubious claims fall include economic loss, interest (no matter how it is dressed up in the claim document), lost opportunity, punitive damages, "impact costs", general (i.e., non-cost related) delay damages and the like.[83]

2.14.7 Blank #7: Amount claimed as owing

The comments above with respect to professionally prepared claims are equally applicable to Blank #7, which requires a statement of the amount "claimed as owing". A claims consultant's claim document will state a final number and a rationale for arriving at that number. The client will want to adopt this claim as the "amount claimed as owing". If the amount claimed as owing is derived in this way, it could include damages for breach of contract, which are not lienable. The dividing line is seldom clear. When a subcontractor has done work for which it has not been paid, it has a potential lien for "the price of those services or material", regardless of whether, under a technical interpretation of the contract, nothing was owing and payable to the subcontractor as of the date the lien was registered. Attempts to argue that the value of the lien should be "zero" based on a pay-when-paid clause backcharge argument are therefore likely to fail.[84]

Although the law was thought to have been settled in 1968 in *Alkok v. Grymek*[85] that even in the event of non-completion a contractor is

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83 See *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*, 1998 CarswellOnt 4538, [1998] O.J. No. 4884 (Gen. Div.); additional reasons 1999 CarswellOnt 436 (Gen. Div.).

84 *Bradhill Masonry Inc. v. Simcoe County District School Board*, 2013 CarswellOnt 9684 (S.C.J.); additional reasons 2013 CarswellOnt 12638 (S.C.J.); affirmed *B.W.K. Construction Co. v. Bradhill Masonry Inc.*, 2015 CarswellOnt 8852 (Div. Ct.).

85 *Alkok v. Grymek*, 1968 CarswellOnt 72, [1968] S.C.R. 452 [Spence J.]: Once it is determined that the respondents' action in terminating the contract had not been justified, one must turn to the question of what, if any, damages the appellant is entitled to recover. It was said in *Macklem & Bristow on Mechanics' Liens in Canada*, at p. 47: "If the owner ceases to make payments under the

entitled to enforce a claim for lien for the actual value of work performed and materials supplied up until that time, cases still arise challenging that proposition and arguing that a claim based on implied contract or *quantum meruit* is not lienable.[86]

The Divisional Court decision in *HMI Construction Inc. v. Index Energy Mills Road Corp.*,[87] held that in a fixed price context, a contractor cannot include in a claim for lien extra charges beyond the stipulated price without a proper breakdown of expenses. The contractor had simply liened for its project costs and added profit but had not provided an itemized claim showing (i) contract accounting plus (ii) extras (with amounts claimed for each extra, including the basis on which those claims were calculated), less (iii) credits for contract work not done, and less (iv) acknowledged deficiencies (if any), plus (v) any other claims (such as delay costs). Instead, it provided an accounting of its total costs for the project. That, the court held, completely ignored the nature of the contract:

> The phrase "actual value of the work done" as used here does not mean "actual cost of the work done". It means value, as measured by the contract. And this is clear from the passages cited in *Biotechnik* from *Alkok v. Grymek* and the textbook by Messrs. Macklem and Bristow. The *quantum meruit* calculation in issue in all of these authorities was the incremental progress between progress billings or milestones. These cases do not stand for the proposition that where there is a construction lien, the lien claim shall be calculated on a "costs plus" basis, without regard to the contract.

Applied to a fixed price contract, therefore, the statement in *Biotechnik* that resort to *quantum meruit* was necessary to recover "the actual value of the work done" means not actual cost of the work

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contract, cancels it or, through some act of his own and without cause, makes it impossible for the contractor to complete then the contractor is justified in abandoning the work and is entitled at that time to enforce his claim for lien to the extent of the actual value of the work performed and materials supplied up until that time." The contractor's right to recover therefore would seem to be what he could prove on a *quantum meruit* basis.

86 See *Komorowski v. Van Weel*, 1993 CarswellOnt 856, 12 O.R. (3d) 444 (Gen. Div.) at pp. 458-459 [O.R.], and contrast *Biotechnik Inc. v. O'Shanter Development Co.*, 2002 CarswellOnt 5713, [2002] O.J. No. 2899 (Div. Ct.); additional reasons 2002 CarswellOnt 5714 (Div. Ct.). See also the case comment in the *Construction Law Journal* ((1992), 8 C. L. J. 245).

87 2017 ONSC 4075, 2017 CarswellOnt 10314 (Div. Ct.).

done but rather value as measured by the contract between contractual performance milestones.

The issue of the lienability of delay claims is still litigated.[88] Delay claims are lienable, but only to the extent that the delay increased the actual cost of services and materials supplied to the improvement.[89] A loss of productivity claim will be lienable only if it is made on the basis of actual hours worked and wages paid, and not on the basis of some abstract theory of compensation.[90] The component of a delay or contract extension claim that relates to actual wages paid, including overtime premiums and shift differentials, (i.e., actual realizable value added to the project) is lienable.

Overhead attribution is another common problem. If there is a 100% scope growth, does head office overhead recovery double? On what basis does one make this calculation and is this amount lienable? There are many theories.[91] It is common to include reasonable overhead and profit in a lien claim, although the propriety of this practice has yet to be fully analyzed judicially. Where the contract is for an undifferentiated lump sum payment, overhead and profit are part of the value of the improvement "calculated in accordance with the contract price". "Cost plus" contracts are different and overhead

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88 See *K-Line Maintenance & Construction Ltd. v. Toronto (Metropolitan)*, 1979 CarswellOnt 210, 25 O.R. (2d) 17 (Div. Ct.); varied 1980 CarswellOnt 1383, 29 O.R. (2d) 787 (C.A.), *Stucor Construction Ltd. v. Brock University*, 2001 CarswellOnt 3678, 13 C.L.R. (3d) 201 (S.C.J.); additional reasons 2001 CarswellOnt 4601 (S.C.J.), *Place Royale Ltd. v. Clarkson Co.*, 1982 CarswellOnt 228, 139 D.L.R. (3d) 633 (H.C.).

89 See, for example, *Landis & Gyr Powers Ltd. v. Megatech Contracting Ltd.*, 1992 CarswellOnt 3183, [1992] O.J. No. 2103 (Gen. Div.), where the security to be posted for a lien claim was reduced to the extent that the lien claim claimed a "delay claim" as such.

90 Construction Industry Institute, *An Analysis of the methods for Measuring Construction Productivity*, SD-13 (Austin, Texas: 1984); K. Humphries, *Jelen's Cost and Optimization Engineering*, 3rd ed. (New York: McGraw-Hill, 1991); M.R. Finke, "Claims for Construction Productivity Losses", 26 Pub. Contr. L.J. 311; H.R. Thomas and C.T. Matthews, *An Analysis of the Methods for Measuring Construction Productivity* (Austin: Construction Industry Institute, 1986); B. Foster, "Monitoring Job-Site Productivity" (2000), 19:2 Revay Report.

91 See Sandori, "Contractor's Head Office Overhead: What Is the Right Formula?" (2003), 26 C.L.R. (3d) 110.

and profit are divorced from the value of the improvement and may not be lienable, as anomalous as this may sound.

This leaves the lawyer preparing a complex claim for lien in a dilemma. If the lawyer errs on the side of over-liening based on the information known at the time of claim for lien is prepared, that decision may be second-guessed on the basis of fuller enquiry into the claim. If the lawyer over-liens, then the lawyer and the client are both exposed to an adverse order for costs, if not to a direct action for damages.[92] If, however, the lawyer under-liens, the lien for any amount in excess of the claim for lien expires by mere passage of time and is gone forever.[93] In such a case, the lawyer faces possible exposure to the client in negligence.

Most lawyers encountering this dilemma include dubious amounts in the claim for lien and exclude only components of that claim that are clearly not lienable, such as "use of money" (interest) claims and other pure economic loss claims. A lawyer faced with a close call might be well advised to seek and document a second opinion so as to be able to prove later that a reasonable course of conduct was followed.

Subsection **14(2)** is clear: there can be no lien for interest on the amount owed to the person in respect of the services or material supplied. Interest is never lienable, although the time value of money can be disguised. Nothing prevents a person from recovering interest as part of a personal judgment as opposed to a lien on the land.[94] A

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92 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 35, 86**.

93 Per: Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference, at p. 19: "If the amount claimed is too low, the lien itself cannot be amended and thus, the lien claim cannot be increased, but the statement of claim (for personal judgment) can be amended *if* the claim is between *contracting parties*: see *Favot Construction Ltd. v. Maplecrest Developments Inc.*, 1990 CarswellOnt 672, 42 C.L.R. 34 (H.C.), *AFG Glass Inc. v. Glaxo Canada Inc.*, 1992 CarswellOnt 861, 49 C.L.R. 215 (Master).

But see *City Accoustics Ltd. v. Waterloo Region Roman Catholic Separate School Board*, 1995 CarswellOnt 416, 20 C.L.R. (2d) 156 (Gen. Div.), where an amendment to increase the amount claimed in the claim for lien was permitted."

94 The basic proposition, that there is no lien for interest is consistently affirmed: *M. Alzner Contractors Ltd. v. Roko Construction Ltd.*, 1995 CarswellOnt 1117,

lawyer who includes a claim for interest in a claim for lien will be exposed to a claim for damages and costs in the event that someone sustains damages or incurs costs as a result.[95]

An error in stating the amount claimed as owing can be corrected after the fact, provided that no one has been prejudiced by the error or its correction.[96] It has been held, however, that the court has no jurisdiction to amend the amount claimed upwards.[97] The "curative" section, **s. 6,** speaks only about the "invalidation" of liens and does not speak about limiting a lien to the amount claimed on its face.[98]

What about foreign currency obligations? The starting point is s. 121 of the *Courts of Justice Act*,[99] which deals with foreign money obligations. Where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario listed in Schedule 1 to the

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26 O.R. (3d) 516, 25 C.L.R. (2d) 268 (Gen. Div.), *Cesan Mechanical Systems (1990) Ltd. v. York Humber Ltd.*, 1994 CarswellOnt 944, 16 C.L.R. (2d) 185 (Gen. Div.), *Lindsay Brothers Construction Ltd. v. Halton Hills Development Corp.*, 1992 CarswellOnt 865, 11 O.R. (3d) 23 (Gen. Div.), and this must be watched when distributing security in court: *P & D Holdings Ltd. v. Alta Surety Co.*, 1996 CarswellOnt 2937, 29 C.L.R. (2d) 60 (C.A.), as considered and to some extent distinguished in *M. Sullivan & Son Ltd. v. Roche Ltée*, 1998 CarswellOnt 2851, 39 C.L.R. (2d) 251 (Gen. Div.), and it must be considered in the case of considering mortgage priorities: *Boehmers v. 794561 Ontario Inc.*, 1993 CarswellOnt 821, 11 C.L.R. (2d) 99 (Gen. Div.); affirmed 1995 CarswellOnt 244 (C.A.), *Trus Joist Canada Ltd. v. Princess Gardens Inc.*, 1993 CarswellOnt 822, 11 C.L.R. (2d) 126 (Div. Ct.).

There is a further anomaly if lien security also stands as security for trust claims, in which case interest may be awarded out of the security: *Ben Plastering Ltd. v. Mollenhauer Residential Ltd.*, 1993 CarswellOnt 830, 15 O.R. (3d) 418 (Gen. Div.); affirmed 1997 CarswellOnt 1671 (C.A.).

95 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 35, 86**.

96 *City Accoustics Ltd. v. Waterloo Region Roman Catholic Separate School Board*, 1995 CarswellOnt 416, 20 C.L.R. (2d) 156 (Gen. Div.).

97 *Favot Construction Ltd. v. Maplecrest Developments Inc.*, 1990 CarswellOnt 672, 42 C.L.R. 34 (H.C.).

98 *AFG Glass Inc. v. Glaxo Canada Inc.*, 1992 CarswellOnt 861, 49 C.L.R. 215 (Gen. Div.).

99 *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Bank Act (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the judgment creditor. The court is given discretion if the result of the conversion would be "inequitable to any party".[100]

This section of the *Courts of Justice Act* is applicable to lien claims by virtue of **s. 50(2)** of the *Act*, which provides that except where inconsistent with the *Construction Act*, the *Courts of Justice Act* applies to construction lien pleadings and proceedings.

In terms of completing the claim for lien, the "best practice" is to clearly identify all amounts in the foreign currency. A claim for lien could be in dollars or pounds, or euros if the underlying obligation was created in that currency. If a claim for lien expressed in foreign currency is to be vacated, the only permissible course, in view of s. 121 of the *Courts of Justice Act* and **s. 50(2)** of the *Construction Act*, is to vacate the claim for lien using security in the same currency as the claim for lien. Thus, a claim for lien in Mexican pesos, or United States dollars would be vacated by cash or letter of credit drawn on an appropriate Schedule 1 bank under the *Bank Act (Canada)*, by further reference to s. 121 of the *Courts of Justice Act*.

If you are planning to vacate a lien expressed in a foreign currency with the letter of credit of a bank that is not a Schedule 1 bank under the *Bank Act (Canada)*, then expect to "show cause" as to why the court should accept the security of that institution. This would be done by affidavit of a responsible bank officer and would require sufficient notice to the other side to consider the material filed in that regard.

If a bond is used in place of cash, the issue becomes slightly more complex. A court would have to be satisfied, upon the posting of the bond, that the surety's obligation was expressed consistently with s. 121 of the *Courts of Justice Act*. Once again, such a motion, because of its added complexity, would have to be brought on sufficient notice to permit the other side to consider the sufficiency of the proposed bond wording.

Another issue is H.S.T. It is common to see claims for lien state the amount claimed as owing, in Blank #7 of the statutory form as

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100 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 121(3).

"$100,000 plus H.S.T.", for example. While this is formally correct, it runs the risk that upon *ex parte* application to vacate under **s. 44** the court might approve the security without reference to the H.S.T. component, which would leave the lien claimant under-secured, and might expose the lien claimant's lawyer to claim in the event that the under-security turned out to be material in the final outcome.

The best practice is to calculate the H.S.T. and express it in dollars in the claim for lien form itself. If the client has invoiced for a gross amount, inclusive of H.S.T., then there is no issue in this regard, as the H.S.T. will automatically be included in any calculation of security under **s. 44**.

2.14.8 Blank #8: Execution of the lien form: Parts "A" and "B"

Section 2(12) of O. Reg. 303/18 provides that a claim for lien *shall* be in Form 12. **Section 34(5)** of the *Act* provides that every claim for lien *shall* "set out" a number of matters, including names and addresses for service, a short description of the services or materials supplied, and the price, and the amount claimed, and a description of the premises liened sufficient for the purposes of registration.

The prescribed form, Form 12, contains an internal guide as to when to use the two *alternate* statements made by a lien claimant when completing the mandatory claim for lien form: "Use A where the lien attaches to the premises; use B where the lien does not attach to the premises".

Who should execute the claim for lien? In most cases, the choice is obvious. There will be one person that by reason of their knowledge of the project is the right person to sign the claim for lien. In more complex cases, a good deal of thought should go into this decision.

The person who signs the claim for lien will very likely be the person who will be cross-examined under s. 40 on the contents of the claim for lien. You will want your deponent to be able to explain your claim for lien to the other side in a way that they will understand. Some senior lien counsel, take the opposite view and say that you should advance a responsible person with as little specific knowledge as possible so as to keep the other side uninformed as to the merits of your case and the strength of your witnesses and to control flow of information using undertakings. Do you want the other side to have a transcript of an early cross-examination of your key wit-

ness? Do you want to reserve a strong corporate representative for the purpose of negotiations? Do you want to field a particularly strong or intimidating witness early in the proceedings in hope of persuading the other side to settle the case? You may or may not want the other side to see your best witness early on, but on the other hand if you have a well-prepared, well-reasoned claim, why not? By assigning someone with little or no knowledge of the lien, you end up with cross-examination by undertaking. That being said, there would seem to be no judicial disapproval of this tactic.[101]

Notwithstanding the difficult test that has to be met on motions to reduce security or vacate liens without security, such motions are still brought on the strength of admissions made on cross-examinations on claims for lien. This reality must be considered when choosing a person to execute a claim for lien.

2.14.9 Schedule "A": Description of the premises

The requirements of the statute are surprisingly modest in this regard. Where the lien attaches to the premises, **s. 34(5)** merely requires a description of the premises sufficient for registration. Where the lien does not attach to the premises, **s. 34(5)** requires only an address "or other identification of the location of the premises". This same requirement is repeated in the mandatory statutory form for the claim for lien, **Form 12**.[102] No special provision is made for the registration of liens against condominium interests in Land Titles. The schedule for the description of the land required by **s. 34(5)** is salvageable under **s. 6** in the event that the error is a "failure to comply strictly" with the *Act*, and there is no prejudice that cannot be remedied.[103]

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101 *Graham Mining Ltd. v. Rapid-Eau Technologies Inc.*, 2000 CarswellOnt 5205, 7 C.L.R. (3d) 279 (S.C.J.); additional reasons 2001 CarswellOnt 674 (S.C.J.).

102 O. Reg. 303/18 s. 2(12).

103 Per: Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference, at p. 19: "An error in the legal description was overlooked in the cases of *Allied Fasteners v. Perras* (unreported, Div. Ct., November 20, 1986), *Kirsh's Construction Lien Case Finder*, Case No. 66, *Phoenix Drywall v. Mississauga Rest Home Two Inc.*, 1988 CarswellOnt 766, 31 C.L.R. 1 (H.C.),

Our courts have shown a willingness to correct errors in legal description where there is no demonstrable prejudice. Two situations must be distinguished: cases in which a lien bearing the wrong description is registered against the *right* land (salvageable, subject to an argument of prejudice), and cases in which a lien bearing either the right or wrong description is registered against the *wrong* land (not salvageable, the issue of prejudice does not even arise in such cases).[104]

Comment has been made elsewhere on the expanded definition of "premises" in the *Act*. Lands occupied by the improvement are included in the definition of "premises" along with lands "enjoyed therewith".[105] A common sense approach serves well in understanding the scope of the phrase "enjoyed therewith". If the land improved necessarily involves the use of some other land in order to function as intended, and there is some physical proximity, then it is "enjoyed therewith". A parking lot for a church restaurant or shopping centre across a road from the main building, for example, might be "enjoyed therewith". An underdeveloped adjacent building lot might not be

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Twin Windows Inc. v. Holiday Construction Ltd., 1985 CarswellOnt 846, 15 C.L.R. 311 (H.C.) and *Ottawa Air Design Ltd. v. Wesmar Construction Co.*, 1990 CarswellOnt 662, 40 C.L.R. 159 (H.C.). But in *Bravo Cement v. University of Toronto*, 1991 CarswellOnt 790, 46 C.L.R. 207 (Div. Ct.); additional reasons (1991), 52 O.A.C. 107 at 110 (Div. Ct.), the Court refused to permit a correction to a claim for lien with the wrongly-named lands shown, and held this to be a fatal flaw".

104 For an example of the court's purposive application of the statute, i.e., to simply require a description suitable for registration, see *Southside Construction (London) Ltd. v. Emco Ltd.*, 1991 CarswellOnt 795, 47 C.L.R. 73 (Gen. Div.). Where the registration was in Land Registry, when the title had been transferred to Land Titles, see *Ambler-Courtney Inc. v. CAAG Land Development Ltd.*, 1998 CarswellOnt 1636, 38 C.L.R. (2d) 58 (Gen. Div.).

105 *Riverside Glass Ltd. v. Charron's Quality Market Ltd.*, 1993 CarswellOnt 824, 11 C.L.R. (2d) 150 (Gen. Div.); additional reasons 1993 CarswellOnt 1975 (Gen. Div.), *Alarm Group Ltd. v. Bloor-Madison Realty Inc.*, 1995 CarswellOnt 3260, [1995] O.J. No. 1784 (Gen. Div.); additional reasons 1995 CarswellOnt 4671 (Gen. Div.); additional reasons 1995 CarswellOnt 4772 (Gen. Div.), and *Alarm Group Ltd. v. Bloor-Madison Realty Inc.*, 1995 CarswellOnt 4772, [1995] O.J. No. 3613 (Gen. Div.); additional reasons 1995 CarswellOnt 4671, [1995] O.J. No. 3075 (Gen. Div.), and see *Phoenix Drywall v. Mississauga Rest Home Two Inc.*, 1988 CarswellOnt 766, 31 C.L.R. 1 (H.C.).

"enjoyed therewith".

A final note of caution here: in describing the premises, be very careful in relying on the maps provided by Teranet. They are accurate as far as they go, but they are not reliable when it comes to tracking street names and boundary lines. You are always better to work with an R-plan.

2.14.10 The "curative" section, s. 6

Section 6 provides that no certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with **s. 32(2)** (contents of certificate or declaration of substantial performance), **s. 33(1)** (certificate of completion of a subcontract) or **s. 34(5)** (contents of claim for lien), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered.

The first question to ask when an error is found is not whether there has been prejudice. The first question is whether the non-compliance is minor. Only if the error is a minor irregularity does prejudice come into play. If the error is not a minor irregularity, prejudice is irrelevant.[106] The *Act* now defines "minor irregularities" to include a minor error or irregularity in the name of an owner of a premises or of a person for whom services or materials were supplied; a minor error or irregularity in the legal description of a premises; and including an owner's name in the wrong portion of a claim for lien.

If the failure to comply is more than a failure to "strictly comply", then s. 6 has no application. To repeat, if the error is so egregious that it falls outside of a mere failure to strictly comply with the *Act* (i.e., if it is actually a failure to *substantially* comply), then **s. 6** has no application. On this reasoning, "non-joinder", to use old terminology, is incurable, whereas "misnomer" in one of the named subsections may be curable.

Although it has been argued that the issue of prejudice is triable and should await trial, it has also been held that the issue of the applicability of **s. 6** can be decided on summary motion *if* there are no

106 *Williams & Prior Ltd. v. Taskon Construction Ltd.*, 2003 CarswellOnt 474, [2003] O.J. No. 498 at para. 75 (S.C.J.).

factual disputes related to that issue that would require a trial.[107]

There is no general power to "amend" a registered claim for lien, although there is power to amend a statement of claim.[108]

2.14.11 Preservation by "giving" a copy of the executed lien

If the Crown or a municipality are the owner of the premises, or where the premises is a railway right-of-way, the lien does not attach to the premises.[109] In such cases, the lien is preserved simply by "giving" a copy of the lien to the appropriate corporate department and officer.[110] Pursuant to Ontario Regulation 304/18, a municipality may provide a method or methods for the giving of a copy of a claim for lien by publishing a statement on its website. These methods include the following:

1. Sending a copy of the claim for lien by email to a specified email address

2. Completing and submitting the claim for lien through a specified web portal

In the event that a municipality has not published a method for the giving of a claim for lien on its website, then claim for lien must be given to the clerk of the municipality.

As of January 8, 2020, the following municipal entities created portals and provide instructions for electronic filing of claims for lien (Form 12):

1) City of Toronto — https://www.toronto.ca/business-economy/doing-business-with-the-city/claim-for-lien/claim-for-lien-submission/

2) Sudbury — https://www.greatersudbury.ca/do-business/claim-for-lien/

3) Durham — https://www.durham.ca/en/doing-business/const-

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107 *Williams & Prior Ltd. v. Taskon Construction Ltd.*, 2003 CarswellOnt 474, [2003] O.J. No. 498 (S.C.J.).

108 *Ibid.*, para. 65; *Engineered Construction Ltd. v. Arena Entertainment Corp.*, 2006 CarswellOnt 8685, [2006] O.J. No. 5582 (S.C.J.).

109 *Construction Act*, R.S.O. 1990, c. C.30, **s. 16**.

110 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(1)**.

ruction-liens.aspx

4) Pickering — https://www.pickering.ca/en/city-hall/claim-for-lien.aspx

5) Oxford County — https://www.oxfordcounty.ca/Contact-Us/Construction-Act

6) City of Hamilton — https://www.hamilton.ca/government-information/accountability/construction-liens

7) Region of Waterloo — https://www.regionofwaterloo.ca/en/regional-government/submit-a-claim.aspx

8) Halton Region — https://www.halton.ca/getmedia/cdb5564f-81ef-4b7a-9436-936aa2983297/FIN-claims-for-lien-construction-act.aspx

9) Thunder Bay — https://www.thunderbay.ca/en/city-hall/lien-claim-registry-for-city-property.aspx#

10) Mississauga — http://www.mississauga.ca/portal/cityhall/officeofthecityclerk

11) Ajax — https://www.ajax.ca/en/business-and-growth/building-and-construction-projects.aspx

12) Peel Region — https://www.peelregion.ca/procurement/

13) Simcoe — https://www.simcoe.ca/Clerks/Pages/Submitting-a-Claim-for-Lien.aspx

These links lead to detailed instructions as to how claims for lien are to be submitted/e-mailed to these municipalities.

Since this practice is very new and various municipalities are still updating their websites, it is recommended that lien claimants submit their liens both electronically (if permitted) and by giving a hard copy to the clerk in order to comply with the *Act*.

Since the new amendment came into effect very recently, parties are strongly encouraged to check the municipal websites for such instructions prior to giving a lien to a municipality using any other method.

There is some potential uncertainty with respect to liening entities that are "municipalities" for the purposes of the *Act* but that are not actual "municipalities" as the term is understood in municipal law. Take, for example, a project where the owner is the Toronto Public Library Board. The Toronto Public Library Board is a local board

"within the meaning of the *Municipal Act, 2001* or the *City of Toronto Act, 2006*" and therefore a "municipality" for the purposes of the *Construction Act*.[111] Under **s. 34(3.1)**, where the owner of the premises is a municipality, the copy of the claim for lien must be given to the clerk of the municipality, and under **s. 11** of O. Reg. 304/18, the municipality may set up rules for how that is to be done. The Toronto Public Library Board, while a municipality for the purposes of the *Construction Act*, is not, in fact, a municipality for the purposes of municipal law and has no clerk. Technically, therefore, the *Construction Act* mandates that the lien be given to a person who does not exist. The City of Toronto is a municipality and has a clerk but is not the owner. Under the *Public Libraries Act*, a municipal council may by by-law establish a public library, and wherever there is a role for a "clerk" in that *Act*, it is the clerk of the appointing municipality — in this case, the clerk of the City of Toronto. So arguably, the lien in this case should be given to the Toronto City Clerk, but it is not entirely clear. The City of Toronto's website states that liens against the City and its agencies should be given to the City Clerk.[112] It would, therefore, seem best practice for the time being when dealing with local boards and the like to give the lien to the clerk of the relevant appointing municipality.

All three words should be underlined: and its agencies

Sending a printout of the e-registration confirmation of a lien to an owner does not constitute "giving" a lien to an owner under **s. 16(3)**, **s. 34(1)(b)** and **s. 87** of the *Act*. A copy of the actual claim for lien must be "given" to comply with the *Act*.[113]

The reason for the requirement for "giving" rather than registration in such circumstances is that the lien attaches to holdbacks in the hands of the owner and not to the premises itself. Public property is

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111 Section 1 ("municipality").

112 https://www.toronto.ca/business-economy/doing-business-with-the-city/claim-for-lien/. The same is true for the TTC: https://www.ttc.ca/TTC_Business/Claim_for_lien.jsp.

113 *Petroff Partnership Architects v. Mobius Corp.*, 2003 CarswellOnt 2260, 29 C.L.R. (3d) 277 (S.C.J.), applies only to liens that attach to the land, as that case turned on the provisions of the *Land Registration Reform Act*. *Petroff Partnerships* does not apply to the preservation of liens under **s. 34(1)(b)**; *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479, 37 C.L.R. (3d) 1 (S.C.J.).

not sold in satisfaction of private debts.[114] As the lien in such circumstances attaches to holdbacks in the owner's hands and not to the owner's premises itself, the *Act* ensures that the owner receives the lien in time to do something about it. It is now clear that these provisions will be construed strictly.[115]

There are federal interests in real property that cannot be liened. Some of these instances are subtle, such as in the case of privately owned office buildings leased to and then improved by federal agencies,[116] or diplomatic residences and premises.[117]

First Nations' reserve lands may be susceptible to the trust provisions of the provincial lien legislation, and in other cases may not.[118]

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114 *Bain v. Canada (Director, Veterans' Land Act)*, 1947 CarswellOnt 356, [1947] O.W.N. 917 (S.C.) at pp. 918-919 [O.W.N.] (Assistant Master Marriott): "The substance of the enactment (The *Mechanics' Lien Act*) is the sale of the land: per Meredith C.J.C.P. in *Crawford v. Tilden*, 1907 CarswellOnt 692, 14 O.L.R. 572 (C.A.) at p. 577 [O.L.R.]. How can that relief be enforced as against the Dominion Crown? The Ontario Courts have no power to order the sale of property owned by the Crown, and I have found the Director to be an emanation or agent of the Crown. In another aspect of the matter the plaintiff is seeking to reach, by a judgment of this Court, revenue or property which in substance is that of the Dominion Crown, and this of course he cannot do except by petition of right, as there appears to be nothing in the *Veterans' Land Act* which gives him this right either specifically or by implication."

115 *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479, 37 C.L.R. (3d) 1 (S.C.J.).

116 See *Bravo Cement v. University of Toronto*, 1991 CarswellOnt 790, 46 C.L.R. 207 (Div. Ct.); additional reasons 1991 CarswellOnt 6595, 52 O.A.C. 107 at 110 (Div. Ct.).

117 But see *Croatia (Republic) v. Ru-Ko Inc.*, 1998 CarswellOnt 132, 37 O.R. (3d) 133 (Gen. Div.), which dismissed a motion to vacate on this ground because the foreign mission did not fall within the definition of "premises of the mission" in the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 and *Vienna Convention on Diplomatic Relations* Articles 1 and 22.

118 *Skukowski v. James Conci Holdings Inc.*, 1998 CarswellOnt 4119, 80 O.T.C. 394 (Gen. Div.); reversed 1998 CarswellOnt 4297 (Gen. Div.); additional reasons 1999 CarswellOnt 87 (Gen. Div.) (neither lien nor trust can impose duty on federal Crown, but that does not mean that persons other than the federal Crown, into whose hands the money flows, are free from the trust obligations under the Act), *LeBrun Northern Contracting Ltd., Re*, 2001 CarswellOnt 387, 8 C.L.R. (3d) 150 (S.C.J.) (Motion argued on basis that trust provisions of the *Act* apply),

Reserve lands are not lienable, just as they are not exigible for civil debts.

The practical solution for a lawyer facing a doubtful situation is to both "give" and register a lien claim, but be prepared to vacate (***not discharge***) the registered claim for lien without cost to the owner if later persuaded that registration was unnecessary. This solution was adopted by lien claimants in *Ken Gordon Excavating Ltd. v. Edstan Construction Ltd.*,[119] whose liens were eventually saved in the Supreme Court of Canada. Claimants in that case who had registered only and did not serve their liens lost their lien security entirely.

Once you have determined that your client's lien claim is one that should properly be "given" and not registered on title, how do you accomplish this?

In most cases, the statute makes the decision for you. The statute clearly specifies whom to serve in the case of public highways,[120] in the case of premises "owned" by the Crown,[121] and in the special case of railway rights-of-way.[122] An affidavit detailing the "giving" of notice of the claim for lien in this way should be sworn and kept in the file.

Except where otherwise ordered by the court, all documents and notices required to be "given" or that may be "given" under the *Act* may be served in any manner permitted under the *Rules of Civil Procedure*,[123] or, in the alternative, may be sent by certified or registered mail addressed to the intended recipient at the recipient's last known mailing address, either according to the records of the person receiv-

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Datasphere Sales Ltd. v. Universal Light & Power Corp., 1991 CarswellOnt 804, 48 C.L.R. 25 (Gen. Div.) (Fact that plaintiff is not entitled to lien since Queen is owner of the property does not bar claim under the trust provisions of the *Act*.).

119 1984 CarswellOnt 734, 1984 CarswellOnt 806, 12 D.L.R. (4th) 481 (S.C.C.) cited with approval by the Master in *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479, 37 C.L.R. (3d) 1 (S.C.J.).

120 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(2)**.

121 O. Reg. 304/18, **s. 11**.

122 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(4)**.

123 As of January 1, 2021, the *Rules* authorize service by email without consent or court order for documents that are not required to be served personally or by an alternative to personal service: *Rules of Civil Procedure*, r. 16.05(1)(f).

ing the document, or as stated in the most recently registered document identifying the person as having an interest in the premises.[124]

In practice, this involves another search, this time of the regulations under the "owner's" relevant statute and perhaps a confirmatory telephone call to the appropriate agency to identify the correct office and officer for service. O. Reg. 304/18 sets out four offices of the Crown to which a copy of a claim for lien *must* be given.[125] Where the contract is with a Ministry of the Crown, the office of the Director of Legal Services of that Ministry is mandatory; where the contract is with the Ontario Housing Corporation, the office of the Director of Legal Services of the Ministry of Housing is mandatory; where the contract is with a college of applied arts and technology, the office of the President of the college is mandatory; and where the contract is with any other office of the Crown, the chief executive officer of that office is mandatory.

Is it good practice to serve a true copy of the registered claim for lien on all relevant parties? This used to be the universal practice among lien lawyers, but it has fallen away. The idea was to immediately put all parties on notice of the registration, to initiate negotiations if appropriate, prior to the registration popping up in a routine subsearch. There is a lot to be said for the practice. It may work in the lien claimant's favour if there are financial negotiations taking place in the background.

2.14.12 Written notice of lien

Registration of a claim for lien to "preserve" a lien under the *Act* is not the same thing as "written notice of lien". In other words, just because you have registered your client's claim for lien does not relieve you from having to serve written notice of lien to fully protect your client's priority interests over mortgages, for example. Written notice of a lien must be actually received by the person sought to be affected. Where notice is to be "given" as opposed to "received" (to affect priorities under **s. 78**, it is not enough that written notice of lien be "given", it must be "received"), it may be served in any manner permitted under the *Rules of Civil Procedure* or, in the alternative,

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124 *Construction Act*, R.S.O. 1990, c. C.30, **s. 87(1)**.

125 O. Reg. 304/18, **s. 11**.

may be sent by certified or registered mail addressed to the intended recipient at the recipient's last known mailing address according to the records of the person sending the document, or as stated on the most recently registered instrument identifying the recipient as a person having an interest in the premises.[126]

Written notice of lien must be made in a manner permitted under the *Rules of Civil Procedure* for service of an originating process.[127]

In *Vaillancourt Lumber Co. v. Balfour (Township) Separate School Section No. 2*,[128] McGillivray J.A., for the Court of Appeal, held that once the owner received written notice of lien it had to retain the amount claimed in the notice of lien in addition to the statutory holdback or risk paying twice:

> The hardship imposed upon an owner called upon to pay twice for the same work was pointed out to the Court but no hardship need occur if the owner proceeds in a proper fashion. He can and would I should think in the usual practice, upon receiving notice and before paying further moneys, either demand that the contractor pay the lien forthwith or pay it himself as provided by s. 12(1). In the present instance the owner did neither and by paying the contractor some $16,744 after receipt of notice of the lien it enabled the contractor to deprive lien claimants of money to which they were entitled.

Unlike the statutory holdback, this so-called notice holdback (i.e., the amount mentioned in the written notice of lien that is held back *in addition* to the 10% statutory holdback) is subject to set-off. In *S.I. Guttman Ltd. v. James D. Mokry Ltd.*,[129] the Court of Appeal held that where the owner, after receiving written notice of lien, had not paid anything to the contractor the owner was entitled to retain the amount it was holding in addition to the holdback to set off his claims for damages against the contractor.[130]

As a result of the important purposes served by written notice of

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126 *Hal Mann Tiles Inc. v. Palmer*, 1995 CarswellOnt 418, 24 O.R. (3d) 93, 22 C.L.R. (2d) 61 (Gen. Div.); additional reasons 1995 CarswellOnt 4275 (Gen. Div.); **s. 87(1)**.

127 *Construction Act*, R.S.O. 1990, c. C.30, s. 87(1.1).

128 1964 CarswellOnt 228, [1964] 1 O.R. 418 (C.A.).

129 1968 CarswellOnt 330, [1969] 1 O.R. 7 (C.A.).

130 The decision in *S.I. Guttman* was approved in *Canadian Comstock Co. v. Toronto Transit Commission*, 1969 CarswellOnt 141, 1969 CarswellOnt 141F, [1970] S.C.R. 205. See also *L.I.U.N.A. Employee Benefit Trust, Local 506*

lien, the wording of the written notice must be unequivocal. Simply notifying a party that you are giving them a last chance to pay, failing which you "will" or "may" register a claim for lien is not enough even under the less onerous statutory definition of "written notice of lien" in the *Construction Act*.[131]

"Written notice of lien" is a defined term.[132] The statutory definition is less onerous than the judicial definition of "notice in writing of the lien" under the former *Mechanics' Lien Act*.[133] The concept of "written notice of lien" is important in two contexts: payment (especially direct payment to non-privies and payment of holdback[134]) and the establishment of priorities.[135]

As of July 1, 2018, a written notice of lien must be in Form 1.[136] Despite the mandatory language, it is important to note that s. 84 of

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(Trustee of) v. Bayview Hospital, 2000 CarswellOnt 714, 1 C.L.R. (3d) 150 (S.C.J.).

131 *Andrew Paving & Engineering Ltd. v. Shell Canada Products Ltd.*, 1996 CarswellOnt 2065, 28 C.L.R. (2d) 15 (Gen. Div.).

132 *Construction Act*, R.S.O. 1990, c. C.30, **s. 1(1)**.

133 See *Andrew Paving & Engineering Ltd. v. Shell Canada Products Ltd.*, 1996 CarswellOnt 2065, 28 C.L.R. (2d) 15 (Gen. Div.) The current *Act* defines "written notice of lien" as follows: "written notice of a lien" includes a claim for lien and any written notice given by a person having a lien that, (a) identifies the payer and identifies the premises, and (b) states the amount that the person has not been paid and is owed to the person by the payer. Case law under the old *Act* required that the notice include an indication that the subcontractor is supplying material to the contractor, that there is an amount owed thereby, that the subcontractor is claiming a lien and the amount of the lien. See *354628 Ontario Ltd. v. Mutic*, 1978 CarswellOnt 198, 20 O.R. (2d) 581 (S.C.).

134 *Construction Act*, R.S.O. 1990, c. C.30, **s. 24** (holdback), **s. 28** (direct payment).

135 *Construction Act*, R.S.O. 1990, c. C.30, **s. 78(4)(b)** (prior mortgages, subsequent advances); **s. 78(6)** (general priority against subsequent mortgages). See an excellent treatment of this subject in H.J. Kirsh, "Progress Payments and 'Written Notices of Lien'" (1993), 8 C.L.R. (2d) 86. While "written notice of lien" is defined in **s. 1(1)** to include a claim for lien, the survey among various lien practitioners conducted by Mr. Kirsh concludes that for the purposes of **s. 24** of the *Act*, registration of a claim for lien does not constitute "written notice of a lien", which means that it is not necessary for a payer to search title before making each progress advance.

136 O. Reg. 303/18, **s. 2(1)**.

the *Legislation Act, 2006*[137] provides that deviations from the use of this Form will not invalidate the Form if the deviations do not affect the substance and are unlikely to mislead, and if the Form is organized in the same or substantially the same way as the Form whose use is required.

Before Form 1, case law had outlined four components of a valid written notice of lien. In *354628 Ontario Ltd. v. Mutic*,[138] a case decided under the former *Mechanics' Lien Act*, relying in turn on a 1969 decision of the Supreme Court of Alberta,[139] an Ontario Master required the notice to contain the following:

1. An indication that the subcontractor is supplying material to the contractor;

2. A clear statement that there is an account owed by the contractor to the subcontractor;

3. A clear statement that the subcontractor is claiming a lien, and will register it unless payment is made; and

4. The amount of the lien that is claimed.

Almost 40 years later, after a thorough review of the case law on point, Master Wiebe, in *Trenchline Construction Inc. v. Unimac-United Management Corp.*,[140] identified a fifth necessary element:

> Therefore, I have concluded that a "written notice of a lien under" *CLA* section 24 requires a fifth element, namely a warning from the lien claimant to the recipient that the dispute between the lien claimant and its payer has reached "the lien stage" and that the *status quo* flow of funds is to be interrupted immediately. Again, this warning does not require any particular form. It can be a statement that the letter is a "written notice of lien" or that the lien claimant has a present intention to register a claim for lien. It can also be just a statement that the recipient is to stop paying the payer without even mentioning the word "lien." There is no magic in the word "lien." I base this conclusion on my reading of the word "notice" in the statute and

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137 S.O. 2006, c. 21, Sched. F.

138 *354628 Ontario Ltd. v. Mutic*, 1978 CarswellOnt 198, 20 O.R. (2d) 581 (S.C.); applied in *Bestdoor Co. v. Toronto Economic Development Corp.*, 2004 CarswellOnt 2426, 35 C.L.R. (3d) 70 (S.C.J.).

139 *Bird Construction Co. v. Mountview Construction Ltd.*, 1969 CarswellAlta 9, 4 D.L.R. (3d) 203 (T.D.).

140 2016 ONSC 6136, 2016 CarswellOnt 15025 (S.C.J.); additional reasons 2016 CarswellOnt 17928 (S.C.J.).

its underlying purpose, and the decisions in *Andrew Paving*, *Mutic* and *Craig*.

Form 1 is now mandatory, but the above case law may still assist in cases where the form was not used, and a s. 84 *Legislation Act* analysis becomes necessary. The effect of giving written notice of a lien should be considered carefully. The effect is instantaneous and hard to take back, even when it becomes in your client's interest to do so. A mortgagee who receives written notice of lien stops advancing. Some mortgagees may actually hold back only the holdback from each advance *plus* the amount claimed in the written notice of lien, and then continue advancing, but usually the effect is to freeze the flow of all contract funds.

In the event that written notice of lien has been served, how do you withdraw or remove it? While there used to be uncertainty on the process of withdrawing the notice, as of 2018, the Regulations provide for a form for withdrawal, currently Form 18.[141] The withdrawal must be given to the same person to whom the written notice of lien was given.[142]

If work is ongoing and there are subsisting or other preserved liens, there may be the need for judicial intervention. This is contemplated by **s. 47(1.1)2** of the *Act*. Upon motion a court may "declare", where written notice of lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given. The lawyer using **s. 47** should be alert to the nature of the order. It is a declaration, not a judgment or order of any other kind. It is necessary to serve anyone who may have an interest in the outcome, which would include mortgagees, owners and other lien claimants.

Some lawyers try to solve this problem by including as a standard term in *ex parte* orders vacating the registration of liens under **s. 44**, a declaration that written notice of lien no longer binds "any person". This means, however, that any person affected by such an order could then apply to overturn it once they have notice of the order and seek costs. Whatever the outcome, the lawyer who took out the original *ex parte* order may be exposed to costs personally under s. 86. Best

141 O. Reg. 303/18, **s. 2(17)**, Form 18.

142 *Construction Act*, R.S.O. 1990, c. C. 30, **s. 41(2)**.

practice is not to proceed *ex parte* but to move under **s. 47** on notice.

2.15 Liens against Leasehold Interests

Tenants can be "owners" under the *Construction Act*. Liens can attach to leases. Leases can be sold to satisfy liens. Liens against the leasehold interests commonly arise during tenant's improvements in shopping malls, industrial units, office buildings and the like. They can also arise when a project is financed on a "build to suit" basis or "sale and lease back" basis. Most lien claimants assume that their work for a tenant gives them a right to lien the landlord's interest as well. This is not necessarily so.

Under the former *Construction Lien Act*, in order to make the landlord's interest subject to a lien, the contractor had to notify the landlord in advance that the lienable supply was going to take place and that the contractor intended to look to lien rights against the freehold interest in the event of non-payment. If the landlord received such a notice from the contractor and did not respond in writing within fifteen days of receipt of notice, stating that it assumed no responsibility for the improvement being made, the contractor and its trades could attach their liens to the underlying fee simple.

That notice-based regime was removed in the 2018 amendments. Going forward, where payment for an improvement is accounted for under the terms of the lease, a renewal, or any agreement with the landlord connected to the lease, the landlord's interest will be subject to a lien, to the extent of 10% of that payment, with no requirement for the contractor to give notice.[143]

Section 39 of the *Act* now provides that any person having a lien can require landlords to answer requests for information within twenty-one days. If a landlord receives a **s. 39** request for information, the landlord must provide the following information:

a) the names of the parties to the lease;

b) the amount of the payment for all or part of the improvement accounted for under the lease or under any agreement that is connected to the lease; and

c) the state of accounts between the landlord and the tenant.

143 **Section 19**.

It is imperative that the claim for lien name the tenant, in some fashion, as a person against whom the lien is to be enforced. The *Act* requires that where a lien claimant claims a lien against a tenant's interest in a landlord's land and building, the name and address of this tenant must be set out, and where the lien claimant also claims a lien against the landlord's interest in the land and building, the name and address of this landlord must also be set out. It is enough that *any* reference to the tenant be made, however crude or approximate, as then there is a chance that the so-called curative provisions of **s. 6** of the *Act* may save the lien.

The law in this area was thoroughly canvassed by Master Sandler in *Williams & Prior Ltd. v. Taskon Construction Ltd.*[144] While it is difficult to make a mistake that completely voids a claim against a leasehold interest, it is possible. It is fundamental to the survival of the lien that the name of the tenant against whom the lien is claimed be somehow named in the claim for lien itself. In *Williams & Prior*, Master Sandler discharged a lien where the lien claimant had failed to name the tenant as an "owner" in any fashion whatsoever. The Master held as follows:

> From all of the above statutory provisions, it is clear that when a person has supplied services or materials, at the request of a tenant in a building, to the leased premises (in this case, to Suites 108 at 130 Bloor Street West), such person has a lien upon the estate or interest of such tenant in the premises and the claim for lien *must* set out the name and address of this "owner" (in this case, 379). If the lien claimant (or its solicitors) do not know the exact name of this "owner" (as was *not* the case here, based on the evidence I reviewed above and the submissions of counsel), then it must use the best description it has. In this case, if the exact name had not been known, then perhaps "Hugo Boss store, suite 108, as tenant," or, at least, "the tenant's interest in Suite 108, 130 Bloor Street West," or some other such wording to indicate that a claim for lien was being made against the leasehold interest of the tenant in the leased premises, might have been used. Then the lien claimant (and its solicitors) must hope that s. 6, the "minor irregularities" section, will protect the lien from invalidation. If the leased premises have a separate legal description, then registration against that description (interest) must be used in addition to the legal description of any other alleged "owner," i.e., the landlord. But these views are obiter since this is *not* what occurred here.
>
> [. . .]

144 2003 CarswellOnt 474 (S.C.J.).

> In my opinion, the first question to ask is *not* whether there has been prejudice caused by a non-compliance with s. 34(5). Rather, the first question to ask is whether such non-compliance is a minor or technical irregularity or not: see *Gillies Lumber*, cited above at para. [70], the Reasons of McMurtry C.J.O., at pp. 20–23 of the report. If it is, s. 6 applies and a court must then go on to consider the question of prejudice. If it is not, i.e., if it is *more* than a minor or technical irregularity, then s. 6 has no application. Section 6 provides that "No . . . claim for lien is invalidated *by reason only* of a failure to comply *strictly* with . . . subsection 34(5)" (my emphasis). So, strict compliance with these sections is the required standard. A failure to comply *strictly* can be ~~over looked~~ provided no prejudice has been suffered. But *if* the failure to comply is *more than* a failure to comply *strictly*, then s. 6 cannot apply. Thus, the first question to be asked here is whether the failure of the two lien claimants to name 379 at all as an "owner," i.e., as a person whose interest in the premises improved is sought to be made subject of the lien claimants' liens, is a minor or technical irregularity, or goes beyond that, i.e., goes beyond a failure to comply *strictly* with the requirement of s. 34(5)? In my opinion, such a failure is not merely minor or technical, and is *more* that a failure to comply strictly with s. 34(5)'s requirement to set out ". . . the name and address of the owner of the premises." "Premises" is a defined term which term includes the "improvement." "Improvement" is also defined term, being "any alteration, addition . . . construction, erection or installation on any land . . . "This total omission to make any allegation against 379 in either of the claims for lien and to preserve these liens against 379's interest in the premises, within the statutory 45 days of last supply, is an extremely serious error. It is neither a minor nor technical error but rather a fundamental error in the assertion of a valid claim for lien against 379's interest in these "premises."

overlooked

Please keep together.

Often, the names under which commercial tenants do business in the real world bear little or no relationship to the true corporate name. At least, make an effort to name the tenant as the owner in the claim for lien document. If you have absolutely no idea as to the name of the tenant, then include something like "the tenant of the clothing store at Unit 13, South Mall". Retail leases are sometimes unregistered, which makes anything more than this impossible, but anything is better than nothing in this situation. In this way, there will be something there for the court to correct under **s. 6** of the *Act*. Otherwise, the problem is a problem of "non-joinder", not "misnomer", and the lien may fail entirely.

In addition, it will remain possible but difficult to lien the interest of a landlord who can be shown to meet the definition of "owner" for

the purposes of the *Act*. This approach is rarely successful.[145] The test is onerous. The statutory definition of "owner" has two requirements, and they must co-exist: (1) there has to be a specific "request" by the alleged owner that the lien claimant do the work; (2) the lien claimant must establish one of the following four requirements:

1. that the work was done upon the owner's credit; or
2. that the work was done on the owner's behalf; or
3. that the work was done with the owner's privity or consent; or
4. that the work was done for the owner's direct benefit.

2.16 Registration and E-registration

The interaction of land registration statutes[146] and the *Construction Act* is manifest in **s. 76. Section 76** provides that where a claim for lien is preserved by registration, the lien claimant is "deemed to be a purchaser" under the *Registry Act* and *Land Titles Act* to the extent of their lien. It must be noted that in the case of subsisting but unregistered liens, the priority scheme of the *Registry Act* prevails and priority of registration ahead of the preservation of the lien will determine interest in the absence of actual notice.[147]

Electronic registration is compulsory in most of Ontario.[148] There are several sources for guides written specifically for lien lawyers. Much of what follows is drawn from these sources, with the permis-

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145 For an excellent and encyclopedic review of the arguments and the relevant authorities, see *Winnen Construction Group Conditioning Ltd. v. Oxford MRC Inc.*, 2002 CarswellOnt 3593, 21 C.L.R. (3d) 129 (S.C.J.).

146 *Land Registration Reform Act*, R.S.O. 1990, c. L.4; *Land Titles Act*, R.S.O. 1990, c. L.5.

147 *Ronark Developments v. 21 East Avenue South Ltd.*, 1981 CarswellOnt 209, 39 C.B.R. (N.S.) 301 (Div. Ct.), and see *Dorbern Investments Ltd. v. Provincial Bank of Canada*, 1981 CarswellOnt 508, 1981 CarswellOnt 606, 18 R.P.R. 145 (S.C.C.).

148 Electronic Registration Procedure Guide, 2011, available at: <https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5_ProGuide.pdf>. Even where compulsory, there are still exceptional circumstances only where paper-based registration is possible. For example, the system can accommodate only 450 PINS per registration, so with condominiums with more than 450 PINS, paper registration is still required.

sion of the original authors. The reader is encouraged to make reference to the original sources, cited fully below.[149]

A private consortium, Teranet, administers this Land Titles-based "POLARIS" system in Ontario.[150] The software needed to register liens in e-registration in Ontario is called "Teraview". Access to Teraview is restricted to individuals with a licence from Teranet. The system is controlled by an external device holding the user's security profile and password.

The role of the lawyer is central to e-registration. A law clerk may prepare the documentation, but only a lawyer may make "law statements", which are denoted in bold type in the system software. All documents for registration must be thoroughly reviewed by a lawyer.

In many registry offices, paper versions of instruments for registration are no longer permitted. It is wise to retain paper versions of all instruments in your file as evidence of compliance with the *Construction Act*. In some cases, it is possible to scan and attach a paper docu-

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149 See the numerous publications of Roger Gillott of Osler, Hoskin & Harcourt: "Teranet, the Internet and Liens: Electronic Registration Meets Construction Law" (2001), 6 C.L.R. (3d) 228; "Electronic Commerce: The Electronic Registration of Construction Liens", the Law Society of Upper Canada conference, "The Six-Minute Construction Lawyer", May 15, 2002; Nuts & Bolts, The Canadian Bar Association Construction Law Section Newsletter, Vol. 16, No. 2, March, 2002, "A Call For Input: Problems and Suggested Solutions in the Electronic Registration of Liens"; Conference Paper, "Liening in the Information Age: The Electronic Registration of Construction Liens" at The Canadian Institute Conference, "Construction Liens", March 7, 2002, The Four Seasons Hotel, Toronto; Construction Canada, "Liening in the Information Age: The Electronic Registration of Construction Liens", January 2002, Vol. 44, No. 1, pp. 10–12; Pipeline, "Electronic Registration of Construction Liens", Summer 2001, Vol. 3, No. 3, pp. 3-4; E-registration of Construction Liens is Here to Stay, The Lawyers' Weekly, March 16, 2001; Brendan D. Bowles and David J. Forgione, "Electronic Registration of Liens — Current Problems and Workarounds", the Society of Upper Canada conference, "Practice Gems: Construction Lien Essentials", January 14, 2009, Toronto; and Brendan D. Bowles, "Impact of the Proposed New Amendments to the *Construction Lien Act* on the Electronic Registration of Liens and Liening a Condominium", "Practice Gems: Construction Lien Essentials", January 12 and March 23, 2011, Toronto.

150 POLARIS (an acronym for Province of Ontario Land Registration and Information System) is an automated land registration system based on title index and property mapping databases.

ment in electronic format.

Upon the registration of a claim for lien, for example, the Ministry of Government Services requires that either the statements in the software be used, or the lawyer scan and attach a schedule with information that does not fit in the statement, such as multiple owners, for example. The Ontario Ministry of Government Services has issued an "Electronic Registration Procedures Guide, 2014," updated as necessary, to which reference should be made.[151]

Many problems have arisen dealing specifically with the conduct of lien proceedings in e-registration. Lawyers in the area have found their way around most of these problems by improvising, by challenging the administrative rulings of e-registration clerks in "make it or break it" situations, and by resorting to schedules containing paper documentation wherever they are in doubt. Teranet is aware of these problems, and there is no doubt that changes will be made in the near future to make electronic registration of instruments under the *Construction Act* as seamless and effective as paper registration. Further, the Ontario government has responded with legislative reform that should resolve many of the problems that have been identified with e-registration.

2.16.1 Registering a lien on a condominium project

An owner of land described in a description that is intended to be registered together with a declaration in accordance with the *Condominium Act, 1998* shall publish notice of the intended registration in the manner set out in the Regulations.[152]

The Ontario *Condominium Act, 1998* provides that upon the registration of the declaration and description, an encumbrance against the common elements is no longer enforceable against the common elements but is enforceable against all the units and common interests.[153] As a result, it is much easier and less costly for a contractor working on what will become common elements to register a lien before the developer registers the declaration. Prior to registration,

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151 Electronic Registration Procedure Guide, 2014, available at: <https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5_ProGuide.pdf>.

152 *Construction Act*, **s. 33.1**; O.Reg. 303/18, **s. 2(11)**, Form 11.

153 *Condominium Act, 1998*, S.O. 1998, c. 9, s. 13.

the land is owned by the developer or other owner, and the usual law regarding liens applies.

However, once the declaration is registered, the cost of performing the necessary title searches increases dramatically. It is necessary to lien every unit in a condominium in order to lien the common elements, because the common elements are owned collectively by all unit owners as tenants in common. The need to lien every unit, which requires searching the Property Identification Numbers (PINs) associated with each unit to learn the owner's name, makes the remedy of the lien prohibitively expensive for many small contractors.[154]

An owner who fails to comply with this notice requirement is liable to any person entitled to a lien who suffers damages as a result. As a result of this amendment, contractors will receive sufficient notice of pending registration to preserve their liens before it becomes prohibitively cumbersome and expensive to do so.[155]

2.16.2 Cross-examination on the claim for lien

Until July 1, 2011, it had been a requirement that a claim for lien in Ontario be verified by an affidavit of the person claiming the lien, or of an agent or assignee of the claimant who is informed of the facts set out in the claim, and that the affidavit of the agent or assignee must state that the agent or assignee believes those facts to be true. The *Construction Lien Act* was then amended by the *Open for Business Act* on July 1, 2011, to eliminate the requirement for affidavits of verification.

The right to cross-examination under the *Construction Act*, however, has been explicitly preserved even absent an affidavit of verification. **Section 40(1)** of the *Construction Act* now reads as follows:

> (1) Cross-examination on claim for lien: Any of the following persons is liable to be cross-examined without an order on a claim for lien at any time, regardless of whether an action has been commenced:
>
> The lien claimant.

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154 Roger Gillott has also published on the problems related to registering a lien against the common elements of a condominium: see, for example, "How to Lien the Common Elements (and other parts) of a Condominium" (1998), 35 C.L.R. (3d) 159.

155 *Construction Act*, R.S.O. 1990, c. C.30, **s. 33.1(4)**.

An agent or assignee of the lien claimant.

A trustee of the workers'trust fund, where **s. 81(2)** applies.

The right to cross-examine is now explicitly "on a claim for lien" as opposed to "on an affidavit of verification". The cross-examination is no longer conducted on a sworn statement, but instead on the claim for lien itself. This is consistent with the electronic claim for lien form, which requires the lien claimant or the agent of the lien claimant to state that the "facts in the claim for lien are true", a formulation similar to that used in the former affidavit. Whatever the route taken to cross-examination, a cross-examination under **s. 40** of the *Construction Act* has always been a cross-examination on the facts set out in the claim for lien. This cross-examination tests the issues of timeliness, lienability and quantum. Cross-examination outside the "four corners of the lien, however, becomes more of an examination for discovery and is not permitted.[156]

When the lien claimant is a natural person such as a sole proprietor, or the trustee of a worker's trust fund, the person to be cross-examined on the claim for lien is clear. It is that natural person. Where the lien claimant is a corporation, the situation is less clear. Statement 2522 of the electronic lien form names an agent for the corporation who is a person employed by the corporate lien claimant and who is sufficiently informed of the underlying facts of the claim for lien to be able to meaningfully answer questions on a cross-examination. In most cases, the person cross-examined on the claim for lien will be the person identified in the electronic form as agent for the corporation. The person cross-examined has to be a person who can bind the corporation.

The procedure for preserving liens that do not attach to land is also problematic. Under **s. 34(1)(b)** of the *Construction Lien Act*,[157] where a lien does not attach to land, it was required that a copy of the claim for lien and the affidavit of verification required by **s. 34(6)** of the *Construction Lien Act*, be "given" to the owner of the property in order for the claim to be persevered.

The form for preparing an electronic claim for lien contains an op-

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156 *Eurocor Ltd. v. Vernich*, 1995 CarswellOnt 4534, [1995] O.J. No. 2315 (Gen. Div.).

157 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(1)(b)**.

tional statement, which provides a statement associated with a lien that does not attach to the premises. Statement 3712 may be completed by a lawyer stating:

> 3712 The lien claimant claims a charge against the holdbacks required to be retained under the Act and any additional amount owed by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the services or materials that have been supplied by the lien claimant in relation to the premises at *address*.

Many construction practitioners questioned the need for this statement in cases where the lien does not attach to land. The practical solution was for lawyers to prepare a claim electronically but then print it out and "give" a hard copy of the printed version to the clerk of the municipal or other crown agencies as the case may be, avoiding the e-registration statement entirely.

The problem with printing the electronic version of the claim for lien used to be that the electronic version lacked an affidavit of verification. In *Dirm Inc. v. Dalton Engineering & Construction Ltd.*,[158] for example, Master Sandler found that delivering a printed-out copy of an electronic claim for lien was insufficient to preserve a lien where it does not attach to the land and that it is necessary to properly serve a paper claim for lien *and* affidavit of verification. In other words, *Petroff* says that an affidavit of verification is no longer required for a lien that does attach to the premises while *Dirm* says the affidavit of verification is still required where the lien does not attach to the premises.

With the amendments to **s. 34**, however, there is now no longer any need to have or give an affidavit of verification at all, even where the claim for lien does not attach to the land. Where the lien does not attach to the premises, all that is required is that you "give" a copy of the claim for lien to the official designated by the *Construction Act* or other statute. Some practitioners may indeed find it most convenient to prepare a claim for lien using the e-registration form, and then print it out and "give" a copy of the printed version to the required party.

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158 *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479, [2004] O.J. No. 3524 at para. 80 (S.C.J.).

2.16.3 The "sheltering statement"

The concept of sheltering is often misunderstood. Sheltering allows a preserved lien to become perfected by a lien action of another perfected lien claimant. The only benefit of sheltering is that it saves the sheltering lien claimant the cost of preparing a statement of claim and registering a certificate of action. The lien claimant must still participate fully in lien pre-trials, the settlement conference, and the vetting and trial processes.

Sheltering should be seen as a last resort, not as a suitable alternative to conventional perfection.

Cost savings realized through sheltering may seem a distant memory by the time a multi-party lien action has moved into examinations for discovery and multiple trial management pre-trial conferences. More importantly, however, there is significant risk entailed in sheltering. The mere registration of a certificate of action by another lien claimant does not guarantee effective sheltering. The sheltering certificate of action must still have been registered in time. The sheltering statement of claim must name the same defendants and nature of relief claimed by the sheltered lien. Determining the existence of a perfected, sheltering lien is a substantive legal issue that requires more than a mere review of title.

A lien claimant whose lien is sheltered under a lien that is vacated may proceed with an action to enforce the sheltered lien as if the order had not been made.

The "sheltering statement" is unique to e-registration. Under the e-registration system, Statements 705, 706 and 707 require the lawyer completing the form to certify whether or not there are lien claimants sheltering under the certificate of action that is being vacated from title and action that is being dismissed in the process. The lawyer chooses one of the following three statements:[159]

> 705 There is sheltering of another lien under Certificate of Action registered as number *instrument number*.
>
> 706 There is no sheltering of another lien under Certificate of Action registered as number *instrument number*.

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159 Electronic Registration Procedure Guide, 2014, at 130, available at <https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5_ProGuide.pdf>.

> 707 A certificate of action has been registered and no other claims for lien have been registered.

Statement 705 and Statement 706 are problematic for a lawyer registering an order vacating a certificate of action from title. The existence of a sheltering lien is a substantive legal determination that cannot be made from a mere subsearch of title. In the case of condominiums, due to the requirement of a lien to be preserved against each unit, a lawyer must search every single PIN in the condominium in order to make the sheltering statement. Because of the potential cost and uncertainty, not to mention the risk of potential liability to an aggrieved sheltering lien claimant, most lawyers are reluctant to make the sheltering statement. The statement is actually unnecessary where a judge or a master has already ordered that the certificate of action be vacated from title. The solution in some cases may be to seek directions under **s. 47(2)** of the *Construction Act*, which provides for the giving of directions by the court with respect to the continuation of the action by any sheltered liens. Subsection **44(9), Rule 4** of the *Construction Act* reads as follows:

> 4. A lien claimant whose lien is sheltered, in accordance with **s. 36(4)**, under the lien that was the subject of the order may proceed with an action to enforce the sheltered lien as if the order had not been made.
>
> Subsection **47(2)** now provides that:
>
> (2) Direction by court — Where a certificate of action is vacated under subsection (1), and there remain liens which may be enforced in the action to which the certificate relates, the court shall give any directions that are necessary in the circumstances in respect of the continuation of that action subject to paragraph 4 of **s. 44(9)**.

The amendments to **s. 44(9), Rule 4** and **s. 47(2)** of the *Act* now provide certainty in the event a certificate of action is vacated under which there may be sheltering liens. In effect, removing a certificate of action from title is now a neutral act insofar as any sheltering liens are concerned.

Where it is unclear whether there are other liens sheltering, it is now common to use Statement 710:

> The deletion of Certificate(s) of Action number(s) *number* is in accordance with the *Construction Lien Act*.[160]

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160 At the time of writing the 2020 edition, Statement 710 still referred to the *Construction Lien Act* rather than the *Construction Act*.

2.16.4 Steps in e-registration

The steps in electronic registration of the various documents are these:

1. Insert personal security external device and log in to Teraview E-registration.[161]

2. Create or open relevant docket/file found under "Administration" from the menu bar.

3. Choose the appropriate Land Registry Office jurisdiction found under "Administration" from the menu bar.

4. Choose "Create New" found under "Instrument" from menu bar.

5. Choose and open the applicable document template.

6. Once registered, the document appears on title immediately. The document is then certified by the Land Registry Office at any time within the next 21 business days. Once the document is certified, it will remain on title until it is removed by another registered instrument. When an Application to Delete Construction Lien is registered and certified by the Land Registry Office, that instrument is also deleted from title along with the lien and Certificate of Action, if any.

E-registration document registration details

(1) Construction Lien

1. "Properties Consideration"

- Enter the amount claimed as owing in respect of services or materials that have been supplied.
- Enter the Property Identification Number under "POLARIS".

2. "Claimant"

- Enter the name of the lien claimant.
- Choose applicable "Person" or "Company".
- Enter the address for service of the lien claimant under the "Ad-

161 A new version of Teraview 6.2 is now available and should be downloaded: <https://www.teranetexpress.ca>.

dress for Service" tab. This is typically the lien claimant's lawyer's address.

- Choose all appropriate statements required under **s. 34** of the *Act*.

  Example 1: Statement 2521, "I (insert name) am the lien claimant and the facts stated in the claim for lien are true."

  Example 2: Statement 2522, "I (insert name) am the agent of the lien claimant and have informed myself of the facts stated in the claim for lien and believe them to be true."

  Example 3: Statement 10, "I (insert name) have the authority to bind the corporation."

  Example 4: Statement 2909, "This document is not authorized under Power of Attorney by this party."

3. "Statements"

- As of the date of publication of this edition of this book, the Ministry requires that a lawyer for a lien claimant choose either to make the law statements in the form, or scan the claim for lien into electronic form, and attach that scanned copy. If choosing statements, complete details of each as required under **s. 34** of the Act.

  Example 1: Statement 3707, (details of services or materials supplied).

  Example 2: Statement 3711, (claiming a lien against the interest of every person identified as owner).

  Example 3: Statement 61, Schedules (use to expand on any previously entered data or use to attach the scanned claim for lien, if necessary).

4. "Signatories"

- electronically sign the document, found under "Instrument" from the menu bar.

5. "Document Identification"

- name the document for saving and recall purposes.

6. "Register"

- electronically register the document (including attachments), found under "Instrument" from the menu bar.

(2) Certificate

1. "Properties"

   Enter the Property Identification Number under "POLARIS".

2. "Party From"

- Enter the name of the lien claimant.
- Choose applicable "Person" or "Company".
- Enter the address for service of the lien claimant under the "Address for Service" tab. This is typically the lien claimant's lawyer's address.
- Choose all appropriate statements:

  Example 1: Statement 10, "I (insert name) have authority to the corporation."

  Example 2: Statement 2909, This document is not authorized under Power of Attorney by this party.

3. "Party To"

- Enter the name and address of owners.

4. "Statements"

- Choose all appropriate statements and complete details of each.

  Example 1: Statement 3730, "This document relates to registration numbers" (insert the instrument number of the claim for lien and also state here that "an action in the Ontario Superior Court of Justice has been commenced under court file number . . .")

  Example 2: Statement 61, Schedules (attach a copy of the certificate of action previously scanned). *Attaching a copy of the Certificate of Action is a requirement.*

5. "Signatories"

- electronically sign the document under "Instrument" from the menu bar.

6. "Document Identification"

- name document for saving purposes.

7. "Registration"

- electronically register the document (including attachments) found under "Instrument" from the menu bar.

2.17 Expiry of non-preserved liens

2.17.1 Deadlines

The expiration of liens is governed by **s. 31** of the *Act*. The *Act* differentiates between the liens of contractors, as defined in **s. 1**, and those of all other persons, and further differentiates between situations in which there is a certificate of substantial performance and

those where there is none.

The lien of a contractor where there is certification of substantial performance of the contract expires 60 days after the earlier of (i) publication of the certificate of substantial performance or (ii) completion, abandonment or termination of the contract.[162]

The lien of a "contractor" where there is no certification of substantial performance of the "contract" expires 60 days after the earlier of (i) completion, (ii) abandonment, or (iii) termination.[163]

The lien of a subcontractor or supplier where the contract (i.e., the general contract with the owner) has been certified as substantially performed expires 60 days after earliest of (i) publication of the certificate of substantial performance; (ii) the date on which the person last supplied services or materials; (iii) the date the contract (again, the general contract) is completed, abandoned or terminated; *and* (iv) the date the subcontract is certified to be completed under s. 33.[164]

In the absence of a certificate or declaration of substantial performance, the lien of a subcontractor or supplier expires 60 days after earlier of (i) last supply of services or materials, (ii) the date the (general) contract is completed, abandoned or terminated, *or* (iii) the date the subcontract is certified completed under s. 33.[165]

2.17.2 Substantial performance

The idea of certification of substantial performance of a head contract is that each lien claimant must be able to know with certainty when their lien rights arise and when they expire. Owners and mortgagees also need to know with certainty when all claims against them have expired so they can release holdbacks free of subsisting, unpreserved liens.

To be clear, it is not "work" that is certified substantially performed; it is the contract between the owner and the contractor.[166]

Furthermore, it is not the certificate of substantial performance itself that starts the lien expiration process; it is the *publication* of that

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162 *Construction Act*, **s. 31(2)(a)**.

163 *Construction Act*, **s. 31(2)(b)**.

164 *Construction Act*, **s. 31(3)(a)**.

165 *Construction Act*, **s. 31(3)(b)**.

166 *Construction Act*, **s. 2(1)**.

certificate in a construction trade newspaper that starts the period running.[167] The publication of a certificate of substantial performance triggers the 60-day expiry period for all liens[168] claiming against the basic holdback.[169] It does not matter whether the lien is that of a contractor, subcontractor, supplier, equipment renter or material-man. No unpreserved lien against basic holdback subsists past the 60th day next following publication of a certificate of substantial performance in a construction trade newspaper.

A published certificate of substantial performance can occur even without a payment certifier. The contractor and the owner can get together and issue and publish a certificate of substantial performance themselves, following the rules and procedures laid out in the *Act*.[170]

Ten "Rules" govern the certification or declaration of substantial performance of the contract. These rules may be summarized as follows:

1. The contractor applies to the payment certifier, if there is one, or to the owner if there is not, for certification of substantial performance of the contract;

2. The owner and the contractor agree as to when the contract was substantially performed;

3. Once the date for substantial performance of the contract is agreed and certified, it is so for all purposes;

4. A payment certifier has seven days to "give" a copy of the signed certificate to both the owner and the contractor;

5. The contractor must publish the certificate once in the *Daily Commercial News*;

6. If the process breaks down, "any person" can publish the signed certificate;

7. "Any person" can apply to the court for a "declaration" of substantial performance of the contract;

8. When a court declares substantial performance, the date of the

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167 *Construction Act*, **ss. 1(2), 32**.

168 *Construction Act*, **ss. 31(2), 31(3)**.

169 *Construction Act*, **s. 22(1)**.

170 *Construction Act*, **s. 32(1) Rule 1**.

declaration is the date of substantial performance for all purposes;

9. When a court declares substantial performance, it is the applicant that has to publish the declaration;

10. Whether substantial performance of the contract is certified or declared, a certificate or declaration has no effect until it is published. This is the rule most often forgotten in practice.

Certificates of Substantial Performance are one of the few statutory documents that are curable under **s. 6** of the statute.[171] **Section 6** specifically refers to **s. 32(2)** (the contents of the certificate itself), but it does *not* refer to the other subsections, such as **s. 32(1)** (rules governing certification or declaration of substantial performance), or the two liability subsections. If the purpose of the rules for certification of substantial performance, as set out in **s. 32(1)**, is achieved in some other manner, the defect will not prove fatal, even if **s. 6** is inapplicable.[172] However, certificates that entirely omitted a legal description of the premises were held to be invalid in *Vestacon Limited v. ARC Productions Ltd.*[173]

Searches for certificates of substantial performance should be conducted on the following sites:

- **Daily Commercial News:** https://canada.constructconnect.com/dcn/certificates-~~andnotices~~ and-notices

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171 *L.A. Legault Electric Ltd. v. 951034 Ontario Inc.*, 1995 CarswellOnt 2737 (Gen. Div.), *For-Con Construction Ltd. v. 1120062 Ontario Inc.*, 1998 CarswellOnt 3644, 41 C.L.R. (2d) 20 (Gen. Div.), *Bob Dionisi & Sons Ltd. v. F.J. Davey Home for the Aged (Algoma)*, 1992 CarswellOnt 855, 3 C.L.R. (2d) 162 (Gen. Div.). But see *Trus Joist Canada Ltd. v. Princess Gardens Inc.*, 1992 CarswellOnt 877, 5 C.L.R. (2d) 146 (Gen. Div.); varied 1993 CarswellOnt 822 (Div. Ct.) where the irregularities were significant and not minor and thus not "curable". Similarly, where there was a litany of errors the cumulative effect of which was substantive and not minor and not "curable", see *Tri-City Flooring Co. v. Quatrosense Environmental Ltd.*, 1991 CarswellOnt 820, 3 O.R. (3d) 744, 49 C.L.R. 319 (Gen. Div.).

172 *For-Con Construction Ltd. v. 1120062 Ontario Inc.*, 1998 CarswellOnt 3644, 41 C.L.R. (2d) 20 (Gen. Div.).

173 2018 ONSC 5366, 2018 CarswellOnt 15345 (S.C.J.). See also *L.A. Legault Electric Ltd. v. 951034 Ontario Inc.*, 1995 CarswellOnt 2737 (Gen. Div.).

- **Link2Build Ontario:** https://certificates.link2build.ca/
- **Ontario Construction News:** https://ontarioconstructionnews.com/certificates/
- **Certificates of Substantial Performance:** http://www.certificatesubstantialperformance.com/

2.17.3 Completion, declaration of last supply and certification of completion of a subcontract

"Completion" is a defined term. "Completion" applies only to "contracts", i.e., contracts between owners and contractors.[174] Under the statutory definition of "completion", no more than 1% of the work remaining *after* substantial performance can remain incomplete. On a $1 million project therefore, "completion" would occur when no more than the *lesser* of $5,000 or 1% of the contract price remained to be completed or corrected. As a result, very few contracts greater than $100,000 are ever "completed" within the meaning of the *Act*.

"Completion" is different from "declaration of last supply" under **s. 31(5)** and "certification of completion of a subcontract" under **s. 33**. These latter two procedures were enacted to avoid having to keep early trades from their basic holdback until substantial performance of the entire project, but they are seldom used in practice.

"Declaration of last supply" under **s. 31(5)** allows a subcontractor to make a binding declaration as to when that material supplier's lien rights expire. These are seldom, if ever, seen in practice.

A "Certificate of Completion of a Subcontract" is initiated by the contractor together with the payment certifier and is meant to result in the expeditious release of holdbacks to certain early subtrades. It is not published. Once again, "Certificates of Completion of a Subcontract" are seldom seen in practice.

2.17.4 Abandonment

The alternative arm of the statutory expiration period is "abandonment". Cessation of work and abandonment are not necessarily the

174 *Construction Act*, **s. 2(3)**.

same thing.[175] It may be that work ceased with an intention of returning once accounts were sorted out, or the strike ended, or weather improved. Ceasing work on an improvement for one of these reasons would not be "abandonment" for the purpose of calculating the time period for expiration of a contractor's lien.[176]

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175 Although the appeal was from a decision of the British Columbia Court of Appeal, the concept of abandonment is authoritatively dealt with in *Dieleman Planer Co. v. Elizabeth Townhouses Ltd.*, 1974 CarswellBC 8, 1974 CarswellBC 352, 20 C.B.R. (N.S.) 81 (S.C.C.), Judson J., adopting the Court of Appeal reasons, which had in turn adopted the trial reasons:

> It is clear that work ceased, but in my view cessation of work and abandonment are not necessarily co-existent. In order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion. Work on this project ceased before 10th December but the evidence is clear that it was intended that work be resumed when the financial problems had been overcome. It was likely that those problems would be overcome because the cost of completion was more than offset by the funds remaining to be advanced on the mortgage.
>
> I agree with the learned trial judge that it is difficult to determine the intention of the company and that this difficulty is made more severe by the several roles played by the directors as creditors, part of the management committee and so forth. I think that he was wholly justified in concluding as he did:
>
> > Nowhere throughout the evidence can I discern any intention by anyone able to control the destiny of the project to abandon the improvement, nor was there in fact such an abandonment as I construe that word. It is true that there was a short cessation of work on construction of the uncompleted portion of the improvement but this, I think, is only one factor to consider and an insignificant one in comparison with the paper work and other efforts proceeding continuously to enable actual construction to continue. A change in ownership of the improvement does not in itself constitute an abandonment, nor does a mere cessation of work.
>
> The findings of fact justified by the evidence defeat the appellants' contention that the respondent fails by reason of late filing. I agree with these reasons. This branch of the appeal fails.

176 See *Paris Construction Ltd. v. J A V Residences Ltd.*, 1985 CarswellOnt 827, 11 C.L.R. 1 (H.C.), and *Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.*, 1996 CarswellOnt 1325, 27 C.L.R. (2d) 184 (Gen. Div.), Stach J.: "Not every stoppage of work can be equated with abandonment.

One practical definition of abandonment is "leaving a jobsite with no *manifest* intention of returning", with the emphasis on the word "manifest". The issue of abandonment involves a determination of the intention of the contractor. The owner will say that the contractor abandoned. The contractor will deny this assertion. Such disputes are triable issues and cannot be resolved on a summary application or motion. It has to be the lien claimant who "abandons" the contract.

Cessation of work and abandonment engage different tests: In *Dieleman Planer Co. Ltd. v. Elizabeth Townhouses Ltd.* (1974), 48 D.L.R. (3d) 635 (S.C.C.), Judson J. approved the following passage at p. 637:

> . . . one must look to the evidence, not to see whether they ought to have abandoned, but to see if they did in fact abandon. It is clear that work ceased, but in my view, cessation of work and abandonment are not necessarily co-existent. In order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion . . . "Nowhere throughout the evidence can I discern any intention by anyone able to control the destiny of the project to abandon the improvement, nor was there in fact such an abandonment . . . Cessation of work on construction of the uncompleted portion of the improvement . . . is only one factor to consider." In the case at bar, active pursuit of the mining program at the site ceased on or about May 2, 1993. The Court concludes however that the program was not abandoned at that point either in fact or in law. Not only did Dobson fail to advise any of the plaintiffs that the project was at an end, several expressions about the imminent resumption of work on the project are exclusively attributable to Dobson. Dobson's assurances to them are most probably the product of her resolve to have this mining property exploited to its maximum potential and her belief in her ability to accomplish that objective by obtaining additional financing. Although optimism as a characteristic ought not to be too readily blighted, there does come a time when reasonable people ought to conclude that a project is at an end, indeed, in the legal sense of having been "abandoned". In point of fact, some of the plaintiffs appear to have concluded that the project eventually be regarded as abandoned."

It gets even more subtle. In *LDR Contracting Inc. v. Filion*, 1996 CarswellOnt 2862, 30 D.L.R. (2d) 16 (Gen. Div.); additional reasons 1996 CarswellOnt 2874, 9 O.T.C. 380 (Gen. Div.), an owner told a contractor to leave the site and only 17 days later did the contractor send its final account to the owner. It was the day 17 days later that was the day of abandonment for the purposes of calculating the lien period. On this theme, see also *D'Andrea Developments Inc. v. Farnham Development Corp.*, 1992 CarswellOnt 884, 9 C.L.R. (2d) 289 (Gen. Div.).

An owner cannot force abandonment by sending a unilateral notice of termination of the contract.[177]

177 *Scepter Industries Ltd. v. Georgian Custom Renovations Inc.*, 2019 ONSC 7515, 2019 CarswellOnt 20917 (Div. Ct.).

CHAPTER 3

PERFECTING A LIEN

3.0

3.1 Guide

Liens preserved by registration are perfected by registration of a certificate of action confirming that a lien action to enforce that lien was commenced on a given day.[1] Such liens may also be perfected by "sheltering" under the perfected lien of another lien claimant on the same improvement.[2] Liens that are not preserved by registration are perfected by the mere commencement of an action to enforce that lien.[3] Registration of a certificate of action is also not necessary where the lien was vacated from title.[4] Perfection must occur prior to the end of the 90-period next following the last day on which the lien could have been preserved under s. 31.[5]

3.2 Where to commence the action

A lien action is commenced by issuing a statement of claim under the *Construction Act* in the court office for the county in which the premises are situate: i.e., if the lands are in Mississauga, the proper court office is Brampton; if the lands are in Ajax, the proper court office is Whitby; if the lands are in Richmond Hill, the proper court office is Newmarket.[6] Failure to start a lien action in the proper court office is a correctable irregularity.[7]

3.3 Parties to a lien action

3.3.1 Plaintiffs

The lien claimant is the plaintiff. This would seem obvious enough;

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1 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(3)(a)**.

2 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(4)**.

3 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(3)(b)**.

4 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(3)(a)**.

5 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(2)**.

6 O. Reg. 302/18, **s. 1(1)**.

7 *Simcoe Block (1979) Ltd. v. Simcoe County Roman Catholic Separate School Board*, 1996 CarswellOnt 1228, 27 C.L.R. (2d) 296 (Gen. Div.).

however, through simple carelessness or inattention, or through the long-standing usage of the client and presumption of regularity by their counsel, a lien claimant will occasionally name itself incorrectly.

If the problem is simple misnomer, the court usually has no problem correcting the error as a "failure to strictly comply" under **s. 6** of the *Act*. If the defect is so severe that the entity named is entirely unknown to the law, then the lien action is void, the underlying lien is not perfected, and if the time to perfect has passed the lien itself is void. In such a case, rights that were once lien rights may become transformed into a cause of action against the responsible lawyer in negligence.

Although these cases are undoubtedly correct as a matter of law, it seems inconsistent that inadvertent non-joinder of a corporate plaintiff (a plaintiff suing as a corporation when not a corporation) should be fatal to a lien,[8] whereas even the use of a fictional name is enough to save a lien against a tenant.[9]

In any event, care has to be taken to get corporate names and status right. Has the plaintiff corporation been filing its corporate returns? If not, it may have been wound up and proceedings in its name may be a nullity unless and until it is re-instated. It may not be possible to rectify this *nunc pro tunc*. Has the company merged, or been acquired? Is the lien claimant a foreign corporation that must register an office in this jurisdiction before acquiring an interest in real property in Ontario, or before enforcing rights in our courts?

What about multiple lien claimants? The statute is clear that any number of persons having liens upon the same premises may unite in a single claim for lien.[10] Section **3 of O. Reg. 302/18** states that any number of lien claimants whose liens are in respect of the same owner and the same premises *may* join in the same action. **Rule 5.02** allows two or more persons represented by the same lawyer of record

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8 See *Skyaramic Development Inc. v. Zotalis*, 1996 CarswellOnt 4508, 33 C.L.R. (2d) 323 (Gen. Div.); *Triple "R" Demolition Inc. v. 1186468 Ontario Ltd.*, 1998 CarswellOnt 859, 37 C.L.R. (2d) 125 (Gen. Div.).

9 *Williams & Prior Ltd. v. Taskon Construction Ltd.*, 2003 CarswellOnt 474, [2003] O.J. No. 498 (S.C.J.).

10 *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(8)**.

to join in a single action where they assert claims arising out of the same transaction or occurrence, or have a common question of fact or law, or if it is convenient for the administration of justice. The requirement that multiple plaintiffs be represented by the same counsel is usually enough to deter the practice.

Wage-earners will often join together to enforce their priority for unpaid wages and benefits. Labour unions lien through a single trustee. It is much less common for a number of subtrades, for example, to join together in a single action against a contractor. Logistics are problematical. In addition to having to agree on common counsel, each pleading for each plaintiff would have to set out each claim for lien, and each claim *in personam* for payment of the underlying debt would have to be properly pleaded.

3.3.2 Defendants

The proper joinder of defendants and claims is determined by reference to the *Construction Act*, not the *Rules of Civil Procedure*.[11]

There are two prevalent views on this issue. The better view is that one should not name as defendants more than the party with whom the client has privity of contract, to support the *in personam* jurisdiction of the court, and the statutory "owner" or "owners" of the premises improved (or tenant), to support the *in rem* jurisdiction of the court, and, of course, any party against whom a priority claim is made. This is generally accepted as the correct position.

Some lien lawyers, however, routinely join as many defendants as

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11 Refer to *Construction Act*, R.S.O. 1990, c. C.30, **s. 34(8)** (any number of persons may join in a claim) and **O. Reg. 302/18 s. 2(1)** (a defendant can counterclaim against the plaintiff for any claim, whether or not related to the improvement, and crossclaim with respect to any claim related to the improvement) and see *J K Associates Corp. v. Arcos Inc.*, 1997 CarswellOnt 1955, 34 C.L.R. (2d) 13 (Gen. Div.). The policy of the *Construction Lien Act*, when it was in draft form, was clearly to restrict joinder. In this regard, see The Attorney General's Advisory Committee Report: "In the opinion of the Committee, the joinder provisions of the Discussion Draft would have greatly complicated the trial of lien actions. While the court was given a liberal power to order severance, a great deal of time might have been wasted in the bringing of severance applications. The Committee proposes new joinder provisions that will restrict joinder to those claims, crossclaims and counterclaims, which are clearly relevant to the lien claim."

they can think of, all the way up the construction "pyramid", regardless of privity of contract or status as "owner" under the statute. The reasoning behind this approach is that each tier has a holdback obligation to the tier two levels down, and all of these parties need to be included in some way in a formal judgment.

Thus, arguably, they are at least proper parties. To the knowledge of the author, however, no one has ever been penalized in costs for taking this approach. This issue is best sorted out early on at the first trial management pre-trial conference. If you do not get all of the right parties initially, there are liberal joinder provisions in **O. Reg. 302/18 s. 6(2)**, which allow the court at any time to add or join any person as a party to the action.

3.3.3 Is the "owner" a necessary party?

There used to be a debate about whether an owner must at all times remain a party to a lien proceeding in order to clothe the court with jurisdiction under that statute, even if, for example, the liens had all been vacated from the owner's title by the general contractor posting security under **s. 44**.

Under the *Mechanics' Lien Act*, an "owner" was not just a proper party but a necessary party to a lien action, without which the court lacked jurisdiction to proceed even to award a personal judgment in debt.[12] In 1983, most of the *Mechanics' Lien Act* was repealed and replaced by the *Construction Lien Act*, which removed many of these overly technical arguments.

Benny Haulage Ltd. v. Carosi Construction Ltd., decided in 1996 under the *Construction Lien Act*, held that under **s. 44(6)**, a vacated lien ceases to attach to the premises and instead attaches to the security, and that it was not only proper in such circumstances that the lien action be discontinued against the owner, it should actually be dismissed against the "owner".[13] Leave was given in *Benny Haulage* to

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12 See, e.g., *M & S Roofing & Sheet Metal Ltd. v. Arthur J. Fish Ltd.*, 1988 CarswellOnt 774, 32 C.L.R. 148 (S.C.).

13 1996 CarswellOnt 5238, *(*sub nom. *Benny Haulage Ltd. v. Hamilton-Wentworth Roman Catholic)* 33 C.L.R. (2d) 44 (Gen. Div.) at p. 45 [C.L.R.]: "The cases of *Bratti Mechanical Inc. v. Orlando Corp. and Delange Asphalt v. Gallagher* make it clear that once a general has posted security, an owner is no longer a required party at the suit of any lien claimant who's lien has been

discontinue against the "owner" under **Rule 23.01(1)(b)** (discontinuance with leave of the court).[14]

The contrary argument is that the lien court is a statutory creation and that its jurisdiction depends upon proof of a lien against the interest of an "owner", which requires a finding *in rem* against an "owner" whose nominal presence, at least, is required at all times. On the other hand if, as the *Act* provides, liens cease to attach to the land and instead attach to the security posted for that lien, the exercise of *in rem* jurisdiction need no longer concern the owner. One argument is jurisdictional; the other argument is remedial. As a practical matter, it seems a complete waste of time and money to have the owner around and separately advised if no order can ever or will ever be made against the owner.

Benny Haulage represents the law of Ontario on this point and it is applied routinely. *Benny Haulage* suggests that a party not only *can* consent in such circumstances but *should* consent. Where security is posted by a party having privity with a lien claimant, the lien claimant is probably safe in dismissing the action against the statutory "owner" and proceeding against the security in court. This proposition has been extended to other parties. It has been held that mortgagees ought to be let out of the action once security is posted.[15] Where, after a sub-subcontractor liened, security was posted by a subcontractor, it was held that the action ought to be dismissed against both the owner and the general contractor.[16]

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bonded off. If an owner is so named it should immediately seek an Order dismissing the claim against it so no further costs are incurred." [citations omitted]

14 It was later held in *Dominion Bridge-Ontario v. Stephen Sura (Canada) Ltd.*, 1997 CarswellOnt 2329, 35 C.L.R. (2d) 1 (Gen. Div.); additional reasons 1998 CarswellOnt 3122 (Gen. Div.), that where all liens are vacated by someone other than the owner, the owner is under no further liability and the claim against the owner should be dismissed. Note that the Master here followed the reasoning of Justice Tobias in *Delange Asphalt Paving, a division of Anderson Paving Ltd. v. W.G. Gallagher Construction Ltd.* (1993), Kirsh's C.L.C.F. 44.29 (Ont. Gen. Div.).

15 *JCP Construction Co. v. 1520705 Ontario Inc.*, 2007 CarswellOnt 5121, 64 C.L.R. (3d) 144 (S.C.J.).

16 *Ablesystems Mechanical Ltd. v. AER Comfort Mechanical Services Ltd.*, 2009 CarswellOnt 6, [2009] O.J. No. 6 (S.C.J.).

The court possesses a wide jurisdiction under **O. Reg. 302/18, s. 6(2)** of the *Act* to add or join parties in order to resolve all issues on a given improvement.[17] The object is to get everyone necessary to an effective final determination of the issues before the court.[18]

3.3.4 Priority claims

Priorities should be pleaded with as much particularity as possible as early as possible. Any person against whom a priority is claimed should be named as a party to the lien action at the first opportunity. Often this will occur at the first lien pre-trial.[19]

3.3.5 Improper joinder in a lien action

O. Reg. 302/18, s. 3 provides that any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same lien action. It is therefore improper to plead claims in a single lien action with respect to different premises, even if they are owned by the same "owner".[20] A typical example would involve a group of trades hired to do tenant's improvements in a chain of new restaurants, all for the same owner but on several different premises throughout a city or region. Even if all the plaintiffs were represented by the same lawyer, claims against multiple premises could not be made in the same statement of claim.

Section **34(8)** (any number of persons may unite in one joint claim for lien), **O. Reg. 302/18, s. 3** (any number of lien claimants may unite in one joint statement of claim in respect of the same owner and same premises), and **s. 55(2)** (counterclaims and crossclaims) are all applicable in such cases, and it would be inconsistent with these sections if the *Rules of Civil Procedure* applied. As a result of **s. 52** of

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17 See *898446 Ontario Inc. v. Greyrock Building Corp.*, 1991 CarswellOnt 818, 49 C.L.R. 222 (Gen. Div.).

18 *Glebe Electric Ltd. v. 595524 Ontario Ltd.*, 1991 CarswellOnt 774, 44 C.L.R. 76 (Gen. Div.).

19 *I.B.E.W. Trust Fund, Local 353 v. 779857 Ontario Inc.*, 2004 CarswellOnt 2528, 36 C.L.R. (3d) 48 (S.C.J.).

20 See, for example, *J K Associates Corp. v. Arcos Inc.*, 1997 CarswellOnt 1955, (sub nom. *JK Associates Corp. v. Arcos Inc.)* 32 O.R. (3d) 627, 34 C.L.R. (2d) 13 (Gen. Div.).

the *Act*, the *Rules of Civil Procedure* with respect to joinder do not apply to pleadings and proceedings under the *Act*.

What about misjoinder? *J K Associates Corp. v. Arcos Inc.*[21] is instructive. Here a subcontractor registered two separate lien claims against two separate properties owned by two separate corporations, but commenced only one action against both corporations. The court held that such joinder was specifically disallowed under the *Construction Lien Act* and that therefore the *Rules of Civil Procedure* did not apply and the claims could not be joined. The court did not stop there:

> Although the court has determined that the Rules of Civil Procedure could not assist the Plaintiff on the issue of joinder as the Rules re Joinder were inconsistent with provisions of the *Construction Lien Act*, can the Rules of Civil Procedure assist the Plaintiff if there is nothing in the *Construction Lien Act* dealing with the issue of misjoinder or relief against joinder?

The court found that the plaintiff could rely on the *Rules* in these circumstances and granted leave to deliver fresh statements of claim within 21 days to claim relief against the separate companies. The reasoning, by implication, should be the same if there is the same general contractor, and the same owner, but different premises.

A practical solution in an extreme case, where there is a common owner but premises in more than one court jurisdiction, may be to approach the parties for their consent that all issues with a common general contractor, and common owner, but different premises be heard in one jurisdiction by a single judge or referee as the case may be. Even if consent of the parties is obtained, special dispensation will be required from the judge or master in the receiving jurisdiction, as without that consent, courts are not free to simply transfer cases to each other. It is an accepted practice in Toronto, for example, to have the non-Toronto lien action, which is commonly *not* referred to a referee, referred to the master at Toronto where the cases are factually connected and there is a practical need for a common accounting.

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21 *J K Associates Corp. v. Arcos Inc.*, 1997 CarswellOnt 1955, *(*sub nom. *JK Associates Corp. v. Arcos Inc.)* 32 O.R. (3d) 627, 34 C.L.R. (2d) 13 (Gen. Div.).

3.4 Pleadings in a lien action

3.4.1 Claims

(1) Statement of claim

Lien claimants' pleadings must comply with the *Rules of Civil Procedure*.[22] Thus, the statement of claim in a lien action has to be divided into paragraphs numbered consecutively, and each allegation has to be contained, insofar as is possible, in a separate paragraph. As with any pleading in Ontario, lien pleadings must contain a concise statement of the material facts but not the evidence needed to prove them. Conditions precedents are assumed to have been performed; non-performance is a matter for defence. Inconsistent allegations are permissible as long as they are pleaded in the alternative. The effect of documents or conversations can be pleaded without recitation in the pleading itself.

It is a convention to recite *verbatim* the entire claim for lien in the pleading or to annex it as a schedule to the statement of claim, but it is not necessary to do so. No lien action will be struck for failure to do so.[23]

The statement of claim should clearly indicate that its purpose is to enforce a lien, although Ontario courts seem to go a long way to save deficient pleadings in this respect.[24]

Parties are strongly encouraged to use Civil Claims Online to issue statements of claim and certificates of action and to receive electronically issued documents in Superior Court of Justice civil actions as follows:

- Access Civil Claims Online at https://www.ontario.ca/page/file-civil-claim-online.
- Start the process by issuing a Statement of Claim.
- The last step in the issuance process will allow parties to upload both the statement of claim and certificate of action.

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22 *Construction Act*, R.S.O. 1990, c. C.30, **s. 50(2)**.

23 *Alros Products Ltd. v. Cambridge Leaseholds Ltd.*, 1995 CarswellOnt 1116, 25 C.L.R. (2d) 265 (Gen. Div.).

24 See, for example, *984499 Ontario Inc. v. 1159337 Ontario Ltd.*, 2013 ONSC 4500, 2013 CarswellOnt 9055 (S.C.J.).

- Upon payment of the court fees (parties will be charged one fee of $359.00 for both the statement of claim and certificate of action), parties will receive an email from Civil Claims Online enclosing both the issued statement of claim and certificate of action. Both issued documents will have an electronically populated court file number and electronic court seal. No court attendance is required.
- Once the statement of claim and certificate of action have been issued, parties may proceed to register the electronically issued certificate of action on title.

It is important to note that in the event that the construction lien has been vacated prior to the issuance of the statement of claim, no certificate of action is required to be issued and registered on title.

(2) Service

The statement of claim must be served on all defendants within 90 days after it is issued, subject to judicial extension of that period granted before or after its expiration.[25] Relevant factors in exercising the court's discretion to extend the time for service are (a) the length of the delay and whether the limitations period has expired, (b) the existence of a compelling reason for the delay, and (c) prejudice to the defendant.[26] Where, for example, the default was not intentional, where the delay had not been inordinate, and where the delay did not affect the hearing of a fair trial, courts may extend time for service or order that service was made "*nunc pro tunc*" to comply with **s. 53(2)** of the *Act*.[27] Prejudice may be found in the fact that the owner has to post security to clear title.[28] While it has been held that a court will

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25 O. Reg. 302/18, **s. 1**.

26 *Petrasso v. Fuller*, 2020 ONSC 7915, 2020 CarswellOnt 18482 (S.C.J.); *MGI Construction Corp. v. 2273865 Ontario Inc.*, 2015 ONSC 4716, 2015 CarswellOnt 11221 (S.C.J.).

27 Now O. Reg. 302/18, **s. 1**. See, for example, the order of Justice Patterson dated May 16, 2016 in *SNS Construction Contracting Ltd. v. Dougall Cabana Inc.*, 2017 ONSC 3711, 2016 CarswellOnt 21725 (S.C.J.).

28 *Ibid.*

refuse extending the period only on rare occasions,[29] courts will declare a lien expired for failure to serve the statement of claim in time in the absence of any compelling reasons for the delay.[30] Even in such cases, however, the court may extend the time for service of the statement of claim regarding the non-lien relief claimed.[31] On such a motion, the court will be made aware of the status of all lien actions, so that if the lien claimant who is late in service of the statement of claim can be sheltered under another lien claimant's action, there is, or may be, no need of an order extending the time for service.

While **s. 87(1)**, providing for the "giving" of documents, by its plain language speaks to "documents and notices" only and thus would appear not to apply to pleadings such as statements of claim, it has been held by the Divisional Court that a statement of claim served by registered mail complied with **s. 87** of the *Act* and an order validating service was unnecessary.[32] This lack of formality in service of originating process can lead to unnecessary expense and delay where service by registered mail is resorted to but the statement of claim does not reach an "officer, director or agent" of a corporation. It is suggested that notwithstanding the currently permissive reading of **s. 87(1)**, it is still better practice to serve all originating process with the formality required by **R. 16** of the *Rules of Civil Procedure*.

(3) Improper claims in a lien action

The 2018 amendments repealed the former s. 55(1), which held that a plaintiff could join with its lien claim a claim for breach of contract or subcontract. That provision had been interpreted to the effect that *only* such claims could be joined, and claims in tort or restitutionary *quantum meruit*, for example, were barred. The removal of the section presumably removed any such barriers and opened the way for

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29 *Newstruc Ltd. v. Sherway Automotive Corp.*, 1995 CarswellOnt 4206 (Gen. Div.); additional reasons 1996 CarswellOnt 453 (Gen. Div.).

30 *MGI Construction Corp. v. 2273865 Ontario Inc.*, 2015 ONSC 4716, 2015 CarswellOnt 11221 (S.C.J.). Cited with approval in *Tam Hampson 20/20 Design Inc. v. Kreuger-Naug*, 2016 NSSC 217, 2016 CarswellNS 678.

31 *Ibid.*

32 *Select Acoustic Supply Inc. v. College of Physicians & Surgeons (Ontario)*, 2008 CarswellOnt 3284, 70 C.L.R. (3d) 118 (Div. Ct.).

such claims in a lien action.

3.4.2 Defences

Defending a lien action is similar to defending any other civil action. In the case of "owners", there are some statutory defences against the claims of non-privies, and there are technical defences available based on failure to strictly comply with the statute (**s. 6**).

(1) Defences with respect to timeliness, lienability and quantum

The three lien-specific issues to be considered in defending any lien proceeding are *timeliness* (did the lien expire before it was preserved or perfected?); *lienability* (was the claimant's supply a "supply of services and materials to an improvement" within the meaning of **s. 14(1)** of the *Act*?); and *quantum* (what is the lien worth as a matter of contractual entitlement?).

One of the most basic questions that you must ask is: does your client even have a defence? Lien courts will consider proportional costs orders where a party maintains patently unsuccessful grounds of defence.[33] In terms of costs, **s. 86** of the *Act* speaks to "any party", which would include a co-defendant who prejudiced or delayed the conduct of the lien action.

(2) Statutory defences

The defendant owner has the additional statutory defences provided by **s. 23** of the *Act*. The 1983 *Construction Lien Act* introduced personal liability of an owner to non-privy lien claimants. The personal liability of an owner under this section may be determined by an action under the *Act* only.[34] A line of case law developed around this provision that resulted in perceived inequities,[35] which eventually led

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33 *Bellissimo Excavating Ltd. v. Ding*, 2004 CarswellOnt 2319, 34 C.L.R. (3d) 185 (S.C.J.); affirmed 2004 CarswellOnt 4167, [2004] O.J. No. 4172 (S.C.J.); leave to appeal refused 2004 CarswellOnt 5401, 39 C.L.R. (3d) 150 (Div. Ct.).

34 *Construction Act*, R.S.O. 1990, c. C.30, **s. 23(4)**.

35 See *Core Developments Ltd. v. Jerry's Asphalt Paving Ltd.*, 1990 CarswellOnt 2806 (C.A.), as referred to in *Lindsay Brothers Construction Ltd. v. Halton Hills Development Corp.*, 1992 CarswellOnt 865, 11 O.R. (3d) 23 (Gen. Div.);

to the 1990 amendments to **s. 23**[36] that now clarify the limits of the owner's liability to non-privies under the statute.

If the defaulting payer is the contractor, the owner is personally liable to those below the contractor only for the holdbacks it was required to keep from the contractor.[37]

If the defaulting payer is a subcontractor, the owner is personally liable to those below the subcontractor for the *lesser* of the owner's holdback or the holdback required to be kept by the defaulting subcontractor's *payer*.[38] This could be a very small amount of money indeed.

These statutory defences have put default judgments out of reach for non-privies.[39] Even if the pleadings do not raise this defence, it is raised by the statute and represents a genuine issue for trial. The contrary argument is that the combined effect of **s. 5(2) of O. Reg. 302/18** (extremely broad jurisdiction in default of defence) and **Rule 19.05(1)** (the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed) should permit default judgment against an owner.

(3) Set-off

Provided that an owner does not reduce the holdbacks required to be kept by the *Act*, the owner has both a statutory and a common law

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Lansing Building Supply (Ontario) Ltd. v. Kemp (March 22, 1993), Kirsh's C.L.C.F., No. 226 (Div. Ct.). The owner's personal liability under the previous section was unduly extended, until the amendments clearly limited the personal liability of the owner to non-privies in s. 23(3)(b), effectively doing away with the decision in *Forte Aluminum Ltd. v. Frank Plastina Investments Ltd.*, 1988 CarswellOnt 755, 29 C.L.R. 167 (S.C.).

36 *Construction Lien Amendment Act, 1990*, S. O. 1990, c. 17, assented to June 28, 1990.

37 *Construction Act*, R.S.O. 1990, c. C.30, **s. 23(2)**.

38 *Construction Act*, R.S.O. 1990, c. C.30, **s. 23(3)**.

39 *P.A.S.A. Enterprises Ltd. v. Pallas*, 1995 CarswellOnt 3735, [1995] O.J. No. 3205 (Gen. Div.).

defence of set-off.[40] The debt being set off must be of sufficient maturity to constitute a "debt" as such. A claim that could exist only on the condition of success in another action, for example, cannot be set off.[41]

When a contractor defaults in the performance of the contract, the owner may become entitled to liquidated or other damages. The owner has a right to set off such costs and damages against amounts that would otherwise be payable to the contractor, subject to any restrictions imposed by statute.

It must be always remembered, however, that one of the fundamental features of lien legislation is to prevent the owner from setting off against the statutory holdback, not non-holdback funds, which would otherwise merely be the subject of a statutory trust.[42]

In a case decided under the former *Mechanics' Lien Act*, *Standard Industries Ltd. v. Treasury Trails Holdings Ltd.*,[43] an Ontario court allowed the owner to set off against funds that had been certified for payment. The Ontario Court of Appeal affirmed the decision. The court found that regardless of the certificate of payment, there was no money owing to the contractor. Thus it is clear that the owner has the

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40 See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 111. See, generally, the discussion in *Noranda Exploration Co. v. Sigurdson*, 1975 CarswellBC 125, 1975 CarswellBC 282, 20 C.B.R. (N.S.) 215 (S.C.C.).

41 *Nortown Electrical Contractors Associates v. Bradsil (1967) Ltd.*, 1999 CarswellOnt 39, 45 C.L.R. (2d) 273 (Gen. Div.); affirmed 1999 CarswellOnt 3110, [1999] O.J. No. 3612 (C.A.).

42 *Len Ariss & Co. v. Peloso*, 1958 CarswellOnt 121, [1958] O.R. 643, 14 D.L.R. (2d) 178 (C.A.), *S.I. Guttman Ltd. v. James D. Mokry Ltd.*, 1968 CarswellOnt 330, [1969] 1 O.R. 7, 1 D.L.R. (3d) 253 (C.A.), *Canadian Comstock Co. v. Toronto Transit Commission*, 1969 CarswellOnt 141, 1969 CarswellOnt 141F, [1970] S.C.R. 205, 8 D.L.R. (3d) 582, *Standard Industries Ltd. v. Treasury Trails Holdings Ltd.*, 1976 CarswellOnt 107, 24 C.B.R. (N.S.) 8 (Co. Ct.); affirmed 1977 CarswellOnt 71, 23 C.B.R. (N.S.) 244 (C.A.), *Royal Trust Co. v. Universal Sheet Metals Ltd.*, 1969 CarswellOnt 961, [1970] 1 O.R. 374, 8 D.L.R. (3d) 432 (C.A.), *P. Nicholls Enterprises Ltd., Re*, 1985 CarswellOnt 174, 50 O.R. (2d) 470, 55 C.B.R. (N.S.) 261, 11 C.L.R. 291, 17 D.L.R. (4th) 301, 8 O.A.C. 74 (C.A.).

43 1976 CarswellOnt 107, 24 C.B.R. (N.S.) 8 (Co. Ct.); affirmed 1977 CarswellOnt 71, 23 C.B.R. (N.S.) 244 (C.A.).

right of set-off against all funds *except* statutory holdback.[44]

In a pure trust context, the trust established by **s. 8** of the *Construction Act* extends to "all amounts owing to a contractor or subcontractor, whether or not due and payable". The availability of set-off, notwithstanding the existence of a statutory trust, is also supported by the decision of the Supreme Court of Canada in *Noranda Exploration Co. v. Sigurdson*.[45] **Section 12** of the Ontario *Construction Act* codifies the principle that the owner is entitled to set-off against trust funds, and the liens of claimants are reduced by way of set-off at least down to the 10% statutory holdback pursuant to **ss. 12, 17(1), 17(2) and 17(3)** of the *Act*.

Section 12 has been interpreted so as to require an owner to "retain" the monies against which set-off is claimed, in the sense of segregating and holding the funds subject to the owner's claim of set-off until there has been a judicial finding as to the validity of the set-off in the circumstances.[46] These cases, however, have arisen in the context of actions for breach of trust under **s. 13** of the *Act* and must be read in that context.

3.4.3 Counterclaims

A relatively small lien claim for unpaid contract balances can draw in response a larger counterclaim for deficient work and delay. A defendant in an action may counterclaim against the plaintiff for any claim that it may have, whether or not related to the improvement.[47] Counterclaims for punitive damages have been allowed to proceed to trial.[48] A counterclaim seeking to set off damages for injury to reputation and goodwill was allowed to proceed in *Aqua-Pond Industries*

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44 This decision was followed in *Robert Roofing Co. v. Tidemark Construction Ltd.*, 1981 CarswellOnt 535, 21 R.P.R. 130 (Co. Ct.).

45 1975 CarswellBC 125, 1975 CarswellBC 282, [1976] 1 S.C.R. 296.

46 *Arborform Countertops Inc. v. Stellato*, 1996 CarswellOnt 1287, 29 O.R. (3d) 129, Kirsh's C.L.C.F. 8.38 (Gen. Div.); *Datasphere Sales Ltd. v. Universal Light & Power Corp.*, 1991 CarswellOnt 804, 48 C.L.R. 25, Kirsh's C.L.C.F. 12.1 (Gen. Div.).

47 O. Reg. 302/18, **s. 2(1)(a)**.

48 See *Johnston & Associates Co. v. Wade*, 1994 CarswellOnt 6898, [1994] O.J. No. 662 (Gen. Div.).

Ltd. v. Gould.[49] It was established in *Marino v. Bay-Walsh Ltd.*[50] that even though under s. 50(2) of the former *Act*, a lien action could not at that time be joined with a trust action, there was no bar to making a counterclaim for restitution of monies improperly received from a trust.

Counterclaims against non-parties are not permitted in lien actions.[51] Where appropriate, a defendant to a lien action might consider commencing a separate non-lien civil action against the non-party that would have otherwise been brought in by counterclaim, had it not been a lien action, and then move to have the two actions tried together by a judge, or, if the lien action is referred to the master, have the companion civil action also referred to the same master. The "connection" of lien and non-lien actions by the master in this way is a relatively common occurrence, particularly where judgment against a corporation would be valueless, and an arguable claim exists against officers and directors in their personal capacities under **s. 13** of the *Act.*

3.4.4 Crossclaims

Defendants to a lien action can crossclaim against any co-defendant for any claim they may have, provided it is related to the improvement in question.[52] But, what if the plaintiff has discontinued against a party against whom you wish to crossclaim (the owner, for example)? This is a surprisingly common occurrence. For example, if a subcontractor lien claimant has sued both the owner and the general

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49 1974 CarswellOnt 443, 3 O.R. (2d) 439 (H.C.).

50 (May 29, 2002), Doc. 98-0469, [2002] O.J. No. 2211 (S.C.J.).

51 *Wharton Enterprises Ltd. v. Brompton Financial Corp.*, 1990 CarswellOnt 345, 71 O.R. (2d) 463, 37 C.L.R. 121, 40 C.P.C. (2d) 51, 67 D.L.R. (4th) 119 (H.C.); *Vinpat Construction Ltd. v. Henze Holdings Inc.*, 2002 CarswellOnt 2274, 18 C.L.R. (3d) 307 (S.C.J.).

52 O. Reg. 302/18, **s. 2(1)(b)**. For an example of a motion to crossclaim against a party noted in default, and a consideration of terms in such circumstances, see *Four Valleys Excavating Grading Ltd. v. Forsan Construction Ltd.*, 1994 CarswellOnt 593, 21 C.L.R. (2d) 107 (Gen. Div.). A crossclaim against a contractor both corporately and personally, involving a claim for punitive damages, was allowed in *Yorkdale Drywall Co. v. Schulberg*, 1993 CarswellOnt 851, [1993] O.J. No. 137 (Gen. Div.).

contractor, and the general contractor has vacated the subcontractor plaintiff's lien, it is likely that the lien action will have been discontinued or even dismissed against the defendant owner.[53] How does the general contractor then crossclaim against the owner? The practical answer, in the master's office in Toronto at least, is that if the action was *discontinued* against the owner and not dismissed, the master will permit the crossclaim in any event. If the action against the owner was dismissed, on the other hand, the master in Toronto will usually grant leave to the defendant general contractor to third party the owner and make the same claims in that way. A case management Master to whom a reference has been directed has jurisdiction under s. 58(4) to hear a motion for an order striking out a crossclaim.[54]

3.4.5 Third-party claims

Third-party claims require leave. Leave is governed by three rules laid out in Regulation 302/18, which constitute a complete code superseding the *Rules* in that regard.[55] These three rules of third-party proceedings in construction lien actions can be paraphrased as follows:

> 1. A person against whom a claim is made in a statement of claim, crossclaim, counterclaim or third-party claim may join a person who is not a party to the action as a third party for the purpose of claiming contribution or indemnity from the third

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53 See also *Benny Haulage Ltd. v. Carosi Construction Ltd.*, 1996 CarswellOnt 5238, *(*sub nom. *Benny Haulage Ltd. v. Hamilton-Wentworth Roman Catholic)* 33 C.L.R. (2d) 44 (Gen. Div.) at p. 45 [C.L.R.]: "The cases of *Bratti Mechanical Inc. v. Orlando Corp.* and *Delange Asphalt v. Gallagher* make it clear that once a general has posted security, an owner is no longer a required party at the suit of any lien claimant who's lien has been bonded off. If an owner is so named it should immediately seek an Order dismissing the claim against it so no further costs are incurred." [citations omitted]

54 *Rebelo v. Borody*, 2007 CarswellOnt 1694, 61 C.L.R. (3d) 154 (S.C.J.); additional reasons 2007 CarswellOnt 10019 (S.C.J.).

55 O. Reg. 302/18, **s. 4**; *BMR Golf International Ltd. v. Forgehill Equities Inc.*, 1999 CarswellOnt 1870, 48 C.L.R. (2d) 240 (S.C.J.).

party in respect of that claim only with prior leave of the court;[56]

2. Since only claims for contribution and indemnity are permitted in construction lien third-party proceedings under **s. 4 of O. Reg. 302/18**, a third-party claim that asserts other claims can only proceed on the ordinary track.[57]

3. Leave is required in all cases. Leave is obtained upon motion with notice to the owner and all persons having subsisting preserved or perfected liens at the time of the motion. The moving party must prove that the granting of leave will not unduly prejudice the ability of the proposed third party or any lien claimant or defendant from prosecuting their claim or defence, and that the third-party claim, if allowed, will not unduly delay or complicate the resolution of the lien action.[58]

The court may (and often does) give such directions as it considers appropriate in respect of the conduct of third-party claims.[59]

The real issue with respect to third-party proceedings in lien actions is the extent to which **Rule 29**, is available to the parties. It is provided by **s. 50(2)** that, except where inconsistent with the *Construction Act*, the *Courts of Justice Act* and the *Rules of Civil Procedure* apply to proceedings under the *Construction Act*.

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56 The claim must really be for contribution and indemnity and not a professional negligence claim in disguise. See *V.K. Mason Construction Ltd. v. Strasscorp Holdings Inc.*, 1991 CarswellOnt 779, 45 C.L.R. 101 (Gen. Div.), and see *Cana Construction Co. v. North York Branson Hospital*, Kirsh's C.L.C.F. 56.2.

57 *Bentivoglio v. Groupe Brigil Construction*, 2017 ONCA 413, 2017 CarswellOnt 7511.

58 For an example of a case where it was found that the late addition of a third party would unduly delay the existing lien proceeding, see *Stensca/Procon Ltd. v. York University*, 1993 CarswellOnt 811, 10 C.L.R. (2d) 13 (Gen. Div.).

59 O. Reg. 302/18, **s. 4(4)**. The most common directions involve pleadings, productions, and the right of discovery as well as the right to defend the main action. Directions will be given as to how the third-party claim is to be tried and as to whether it is trial together or in two separate hearings. In practice, this is no different from the directions a trial judge would be expected to give at trial, and the court's discretion in a lien matter is exercised in the same way, and for the same reasons. If the facts are in common, the court will try the third-party proceeding with the main action; if the third-party proceeding is better separately tried, it will be.

The exercise becomes one of comparing and contrasting the provisions of **s. 4 of O. Reg. 302/18** and **Rule 29** to find "inconsistencies".

The first "inconsistency" is that **s. 4 of O. Reg. 302/18** is more restrictive than **Rule 29. Rule 29.01** permits a defendant to commence a third-party claim against any person who is not a party to the action and who is or may be liable to the defendant for all or part of the plaintiff's claim *or* is or may be liable to the defendant for an independent claim for damages or other relief arising out of a transaction or occurrence or series of transactions or occurrences involved in the main action, or a related transaction or occurrence or series of transactions or occurrences, *or*, even more generally, where the third party "should be bound by the determination of an issue arising between the plaintiff and the defendant." These latter provisions are wholly inconsistent with the more restrictive language used in **s. 4 of O. Reg. 302/18**.

Practically speaking, therefore, **s. 4 of O. Reg. 302/18** requires a draft third-party claim to be included as an essential part of the motion record so that the court can make the determination as to the type of claim that is being advanced.

Although both **Rule 29.02(1.2)** and **s. 4 of O. Reg. 302/18** contemplate motions for leave to add third parties, both are silent as to whether or not the third party itself must be served with the motion for leave. The best practice in lien actions is to serve the proposed third party because without the third party you will have no way of satisfying the statutory requirement of establishing that the trial of the third-party claim will not unduly prejudice the ability of the third party to prosecute a claim or conduct a defence.

Another inconsistency between **Rule 29** and the *Construction Act* provisions is in the timing of the delivery of a third-party claim. The Rule provides that a third-party claim may be issued within 10 days after the defendant delivers a statement of defence, or at any time before the defendant is noted in default, whichever is earlier, or within 10 days after the plaintiff delivers a reply in the main action to the defendant's statement of defence. **Section 6(2) of O. Reg. 302/18** provides that subject to a noting in default, the court may *at any time* add or join any person as a party to the action. **Section 6(2) of O. Reg. 302/18** is the governing provision in a construction lien action.

The directions given by the court in granting leave to issue a third-party claim in a lien action, however, will likely be modeled on the

terms of **Rule 29**, provided that there is no inconsistency between these provisions and the express provisions of the *Construction Act*. There is nothing inherently inconsistent in **Rule 29.03** (timing of third-party defence), **Rule 29.04** (timing of reply, if any, to third-party defence) or **Rule 29.05** (defence of the main action by the third party), and the order granting leave will commonly state that these three Rules apply.

The balance of **Rule 29** contains inconsistencies with the *Construction Act*, and is therefore largely inapplicable. For example, **Rule 29.06** (effect of third-party defence, including provisions relating to notings in default and discovery) and **Rule 29.07** (effect of default of defence to a third-party claim) are inconsistent with both the default provisions of the *Act*[60] and with the prohibition on discoveries without leave.

Under the *Rules of Civil Procedure*, a defendant may only obtain judgment against a third party at the trial of the main action or on motion to a judge. Under **s. 5(5) of O. Reg. 302/18** a third party in default of defence in a third-party action under the *Construction Act* is deemed to admit all of the allegations of fact made in the statement of claim, counterclaim, crossclaim or third-party claim, as the case may be, and is not entitled to any notice of or to participate in the trial of the action or any step in the action, and judgment may be given against that third party.

All third parties in lien actions who are not noted in default are entitled to notice of trial,[61] and all persons served with notice of trial in a lien action are statutory parties to the action.[62] Therefore, the provisions of **Rule 29.08** (trial of third-party claim) are likely inconsistent with the *Act*. Similarly, **Rule 29.09** (orders that third-party claim proceed as a separate action so as not to prejudice the plaintiff) and **Rule 29.10** (motion for directions in respect of any matter of procedure not otherwise provided for in the Rules) are likely inconsistent with the express provision in the *Act* for the granting of leave with directions.

As to **Rules 29.11** and **29.12** (fourth and subsequent party claims),

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60 O. Reg. 302/18, **ss. 5(2), (3) and (4)**.

61 O. Reg. 302/18, **s. 9(2)**.

62 O. Reg. 302/18, **s. 6(1)**.

there seems to be no contemplation of this possibility in the *Construction Act*, and therefore no obvious inconsistency with that statute and no reason why fourth and subsequent party actions are not possible in lien actions, applying the *Act*'s third-party procedures.

A common third-party claim in a construction lien action is against the architect, engineer or other design professional. Until recently, the summary procedures of the *Construction Lien Act*, particularly the provision that there was no appeal from interlocutory orders,[63] were thought sufficiently prejudicial that this argument alone could defeat a motion to add an architect, engineer or other design professional as a third party. Since the decision of Master Sandler in *Domus Development Corp. v. York Condominium Corp. No. 82*,[64] however, this argument may not always be enough to resist a motion for leave in these circumstances. If it is in the interests of justice that all of the issues be tried together, the master will likely address such arguments by "connecting" a civil proceeding with the lien proceeding. The 2018 amendments repealed the general appeal prohibition and now provide that no appeal lies from an interlocutory order except with leave of the Divisional Court.[65] As an alternative to a third-party proceeding, a separate action can be commenced and ordered tried together with the lien action, provided both are referred to the master, or neither is referred to the master.

3.4.6 Service

The time for delivering a statement of defence to a lien claim, crossclaim, counterclaim or third-party claim is 20 days.[66] One of the innovations of the *Construction Lien Act* was to provide a procedure for noting in default. As a consequence, all allegations of fact made against such defaulting party are deemed to be admitted.[67]

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63 *Construction Lien Act*, R.S.O. 1990, c. C.30, **s. 71(3)**.

64 2001 CarswellOnt 1018, 8 C.L.R. (3d) 228 (S.C.J.).

65 *Construction Act*, R.S.O. 1990, c. C.30, **s. 71(3)**.

66 O. Reg. 302/18, **s. 2(5)**.

67 O. Reg. 302/18, **s. 5(5)**. Allegations of fact deemed admitted in a lien proceeding will not bind that party in subsequent proceeding among different parties, even if related in some way to the same improvement, see *Pet Valu Inc. v. Whitlock*, 1992 CarswellOnt 882, 8 C.L.R. (2d) 233 (Gen. Div.).

3.4.7 Replies

The provisions in the *Rules of Civil Procedure* regarding replies are inconsistent with the *Act*, which does not provide for such a pleading. Therefore, while replies may be filed as of right in a civil action, this is not so in a lien action, where a reply requires leave of the court.[68] It may be that the answer is to seek leave under **s. 13** of O. Reg. 302/18 where it is important to deliver a reply.

3.4.8 Particulars

There is no specific provision in the *Construction Act* that contemplates a demand for particulars or a motion to compel a party to provide particulars. However, such motions continue to be brought and lien courts seem little troubled with the issue of jurisdiction. Particulars are ordered in such cases by analogy to the *Rules of Civil Procedure*.[69]

The Scott Schedule required of all parties attending the first trial management pre-trial conference satisfies all functions of particulars of pleadings under R. 25.10 in construction lien actions.

The sheltering Rules specifically provide that any defendant can require of any sheltered lien claimant "further" particulars of the claim for lien or of any fact alleged in the claim for lien.[70] It would be anomalous if the ability to acquire particulars was restricted by the legislators to defendants of sheltered lien claims and denied to those that followed the more acceptable practice of commencing a timely lien action. If there are insufficient particulars of a claim or defence, then the responding parties are as much strangers to the cause of action or defence as would be a sheltered claimant and the policy should favour full particulars of all claims and defences.

Considering the important role of the Scott Schedule in lien ac-

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68 *B.R. Davidson Mining & Development Ltd. v. Lac des Iles Mines Ltd.*, 2003 CarswellOnt 3835 (S.C.J.). In *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 CarswellOnt 721, 90 C.L.R. (3d) 250 (S.C.J.), the court held that a reply served without leave was a nullity. On that point, the court was expressly overruled in *1475707 Ontario Inc. v. Foran*, 2014 CarswellOnt 16470, 36 C.L.R. (4th) 1 (C.A.).

69 *Construction Act*, R.S.O. 1990, c. C.30, **s. 50(2).**

70 *Construction Act*, R.S.O. 1990, c. C.30, **s. 36(4) Rule 4**.

tions, other procedures for the demand and enforcement of particulars of lien claims (as opposed to lien defences) seem unnecessary in view of the demands for information that can be served under **s. 39** and cross-examinations as of right that can be conducted under **s. 40**. Motions for particulars would be rare indeed if these existing procedures were used.

3.4.9 Amendment of pleadings

While **Rule 26.01** contains mandatory language to permit an amendment at any stage of the action, a court can refuse to make an amendment to the prayer for relief where the respondent can show on a balance of probabilities that the amendment would cause prejudice and that the prejudice cannot be compensated for by costs or an adjournment of the proceeding. The burden of showing prejudice lies with the party opposing the amendment. There is a sharp contrast between the philosophies underlying **s. 50(3)** of the *Construction Act* and **Rule 26.01** of the *Rules of Civil Procedure*, and there is a legislative direction to prefer the former over the latter where there is inconsistency.[71] Thus, in a lien action, the court may, but need not, allow amendments. The requirement in **s. 50(3)** to resolve construction lien claims expeditiously overrides the broad discretion in **Rule 26** to grant leave to amend pleadings in almost every case.[72]

When an action has been referred to a master for trial, the master may grant leave to amend any pleadings.[73] As with all interlocutory steps, when considering motions to amend pleadings in lien actions, courts will keep in mind that lien actions should be as far as possible of a summary character. Thus, a motion to amend a pleading to add a counterclaim, for example, will be dismissed where the amendment would unduly broaden the scope of the existing litigation.[74]

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71 Quoted from *Scott Morris Architects Inc. v. Blu Skye Medical Inc.*, 2010 CarswellOnt 865, [2010] O.J. No. 625 (S.C.J.).

72 *Dean's Standard Inc. v. Siljub Toronto Ltd.*, 2016 ONSC 5254, 2016 CarswellOnt 13317 (S.C.J.).

73 **Section 58(4)**.

74 *Salter Farrow Pilon Architects Inc. v. Thunder Bay Regional Hospital*, 2006 CarswellOnt 7471, 60 C.L.R. (3d) 219 (S.C.J.); additional reasons 2007 Cars-

In *Michelin Group Inc. v. Forsan Construction Ltd.*,[75] a subcontractor had registered a claim for lien within the proper time, which specified that it had completed work on June 18, 1991, but it did not commence its action until October 10, 1991, which was 24 days after the time prescribed by the *Act* for doing so. The court refused to permit the subcontractor to amend the claim for lien and statement of claim to state that it performed its last work on August 8, 1991, which was in fact correct and which would have meant that the action had been commenced in time. The court granted a declaration that the lien had expired, holding that it could not cure the defect in the date stated in the claim for lien under **s. 6** of the *Ontario Act*.

Where the error in stating a lesser amount than the amount owed in the claim for lien was corrected by claiming a higher amount in the statement of claim, courts have applied the curative provisions of **s. 6** of the *Act* to prevent the lien claim from being invalid in the absence of prejudice to any other lien claimant or party.[76] See *Favot Construction Ltd. v. Maplecrest Developments Inc.*[77] and *AFG Glass Inc. v. Glaxo Canada Inc.*[78] to the contrary.

3.4.10 Default in defence

One of the policy shifts in the 1983 *Construction Lien Act* was to provide consequences for default in defence.[79] The Attorney General's Advisory Committee voiced its strong disapproval of what it considered to be the improper practice of delaying delivery of statements of defence. As no provisions for default proceedings were given in the original *Mechanics' Lien Act* at that time, some counsel had apparently taken this as licence to withhold a formal defence un-

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wellOnt 1018 (S.C.J.); *Scott Morris Architects Inc. v. Blu Skye Medical Inc.*, 2010 CarswellOnt 865, [2010] O.J. No. 625 (S.C.J.).

75 1994 CarswellOnt 952, 18 O.R. (3d) 523, Kirsh's C.L.C.F. 6.28 (Gen. Div.); affirmed 1995 CarswellOnt 243 (Div. Ct.).

76 *City Accoustics Ltd. v. Waterloo Region Roman Catholic Separate School Board*, 1995 CarswellOnt 416, 20 C.L.R. (2d) 156, Kirsh's C.L.C.F. 6.31 (Gen. Div.).

77 1990 CarswellOnt 672, 42 C.L.R. 34, Kirsh's C.L.C.F. 67.14 (H.C.).

78 1992 CarswellOnt 861, 49 C.L.R. 215, Kirsh's C.L.C.F. 6.19 (Gen. Div.).

79 Originally s. 56, now **O. Reg. 302/18, ss. 2 and 5**.

less and until an order was made requiring one, or the trial occurred, whichever came first. As a result, the Committee drafted the remedial provisions of then **s. 56** to encourage the timely service of statements of defence by providing serious adverse consequences for default of defence.

Where a defendant (to a claim or a third-party claim, if there is one) defaults in the delivery of a statement of defence, pleadings may be noted closed against that defendant, and the defendant will not thereafter be able to contest that claim, crossclaim, counterclaim or third-party claim without leave of the court obtained on motion upon the court being satisfied on the evidence before it that there is evidence to support a defence.[80] Furthermore, except where leave has been granted, a defendant or third party who has been noted in default shall be deemed to admit all allegations of fact made in the statement of claim, counterclaim, crossclaim or third-party claim (i.e., whether made directly against the party in default or not), and shall not be entitled to notice of, or to participate in the trial of the action, or any step in the action. Judgment may and often is given against the defendant or third party in their absence.[81]

One would think from this that an owner noted in default would have no rights whatsoever to any procedural relief under the statute. This is not the case. If, for example, the two-year period under **s. 37** of the statute has expired, even an owner in default of defence can move under **s. 46** to expunge the lien registration from title and dismiss the lien action.[82]

Allegations of fact deemed admitted in a lien proceeding by default do not bar the same parties from re-litigating the issue, and making any relevant allegations of fact in another proceeding in another forum.[83]

One of the consequences of a noting in default can be default personal judgment under **Rule 19.04(1)** (signing of default judgment

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80 **O. Reg. 302/18, s. 5(1)**.

81 **O. Reg. 302/18, s. 5(5)**.

82 *Rentshop Inc. v. Tekke Thermal Inc.*, 2000 CarswellOnt 3576, 6 C.L.R. (3d) 99 (Div. Ct.).

83 *Pet Valu Inc. v. Whitlock*, 1992 CarswellOnt 882, 8 C.L.R. (2d) 233 (Gen. Div.).

where the claim is for a debt or liquidated demand in money) against a contracting party. A lien judgment declaring a lien and holdback amount is not available simply by signing judgment in default of defence but may be available on motion.[84] Neither the Rule nor the *Act* contemplates the signing of judgment for such declaratory relief. Thus, a subcontractor can sign a default money judgment against its contractor, as could a contractor against an owner, but that is as much as can be done "over the counter".

For all other relief in default of a defence, a motion for judgment under **Rule 19.05** is required. A motion under **Rule 19.05** is not inconsistent with the *Act* and is therefore not prohibited by **s. 50(2)**. Judgment in default of defence is expressly provided for by **s. 5(4) of O. Reg. 302/18**, which provides that in the event of a noting in default, the party noted in default shall be deemed to admit all of the allegations of fact made in the statement of claim, counterclaim, cross-claim or third-party claim as the case may be, and shall not be entitled to notice of or to participate in the trial of the action or any step in the action and judgment may be given against the defendant or third party. This provision has been tested in many cases.[85] It was once argued, for example, that the provisions of the *Act*, taken as a whole, particularly the class action aspects of the statute, would lead one to conclude that the legislature contemplated that judgments would be granted only at and after an actual trial on the merits and that default judgments were inappropriate in a lien proceeding. This argument failed.[86]

Still, some lawyers approach this relief from the point of view that they require a judgment of reference and an interim report on a refer-

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84 Cited with approval in *Built-Con Contracting Ltd. v. Lisgar Construction Co.*, 2016 ONSC 1720, 2016 CarswellOnt 3494 (S.C.J.).

85 *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, 2009 CarswellOnt 1671 (S.C.J.); additional reasons 2009 CarswellOnt 2666 (S.C.J.).

86 *Hamilton Landscaping & Paving v. 603893 Ontario Inc.*, 1988 CarswellOnt 760, 30 C.L.R. 127 (H.C.). It was held in this case that the default provisions of the *Construction Lien Act* are not in any fundamental way inconsistent with the default provisions of the Rules of Civil Procedure. The result in *Hamilton Landscaping* was that sufficient merit to the defence was demonstrated, by evidence brought forward on the motion, to create a triable issue, and thus the default proceedings were set aside on terms as to costs.

ence in order to take advantage of the default provisions of the *Act*, when the proper course is to simply move for judgment under **Rule 19.05**.

Noting in default in a lien action is not to be taken lightly. A noting in default in a lien proceeding shifts the onus. Once noted in default in a lien proceeding, the right to contest a claim, crossclaim, counterclaim, or third-party claim is re-acquired only by motion, on presentation of proof satisfactory to the court that "there is evidence to support a defence".[87]

The provisions of the *Construction Act* applying to the setting aside of a noting in default (as opposed to a default judgment) are more restrictive than the corresponding provisions of the *Rules of Civil Procedure*, and, thus, the court must look critically at the quality of evidence and defence put forward by the moving party. The court is entitled to compare what a witness said in an affidavit in support of such a motion to what has been established in examinations for discovery or cross-examinations at that point in time, to determine whether the claim is genuine or not.[88] Whereas the test for setting aside a default judgment in a lien action and a civil action may be similar, the test for setting aside a noting in default in a lien action is much more difficult and restrictive than in other forms of civil proceeding under the Rules.[89]

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87 **O. Reg. 302/18, s. 5(4)**.

88 *Twin City Mechanical v. Chicapee Park Centre Ltd.*, 1991 CarswellOnt 793, 47 C.L.R. 4 (Gen. Div.).

89 Cited with approval in *Built-Con Contracting Ltd. v. Lisgar Construction Co.*, 2016 ONSC 1720, 2016 CarswellOnt 3494 (S.C.J.). In *St. Clair Roofing & Tinsmithing Inc. v. Davidson*, 1992 CarswellOnt 446, 50 C.L.R. 275 (Gen. Div.), the differences between the Rules and the *Act* with respect to a noting in default are explored: "However, I do agree with Judge Costello that the test to set aside only a noting in default under the *Construction Lien Act* is more restrictive than under the Rules, because **s. 5(4) of O. Reg. 302/18** of the *Construction Lien Act* applies to both setting aside a noting of default and setting aside a default judgment, and the statutory test therein set forth must be met on either type of motion. On the other hand, the cases of *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278, 49 O.A.C. 1 (C.A.) and *Axton v. Kent* (1991), 2 O.R. (3d) 797, 49 O.A.C. 32 (Div. Ct.) have held that, except in extreme situations, it is not necessary for a defendant to show a defence on the merits in the motion material in support of a defendant's motion

On a motion to set aside both a default judgment and the noting in default under the *Act*, the onus is on the moving defendants to satisfy the following three requirements:

1. they must show they have moved promptly once becoming aware of the default judgment;

2. they must show that there is an explanation for the default; and

3. they must show that there is evidence to support a defence.[90]

If the judgment or noting in default is set aside, terms are likely.[91] These terms can include payment into court of the full amount of the claim, interest and costs.[92] The court is given a free hand as to costs and terms. Given the strong language used by the Attorney General's Advisory Committee in 1983 (they found the practice of intentional delay in defence "condemnable"), the moving party can expect a critical examination of their materials and discouraging costs orders. Ap-

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to set aside a noting in default under the Rules. Accordingly, the test to set aside a mere noting in default is more restrictive under the *Construction Lien Act* than under the Rules of Civil Procedure, and to this extent, I do agree with the reasons of Costello J. But, because this is a motion to set aside a default judgment, I must be satisfied that there is evidence to support a meritorious defence in the material in support." See also *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.*, 1991 CarswellOnt 828, 3 O.R. (3d) 278, 49 O.A.C. 1 (C.A.), which provided that only in extreme situations would an affidavit deposing as to the merits of the defence be required in the case of setting aside a noting of default, as opposed to a default judgment. The Master had found that because the language of the new Rule was the same as the language of the former Rule, the same interpretation should be given to the language in both cases; however, the Court of Appeal has ruled otherwise.

90 *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, 2009 CarswellOnt 1671, [2009] O.J. No. 1297 (S.C.J.); additional reasons 2009 CarswellOnt 2666 (S.C.J.).

91 See *Hamilton Landscaping & Paving v. 603893 Ontario Inc.*, 1988 CarswellOnt 760, 30 C.L.R. 127 (H.C.). *Hamilton* was a motion in a lien action to set aside a judgment obtained by default on motion, and the test is the same as under the Rules. The difference is in the test for setting aside a noting in default, where the *Act* is far more restrictive than the corresponding Rule. See also: *Twin City Mechanical v. Chicapee Park Centre Ltd.*, 1991 CarswellOnt 793, 47 C.L.R. 4 (Gen. Div.).

92 *St. Clair Roofing & Tinsmithing Inc. v. Davidson*, 1992 CarswellOnt 446, 8 O.R. (3d) 578, 50 C.L.R. 275, 7 C.P.C. (3d) 240 (Gen. Div.).

peals to equity (i.e., proof of inadvertence or personal hardship on the part of either the client or the lawyer) may be less persuasive on such a motion in a lien action.

3.5 Certificate of action (O. Reg. 303/18, Form 14)

The certificate of action is a prescribed form. Once the action is commenced, a certificate of that action is obtained from the Registrar and then registered on title. This is now done in most jurisdictions by e-registration. Effective March 23, 2020, O. Reg 456/19 authorizes the use of the Civil Claims Online Portal to electronically issue certificates of action.

As a reminder, the following information is required when e-registering a certificate:

1. "PIN"
   - Enter the Property Identification Number under "POLARIS".
2. "Party From"
   - Enter the name and address of the lien claimant (Plaintiff in Action).
   - Choose applicable "Person" or "Company".
   - Choose all appropriate statements:
     - Example 1: Statement 10 "I (insert name) have authority to the corporation.
     - Example 2: Statement 2909. This document is not authorized under Power of Attorney by this party.
3. "Party To"
   - Enter the name and address of owners.
4. "Statements"
   - Choose all appropriate statements and complete details of each.
     - Example 1: Statement 3730 "This document relates to registration Nos. (insert the instrument No. of the claim for lien and also state here that an action in the Ontario Superior Court of Justice has been commenced as well as the court file No.)

- Example 2: Statement 61 Schedules (attach a copy of the certificate of action previously scanned).

5. "Signatories"
   - Electronically sign the document under "Instrument" from the menu bar.
6. "Document Identification"
   - Name document for saving purposes.
7. "Registration"
   - Electronically register the document (including attachments) found under "Instrument" from the menu bar.

The section requiring a certificate of action is not mentioned in **s. 6** of the statute; therefore, it would appear to require strict compliance.

3.6 Liability for exaggerated liens

Section 35 of the *Construction Lien Act* was enacted to deter exaggerated claims.[93] The current *Act* provides that a person who knows or ought to know that the amount of a lien has been wilfully exaggerated, or knows or ought to know that he or she does not have a lien, but nevertheless preserves that claim for lien or gives written notice thereof, is liable to any person who suffers damages as a result. The 2018 amendments replaced the concept of "grossly inflated" liens with the concept of "wilfully exaggerated" liens. The Expert Review found that "stronger sanctions [were] needed to dissuade lien claim-

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93 Per Attorney General's Committee Report: "The purpose of section 35 is to deter exaggerated lien claims. Whereas the Discussion Draft would have imposed liability only in respect of preserved lien claims, section 35 also imposes liability where a lien claimant serves written notice of a lien claim for an exaggerated amount. The Committee is of the view that the giving of such notice may also be highly injurious to the industry since it will often result in a stoppage in the flow of the monies that are being used to finance construction. Under the present law, the common law cause of action of slander of title is available to the owner where an exaggerated lien claim has been registered. Unfortunately, it is not available to other persons who may be injured as a result of an exaggerated claim. The Committee believes that it is desirable to provide for a statutory remedy for all those who may be injured as a result of an exaggerated claim for lien . . . It is also of the opinion that such a remedy will be highly effective deterrent to the assertion of unreasonable claims."

ants from exaggerating claims, and compensate parties who are forced to expend resources to defend these claims".[94]

Thus the lien claimant's exposure is twofold: to common law slander of title *and* to the remedy provided by **s. 35**.

Section **35** applies first where the amount claimed is in excess of what is owed (the excessive or exaggerated lien) and second where the claimant has no lien rights under **s. 14** of the *Act* for all or part of a lien claim yet has preserved or attempted to preserve a lien (the "improper" lien). It should be noted that a master has treated an improperly registered general lien as an excessive lien and vacated the lien without security.[95]

The 2018 amendments to the *Act* gave the court the express power to order the discharge of a lien on the basis that it is frivolous, vexatious or an abuse of process.[96] In *GTA Restoration Group Inc. v. Baillie*,[97] the court held that wilful exaggeration of the lien could be the basis for determining that a lien is an abuse of process and that s. 35 is not a complete code when it comes to dealing with exaggerated liens.[98] In the result, though, in that case, there was not sufficient evidence before the Master to discharge the lien on this basis.

Please keep together.

3.7 Pleadings in a trust action

Section 50(2) of the *Construction Lien Act* used to prohibit the joinder of a trust claim with a lien claim. In light of that prohibition, parties often requested and obtained a "connecting order" from a master or judge to procedurally connect lien and trust actions, leading to common discoveries, pre-trial conferences and settlement meetings. The trust action could be referred to the master under Rule 54,

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94 B. Reynolds, S. Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, p. 50.

95 *Brian T. Fletcher Construction Co. v. 1707583 Ontario Inc.*, 2009 CarswellOnt 2805, [2009] O.J. No. 2049 (S.C.J.); additional reasons 2009 CarswellOnt 8879 (S.C.J.).

96 Section 47(1)(a).

97 2020 ONSC 5190, 2020 CarswellOnt 12410 (S.C.J.); additional reasons 2020 CarswellOnt 15469 (S.C.J.).

98 *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190, 2020 CarswellOnt 12410 (S.C.J.); additional reasons 2020 CarswellOnt 15469 (S.C.J.).

and heard by the same master as on-going referred lien actions; or the lien actions could be "un-referred", by order of a judge, and the two actions heard at the same time, or one after the other, by the same judge. In Toronto, masters used the jurisdiction granted by s. 67(3) of the former *Construction Lien Act* and Rule 6.01 of the *Rules of Civil Procedure* to fashion connecting orders. All of that seemed somewhat contrived and actually counterproductive. The Expert Review underlying the 2018 amendments therefore suggested the repeal of s. 55(2):

> The removal of the prohibition against joinder of lien and trust claims would make the *Act* consistent with legislation from the other provinces, where such a prohibition does not exist. It is particularly concerning because the prohibition of joinder can be circumvented by a court order for a trial together or one after another, resulting in unnecessary costs and delays. The very problem this provision seeks to address is exacerbated by the duplication of proceedings it can cause, contributing to the courts' backlog and costs to the parties. The provision has been heavily criticized by stakeholders, most of whom have suggested its removal, and none of whom proposed its retention. In keeping with the summary procedure provisions of the *Act*, parties should be able to join lien and trust claims without leave of the court, subject to a motion by any party that opposes the joinder on grounds that the joinder would cause undue prejudice to other lien claimants or parties.[99]

The section was not carried forward into the *Construction Act*, so that there is nothing preventing parties from bringing forward claims under Part II of the *Act* in a lien action.

The general principles of pleadings discussed in s. 3.4 of chapter 3 apply to pleadings in trust actions. Issues particular to trust pleadings are discussed in subs. 3.7.2 below.

3.7.1 Parties in a trust action

The trust under Part II is privity based. The person with whom the beneficiary had privity of contract is therefore a necessary party, as is any stranger to the trust in whose hands trust monies may be lodged and against whom restitutionary, injunctive or other equitable relief may be necessary. It is not always possible to add such necessary

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99 B. Reynolds, S. Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, p. 102.

parties later.[100]

(1) The owner's trust

The trustee of the s. 7 owner's trust is the "owner" as defined in s. 1 of the *Act*. If a party is not an "owner" as defined by the *Act*, that party has no trust obligations under s. 7 regardless of whether certificates are issued.

Section 7 establishes three distinct trusts: a financing trust under s. 7(1), a progress certificate trust under s. 7(2) and a substantial performance certification trust under s. 7(3). These three distinct trusts can be understood as being progressive through the course of a normal development. First, s. 7(1) ensures that money received to finance the improvement is actually used to finance that specific improvement. While s. 7 of the *Ontario Act* is broad enough to capture any funds specifically earmarked for financing a construction project or improvement, such as insurance proceeds or funds advanced by landlords, as long as they are received by the owner for the specific purpose, general revenues of a corporation are not funds impressed with a trust, even if the owner originally intended to use those funds to pay for the construction. To constitute trust funds under s. 7(1), there must be a distinct fund for the purpose of completing the improvement.[101] Then, s. 7(2), the progress certificate trust, catches in the owner's hands "an amount equal to" amounts certified for work done. Finally, once the work is nearly done, the s. 7(3) substantial performance certificate trust applies, even where no money is borrowed to finance the improvement, i.e., where the owner is financing the improvement out of general revenue. These latter two trusts, the progress certification trusts and the substantial performance certificate trust, are extraordinarily powerful trusts. They arise upon the mere issuance of a certificate by a payment certifier. It is not necessary that money exchange hands with respect to such certificates because the trust fund comprises "an amount that is equal to an amount so certified" that is in the owner's hands or received by the owner "at

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100 *Emco Supply v. D.E. Witmer Plumbing & Heating Ltd.*, 1993 CarswellOnt 823, 11 C.L.R. (2d) 129 (Gen. Div.).

101 *Quoted from Vision Air Conditioning and Heating Corporation v. Golden Dragon Ho Inc.*, 2018 ONSC 3520, 2018 CarswellOnt 8981 (S.C.J.).

any time thereafter". Although the issue has not been directly considered yet, this may be a case where a statute provides no limitation within the meaning of the *Limitations Act, 2002*.

The sole beneficiary of the three owner's trusts under s. 7 is the "contractor", as defined in s. 1(1). An attempt to restrict the group of s. 7 beneficiaries to those direct contracting parties that were willing to contribute to the costs of the action failed in *University Plumbing & Heating Ltd. v. Dynasty Executive Suites Ltd.*[102]

(2) The contractor's and subcontractor's trust

All amounts received by or owing to a contractor or subcontractor on account of the contract or subcontract price constitute a trust fund for those who supplied services or materials to the improvement and are owed amounts by the contractor or subcontractor.[103]

The trustee of the **s. 8** trust is the contractor or subcontractor, again as defined in **s. 1(1)**. These definitions extend to suppliers. "Supplier" is not a term defined in the *Act*. A "supplier" is not recognized as a separate entity by the statute. A supplier is a "contractor" if it contracts directly with the owner. A "supplier" is a "subcontractor" if it contracts with the contractor or another subcontractor. Suppliers may be trustees under the contractor's and subcontractor's trust provisions.[104]

The beneficiaries of the **s. 8** trust are the persons who supplied labour or materials to the improvement and are owed money by the **s. 8** trustee. The **s. 8** trust is created at each level of privity of contract in the construction pyramid for each class of subcontractors supplying materials or services under the improvement.[105]

(3) The vendor's trust

Section 9 of the *Act* creates the vendor's trust. Where the owner's

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102 1998 CarswellOnt 4398, 43 C.L.R. (2d) 118 (Gen. Div.).

103 *Construction Act*, R.S.O. 1990, c. C.30, s. 8.

104 *Schulz Concrete Pipe Ltd., Re*, 1979 CarswellOnt 256, 32 C.B.R. (N.S.) 157 (S.C.); *Maple Leaf Homes & Cottages v. Zoellner Windows (1982) Ltd.*, 1989 CarswellOnt 692, 34 C.L.R. 6 (H.C.); Kevin McGuinness, "Trust Obligations under the *Construction Lien Act"* (1994), 15 C.L.R. (2d) 208 at 228.

105 *Di Mario v. Schuster*, 1994 CarswellOnt 938, 13 C.L.R. (2d) 140 (Gen. Div.).

interest in a premises is sold by the owner, an amount equal to the value of the consideration received by the owner as a result of the sale, less the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises, constitutes a trust fund for the benefit of the contractor. The trustee is the former owner, or "vendor", who sold its interest in the premises while there was an outstanding unpaid "contractor", i.e., a person having privity of contract with the owner/vendor. The sole beneficiary of the various trusts established by s. 9 is the contractor.[106]

(4) Section 13 liability

One of the most important features of the statutory trust scheme is the provision for personal liability for a corporation's breach of trust.[107] **Section 13** provides as follows:

> (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
>
> (a) every director or officer of a corporation; and
>
> (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,
>
> who assents to, or acquiesces in, conduct that he or she knows or reasonably

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106 *Con-Drain Co. (1983) Ltd. v. 846539 Ontario Ltd.*, 1997 CarswellOnt 4319, 35 C.L.R. (2d) 230 (Gen. Div.); affirmed 1998 CarswellOnt 4717, [1998] O.J. No. 5041 (C.A.).

107 The Acts of British Columbia, Manitoba, New Brunswick and Saskatchewan provide that a person who appropriates or converts trust funds to its own use or to any use not authorized by the *Act* is guilty of an offence punishable under the respective provincial offences legislation: B.C., s. 11(1); Man., s. 7; N.B., s. 3(2); Sask., s. 18(1). Those provinces also provide that directors and officers who knowingly assent to or acquiesce in any such office by the corporation is guilty of the offence in addition to the corporation: B.C., s. 11(3); Man., s. 7; N.B., s. 3(2); Sask., s. 18(2). Alberta, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and the Yukon Territory do not make breaches of trust under their lien legislation an offence. In Nova Scotia, Ontario and Saskatchewan, every director or officer, and any person who has effective control of the corporation, who assents to or acquiesces in conduct he or she knows or ought to know amounts to a breach of trust by the corporation, is liable for the breach of trust in addition to the corporation: N.S., s. 44G; Ont., s. 13(1); Sask., s. 16(1).

> ought to know amounts to breach of trust by the corporation is liable for the breach of trust.
>
> (2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.
>
> (3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable.
>
> (4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances.

The sense of the statutory scheme is set out with admirable clarity by Madam Justice Molloy in *Toro Aluminum Ltd. v. Revah*:[108]

> Essentially, a contractor or subcontractor who receives money on account of its contract, holds that money in trust for those who provided services or materials on the project. The trustee must, subject to certain exemptions, use those monies first to pay those who provided services and materials. Failure to do so constitutes breach of trust. Where the contractor receiving the money is a corporation, a director, officer or person effectively controlling the corporation who assents to or acquiesces in conduct, knowing it amount to breach of trust by the corporation, will also be personally liable for breach of trust.

Section 13 carries through the underlying philosophy of the trust provisions, which recognizes that often the lien remedy is only partial security for the earned and unpaid contract price of workers and suppliers, and thus a trust remedy is required to make parties trustees of contract moneys while employees, material suppliers and others remain unpaid.[109]

The relationship between the principles at work in **s. 13** and the general law of corporate personality is discussed by Clarke J. in

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108 1999 CarswellOnt 4825, [1999] O.J. No. 5346 (S.C.J. [Commercial List]).

109 *Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd.*, 1955 CarswellBC 177, *(*sub nom. *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.)* [1955] S.C.R. 694.

Steeplejack Services (Sarnia) Ltd. v. Stowe Nut & Bolt Co.:[110]

> Under normal circumstances a corporation is a legal entity separate from its shareholders. It conducts its business through the medium of agents such as directors and officers. As J. D. Honsberger in "Insolvency and the Corporate Veil in Canada" stated "With the veil between the corporate personality and the guiding agents of the corporation, there is often 'nobody to be kicked nor soul to be damned' when the system is abused" This shield of immunity, however, may at times be lifted especially where a corporation is merely the "alter ego" of an individual. But such times are narrowly construed. An analysis of the authorities demonstrates that the corporate veil will only be pierced to permit damages against an individual where circumstances prevail that cry for equitable redress, such as the existence of personal benefit, fraudulent or flagrant manipulation, or complicity in the breach of trust of the corporation. I note that s. 13 of the *Construction Lien Act* provides that every director or officer of a corporation who assents to or acquiesces in conduct that he knows or reasonably ought to know amounts to a breach of trust by the corporation is liable of the breach of trust.

3.7.2 Trust claim

(1) Breach of trust

In all breach of trust actions, it is crucial to plead and ultimately prove an underlying breach of trust by the relevant trustee under the applicable substantive section of Part II, **s. 7** in the case of an owner or s. 8 in the case of a contractor or subcontractor. Failure to do so will be fatal to the case.[111] Merely having status as an officer, director, or person in control is insufficient to satisfy the requirements of **s. 13(1)**. To be liable under that provision, it is also necessary to plead and prove on the evidence that the personal defendant is one who assented to, or acquiesced in, conduct that they knew or reasonably ought to have known amounted to breach of trust by the corporation. This is a necessary pleading.[112]

The statement of claim must allege a specific breach of trust by a specific statutory trustee and may be deficient in particularity if it

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110 1988 CarswellOnt 770, 31 C.L.R. 115 (Dist. Ct.).

111 *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CarswellOnt 266, 45 C.L.R. (2d) 178 (C.A.).

112 *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CarswellOnt 266, 45 C.L.R. (2d) 178 (C.A.). See also *Hunter Douglas Canada Inc. v. Skyline Interiors Corp.*, 2000 CarswellOnt 3300, [2000] O.J. No. 3533 (S.C.J.).

does not do so.[113] Where a breach of trust allegation is based on active malfeasance such as fraud, misrepresentation, malice, or malicious intent, **Rule 25.06(8)** applies and the pleading requires full particulars. In such cases, only knowledge can be pleaded as a fact without having to plead the circumstances from which knowledge is to be inferred. While the *Construction Act* creates a "breach of trust" independent of the "condition of mind" referenced under **Rule 25.06(8)**, the standard of pleading is still that which is contemplated by **Rule 25.06(8)**.[114]

(2) Claims in damages

The measure of damages for breach of trust is the actual loss that the acts or omissions of the trustee have caused to the trust estate.[115] In other words, the trust is to be put in the same position it would have been in had no breach occurred.[116]

(3) Claims for tracing

Once a breach of trust has been proven, the trust property can be traced at both common law and in equity. Strictly speaking, tracing is not a remedy. The "tracing" itself does not actually return trust property to a beneficiary. Tracing is a means to a remedy.[117] Once trust property has been successfully traced, the "tracing" forms the basis

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113 *Wormald Fire Systems Inc. v. Coopers & Lybrand Ltd.*, 1985 CarswellOnt 164, 11 C.L.R. 77 (Dist. Ct.).

114 *Opec Acoustics & Drywall Ltd. v. Kascon Corp.*, 1997 CarswellOnt 1657, 34 C.L.R. (2d) 75 (Gen. Div.); *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)*, 1990 CarswellOnt 701, 12 O.R. (3d) 750 (H.C.).

115 *Fales v. Canada Permanent Trust Co.*, 1976 CarswellBC 240, 1976 CarswellBC 317, [1977] 2 S.C.R. 302.

116 *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 1996 CarswellAlta 460, 1 C.P.C. (4th) 136 (Q.B.); *Target Holdings Ltd. v. Redferns*, [1995] 3 All E.R. 785 (Eng. H.L.).

117 *Waxman v. Waxman*, 2004 CarswellOnt 1715, [2004] O.J. No. 1765 (C.A.); additional reasons 2004 CarswellOnt 6554 (C.A.); additional reasons 2004 CarswellOnt 3955 (C.A.); additional reasons 2004 CarswellOnt 4941 (C.A.); additional reasons 2004 CarswellOnt 3956 (C.A.); leave to appeal refused 2005 CarswellOnt 1217, 2005 CarswellOnt 1218 (S.C.C.); *Cohen v. Zagdanski*, 2006 CarswellOnt 5629, [2006] O.J. No. 3729 (S.C.J.).

and grounds for an order returning the trust property or its substitute. The common law remedies of conversion, detinue and replevin play no role in the recovery of funds misappropriated in breach of the trust provisions established by the *Construction Act*.[118] Tracing in a construction law context is generally achieved in equity.

The right to trace assets at common law and in equity must be distinguished from the imposition of liability as a constructive trustee on the basis of "knowing receipt", which is a restitutionary remedy.[119] The Supreme Court of Canada explained the differences in *Citadel General Assurance Co. v. Lloyds Bank Canada*:[120]

> Liability at common law is strict, flowing from the fact of receipt. Liability in "knowing receipt" cases is not strict; it depends not only on the fact of enrichment (i.e. receipt of trust property) but also on the unjust nature of that enrichment (i.e. the stranger's knowledge of the breach of trust). A tracing order at common law, unlike a restitutionary remedy, is only available in respect of funds which have not lost their identity by becoming part of a mixed fund. Further, the imposition of liability as a constructive trustee is wider than a tracing order in equity. The former is not limited to the defence of purchaser without notice and "does not depend upon the recipient still having the property or its traceable proceeds"; see *In re Montagu's Settlement Trusts*, *supra*, at p. 276.
>
> Despite these distinctions, there appears to be a common thread running through both "knowing receipt" and tracing cases. That is, constructive knowledge will suffice as the basis for imposing liability on the recipient of misdirected trust funds. Notwithstanding this, it is neither necessary nor desirable to confuse the traditional rules of tracing with the restitutionary principles now applicable to "knowing receipt" cases. This does not mean, however, that a restitutionary remedy and a tracing order are mutually exclusive. Where more than one remedy is available on the facts, the plaintiff should be able to choose the one that is most advantageous. In the present case, the plaintiff did not seek a tracing order. It is therefore unnecessary for me to decide whether such a remedy would have been available on the facts of the present appeal, and I have not explored the issue. The principles relating to tracing at law and in equity have been outlined as follows: Tracing at law does not depend upon the establishment of an initial fiduciary relationship. Liability depends upon receipt by the defendant of the plaintiff's money and

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118 E.E. Gillese and M. Milczynski, *The Law of Trusts*, 2nd ed. (Toronto: Irwin Law, 2005) at 172.

119 *Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805.

120 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805.

> the extent of the liability depends on the amount received. Since liability depends upon receipt the fact that a recipient has not retained the asset is irrelevant. For the same reason dishonesty or lack of inquiry on the part of the recipient are irrelevant. Identification in the defendant's hands of the plaintiff's asset is, however, necessary. It must be shown that the money received by the defendant was the money of the plaintiff. Further, the very limited common law remedies make it difficult to follow at law into mixed funds.
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> . . .
>
> Both common law and equity accepted the right of the true owner to trace his property into the hands of others while it was in an identifiable form. The common law treated property as identified if it had not been mixed with other property. Equity, on the other hand, will follow money into a mixed fund and charge the fund.[121]

When a breach of the trust established by the *Construction Act* has occurred, the funds that are misappropriated are almost invariably either long gone and spent, or substituted or mixed with other funds. When funds are substituted, the interest that was purchased with the funds becomes a trust property itself. For example, if a trustee misappropriates $200,000 from a trust fund and uses the money to buy a house, the house was bought in exchange for trust property and has become trust property itself, and the house is the traceable proceed.[122]

More commonly, the *Construction Act* trust funds will have been mixed or blended with other funds, and often other trust funds, in a common bank account. In such cases, a number of principles apply to help sort out entitlements. Apart from the statutory language of **s. 7(2), s. 7(3) and s. 9** that impresses trust on "an amount equal to" the original trust money, there are several common law principles that can apply. The first principle states that any evidentiary problems created by the person breaching the trust will be resolved against that person. Thus, where the trustee misappropriates $1,000 and places it in an account that already contains $1,000 of its own money, and

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121 *Agip (Africa) Ltd. v. Jackson* (1989), [1990] 1 Ch. 265 (Eng. Ch. Div.); affirmed (1990), [1992] 4 All E.R. 451 (C.A.); cited in *Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805.

122 D.W.M. Waters, M.R. Gillen & L.D. Smith, *Waters' Law of Trust in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 1278-9.

where $1,000 is subsequently withdrawn, it is impossible to determine whose $1,000 remain in the account. This evidentiary problem is solved against the trustee, and the beneficiary can elect whose money remains.[123] If, in the example above, the wrongdoer misappropriates $200,000 and mixes that with $200,000 of his own funds to buy a $400,000 house, the beneficiary can make an election. It can either bring a personal claim for recovery of $200,000 or claim a 50% interest in the house. The choice will depend on the actual value of the house.[124]

The second principle limits the first principle in that it restricts the amount that can be traced to the "lowest intermediate balance" in the fund. For example, a trustee misappropriates $1,000 and deposits that amount into an account that already contains $1,000 of its own money. The trustee then spends $1,400 out of the account in a way that makes it untraceable. At a later point in time, the trustee deposits another $1,000 into the account, bringing the balance to $1,600. At a minimum, then, $400 of the beneficiary's money has been dissipated, and the maximum that can be traced is $600.[125] When funds are mixed with those of other innocent party rather than with funds of the wrongdoer, Ontario courts have rejected the Rule in Clayton's Case in favour of a *pro rata* approach.[126]

Subject once again to the "an amount equal to" formulation in **s. 7(2), s. 7(3) and s. 9**, the equitable right to trace ends when the funds have been dissipated and cannot be traced into property that was pur-

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123 D.W.M. Waters, M.R. Gillen & L.D. Smith, *Waters' Law of Trust in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 1279.

124 *Ibid*.

125 P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 2004) at 7:300.40. The authors discuss some uncertainty regarding the current application of the lowest intermediate balance rule in Ontario at 7:400.10.

126 *Ontario (Securities Commission) v. Greymac Credit Corp.*, 1986 CarswellOnt 158, 55 O.R. (2d) 673 (C.A.); additional reasons (October 20, 1986), Doc. CA 306/85 (Ont. C.A.); affirmed 1988 CarswellOnt 597, 1988 CarswellOnt 964, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.))* [1988] 2 S.C.R. 172; *Law Society of Upper Canada v. Mazzucco*, 2009 CarswellOnt 200, [2009] O.J. No. 193 (S.C.J.).

chased or substituted for it.[127] A bona fide purchaser for value without notice of the trust does not hold the misappropriated property in trust, so that the tracing exercise is also at an end.[128]

In Ontario, a tracing is effected through referral to a referee under the *Rules of Civil Procedure*. An order directing a reference must be obtained under Rule 54. The reference will be conducted according to the procedure laid out in Rule 55.

(4) Accounting

An accounting is one of the most useful remedies available to a construction trust beneficiary. In Ontario, the remedy is also effected through referral to a referee under Rule 55. Rule 55.04 deals specifically with the procedure on a taking of accounts:

> (1) Powers of Referee — On the taking of accounts, the referee may,
>
> (a) take the accounts with rests or otherwise;
>
> (b) take account of money received or that might have been received but for wilful neglect or default;
>
> (c) make allowance for occupation rent and determine the amount;
>
> (d) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and
>
> (e) make all just allowances.
>
> (2) Preparation of Accounts — Where an account is to be taken, the party required to account, unless the referee directs otherwise, shall prepare the account in debit and credit form, verified by affidavit.
>
> (3) The items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be attached to the affidavit.
>
> (4) Books of Accounts as Proof — The referee may direct that the books in which the accounts have been kept be taken as proof, in the absence of evidence to the contrary, of the matters contained in them.
>
> (5) Production of Vouchers — Before hearing a reference, the referee may fix a date for the purpose of taking the accounts and may direct the production and inspection of vouchers and, where appropriate, cross-exami-

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127 *Graphicshoppe Ltd., Re*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (C.A.); additional reasons 2006 CarswellOnt 652 (C.A.); *Law Society of Upper Canada v. Mazzucco*, 2009 CarswellOnt 200, [2009] O.J. No. 193 (S.C.J.).

128 D.W.M. Waters, M.R. Gillen & L.D. Smith, *Waters' Law of Trust in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 1284.

nation on his or her affidavit of the party required to account or of the person who filed the affidavit on the party's behalf or in the party's place, with a view to ascertaining what is admitted and what is contested between the parties.

(6) Questioning Accounts — A party who questions an account shall give particulars of the objection, with specific reference by number to the item in question, to the party required to account, and the referee may require the party to give further particulars of the objection.

Once disclosure has been obtained, the services of a certified fraud examiner should be obtained to complete a forensic review of the trustee's accounting as to source and application of funds. This request should be prepared in the form of an expert's report under r. 53.03.

3.7.3 Trust defence

Sections 10 to 12 of the *Act* constitute a complete code as to the manner in which trust funds may be used. Compliance with those sections will therefore be a complete defence to a breach of trust action.

(1) Payments discharging trust

Every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee.

Only payments for services or materials supplied to the improvement discharge the trust obligations and liabilities of the trustee to all beneficiaries. The corollary is that payments to persons who did not supply "services or materials" to the "improvement" do not discharge the trust and the trustee will be held to account to the legitimate beneficiaries of the trust fund as if such payments had not been made.

Construction lien trusts are unique in requiring the trustee to bear the costs of administration of the trust.[129] A contractor cannot use the statutory construction trust funds to pay even those overhead costs that are directly attributable to the administration of the trust without

129 *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CarswellOnt 266, 42 O.R. (3d) 749 (C.A.).

being in breach of the trust.[130] The statutory test for each payment is simple: was the payments made to a person who was owed money for the supply of services or materials to the improvement?[131] Payment of expenses such as wages, office expenses, rent, legal and accounting fees to landlords, lawyers and accountants are not payments made to "other persons" who supplied services or materials to the improvement.[132]

The words of the section require that the payor be "liable" to pay the payee. Privity of contract between payor and payee will be required for the payment by the trustee to qualify as a payment in discharge of the trust under **s. 10**.[133] Arguably this includes persons the trustee is "liable to pay" on the basis of *quantum meruit*.

(2) Reduction of trust funds

Section 11 allows the trustee to "reduce" the trust fund, but the section does not "discharge" the trustee's liability or obligation to its beneficiaries under the statute. Under **s. 11(1)**, a trustee that has used its own, non-trust funds to pay beneficiaries may "retain" a like amount without being in breach of trust. "Retain" means retain, not use or apply.[134] Under **s. 11(2)**, however, if the trustee has borrowed money and used it to pay beneficiaries, the loan can actually be re-

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130 *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CarswellOnt 266, 42 O.R. (3d) 749 (C.A.); *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*, 1998 CarswellOnt 3970, 42 O.R. (3d) 292 (C.A.); *Heritage Masonry Ltd. v. Building Team Ltd.*, 1995 CarswellOnt 1226, 28 C.L.R. (2d) 101 (Gen. Div.); *Home Depot Inc. v. Fieder Painting Inc.*, 1995 CarswellOnt 4514, [1995] O.J. No. 2263 (Gen. Div.); *Datasphere Sales Ltd. v. Universal Light & Power Corp.*, 1991 CarswellOnt 804, 48 C.L.R. 25 (Gen. Div.); *Emco Supply, division of Emco Ltd. v. Gueguen*, 1987 CarswellOnt 772, 25 C.L.R. 229 (H.C.); *St. Mary's Cement Corp. v. Construc Ltd.*, 1997 CarswellOnt 939, 32 O.R. (3d) 595 (Gen. Div.).

131 *Marino v. Bay-Walsh Ltd.* (May 29, 2002), Doc. 98-0469, [2002] O.J. No. 2211 (S.C.J.).

132 *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*, 1998 CarswellOnt 3970, 42 O.R. (3d) 292 (C.A.).

133 *1150402 Ontario Inc. v. Delfino*, 2003 CarswellOnt 87, 62 O.R. (3d) 768 (S.C.J.).

134 *Datasphere Sales Ltd. v. Universal Light & Power Corp.*, 1991 CarswellOnt 804, 48 C.L.R. 25 (Gen. Div.).

paid with trust funds. Most such payments are therefore carefully structured as single-purpose loans. The accounting is strict and the court will examine such cases minutely. Citing *Canadian Advanced Air Ltd. v. Peel (County) Board of Education*,[135] *Andrea Schmidt Construction Ltd. v. Glatt*[136] and *ASL Paving Ltd. v. Magnus Construction Ltd.*,[137] the court in *Ontario Electrical Construction Co. v. S.I. Guttman Ltd.* enumerated four prerequisites to a valid s. 11(2) defence and clarified the onus upon the parties as follows:

> 1. The trustee must be the one who exercises the discretion to pay the lender;
>
> 2. The funds must have been used to complete in whole or in part any work done;
>
> 3. The amount that can be justified by way of repayment shall be limited to the extent that the lender's money was so used by the trustee;
>
> 4. The onus to establish that a payment comes within the exception permitted by the *Act* and is not an appropriation rests with the party who claims to be entitled to take advantage of it.

(3) Set-off

Section 12 circumscribes the payor's right of set-off. Set-off will only be a defence in very specific circumstances. A trustee has no right to put trust funds to general use simply because the trustee believes that it has or will assert a set-off. It is not sufficient to merely allege set-off; the trust money must be retained and the validity of set-off actually proven at trial.[138] Until the set-off is established in court or on consent, the trust monies in respect of which the set-off is claimed must be *retained*, not applied to general use.

It is important not to equate *Construction Act* set-off with common law set-off. Generally, at common law, debts may not be set off un-

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135 1980 CarswellOnt 1397, 31 O.R. (2d) 225, 118 D.L.R. (3d) 699 (Co. Ct.).

136 1979 CarswellOnt 791, 25 O.R. (2d) 567, 104 D.L.R. (3d) 130 (H.C.); affirmed 1980 CarswellOnt 1365, 28 O.R. (2d) 672, 112 D.L.R. (3d) 371 (C.A.).

137 1994 CarswellSask 192, 13 C.L.R. (2d) 253 (C.A.).

138 *E. Bondy Excavating & Trucking Ltd. v. Amherstburg (Town)*, 1987 CarswellOnt 3182, [1987] O.J. No. 918 (H.C.).

less they are mutual. In *Victoria Steel Products Ltd. v. Matassa Contractors Ltd.*,[139] Sutherland J. explained the common law principle as follows:

> [T]he general rule is that set-off is available in respect of mutual debts between parties acting in the same capacities with regard to each. The element of capacities or mutuality means that there can be no set-off between debts where, for example, A in his personal capacity has a debt claim against B and A in his capacity as a trustee is indebted to B. It is also essential under the general rule that the claims sought to be set off are *debt* claims, and it therefore follows that under the general rule set-off is not available where one of the claims is an unliquidated claim. [emphasis in original]

The statutory right of set-off as provided for in **s. 12** of the *Construction Act* contains no express mutuality requirement. Also, **s. 12** is not restricted to debts. **Section 12** as drafted is a much broader right of set-off than that available at common law.[140] On the other hand, at common law, as long as the debts are mutual, there is no general rule that the funds cannot be spent. Under **s. 12**, as seen, funds have to be retained. Therefore, while the statutory right to set-off may broaden the right to set-off, it severely constrains the remedy of set-off.

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139 1987 CarswellOnt 773, 25 C.L.R. 238 (H.C.).

140 See also *C & A Steel (1983) Ltd. v. Tesc Contracting Co.*, 1998 CarswellOnt 2330, 39 O.R. (3d) 155 (Gen. Div.), which compares the equitable law of set-off to the set-off provided in s. 17(3) of the *Construction Lien Act*.

CHAPTER 4

SETTING A LIEN ACTION DOWN FOR TRIAL

4.0

4.1 Guide

As Master Sandler observed in *Pineau v. Kretschmar Inc.*,[1] the proper procedure for processing a construction lien claim to trial still seems to be a mystery to many lawyers, although the current system has been in place since the late 1960s. The following is a step-by-step guide for setting lien actions down for trial where the land is in To-

[1] 2004 CarswellOnt 548, 37 C.L.R. (3d) 29 (S.C.J.); additional reasons 2004 CarswellOnt 3189 (S.C.J.); additional reasons 2004 CarswellOnt 6072 (S.C.J.).

ronto, drawn from *Pineau*.

1. An action must be commenced by the issuing of a statement of claim in the Toronto office of the Superior Court of Justice.[2]

2. The statement of claim must be served, within 90 days, subject to extension.[3]

3. Pleadings are exchanged as provided by **ss. 2, 3 and 4 of O. Reg. 302/18**. Noting in default is provided by **s. 5 of O. Reg. 302/18**.

4. At this point, a decision must be made as to whether the case is to be tried by a judge or by a master. The election is usually made by the plaintiff but can, in fact, be made as well by any defending party.

5. If any party wants a judge to hear the case (which is almost never done in Toronto), it sets the action down for trial under Rules 48.01 and 48.02 (serving and filing a trial record), but it must also have regard to Rule 48.04 about not thereafter initiating or continuing any form of discovery or any motions (except with leave of the court).

6. Leave or consent for any discovery or any motions is required by **s. 13 of O. Reg. 302/18**, so any discovery or other interlocutory proceeding must be proceeded with first. Such leave (consent) is dealt with by the Toronto construction lien motions master. Where the motion is on consent, it will be heard *ex parte* from Monday to Friday at 9:30 a.m. Otherwise, the construction lien office has its own motion scheduling form.

7. This party must then also serve a notice of trial (statutory form) as required by **s. 9(4) of O. Reg. 302/18**, on all persons described in **s. 9(2) of O. Reg. 302/18**. This is a requirement of the *Act* and not the Rules. Presumably, the form of notice of trial for Toronto lien actions to be tried by judges must be modified so that it is returnable in Trial Scheduling Court at the same date/time as the Trial Scheduling Unit's notice, and this is because of the use of the Trial Scheduling Court procedure in To-

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2 **O. Reg. 302/18, s. 1(1)**.

3 **O. Reg. 302/18, ss. 1(2) and (3)**.

ronto. (It is to be noted that s. **50(2)** of the *Act* provides that the *Courts of Justice Act* and the Rules of court (i.e., the *Rules of Civil Procedure*) apply to cases under the *Act*, except where inconsistent with the *Act*, and subject to **s. 13 of O. Reg. 302/18**.)

8. Once the trial record has been served, and proof of service filed, the Trial Scheduling Office will issue a Trial Scheduling Court Notice. While there is no case or practice direction on point, the **s. 9(4) of O. Reg. 302/18** notice of trial, duly modified, should be returnable for the scheduled Trial Scheduling Court date.

9. The case will be assigned to one of the four Toronto Teams, and the presiding Trial Scheduling Court judge will fix a trial date in the presence of counsel for all parties and other affected persons such as other lien claimants or possibly give other directions. For who are the other affected persons, see **s. 9(4) of O. Reg. 302/18** and, especially, **s. 9(2) of O. Reg. 302/**18.

10. As mentioned, Steps 5 to 9 above are almost never followed in Toronto. Even if they are, **s. 58(3)** of the *Act* provides that, at trial, (or presumably at Trial Scheduling Court), the trial judge may, on his or her own motion, direct a reference to a Toronto master, or to a case management master. This has often been done by Toronto trial judges, especially where there are multiple parties, or in a two-party dispute, or where the trial will be lengthy, or where there are a large number of disputed extras and deficiencies in issue, often in a house construction or house renovation case or where the amount in issue is small.

11. In the usual procedure in Toronto, the party must obtain a judgment of reference under **s. 58(1)** of the *Act* to a Toronto master or case management master. **Section 58(1)** details how the motion for this judgment of reference is to be made. Either all parties must consent or notice of the motion must be given to any defending party who won't consent.

12. The form of this judgment of reference is mandated in Forms 22 or 23 of O. Reg. 303/18.

13. Once the judgment of reference has been obtained, then the party obtaining that judgment (or, in fact, any other party) must make a motion to the court (a master), without notice, to have a date, time and place fixed for the trial of the action. This is a

routine motion. The date so fixed is called the "first construction lien pre-trial" but is really the first day of the trial.

14. **NOTE:** A judgment of reference under **s. 58(1)** is not an "order fixing a trial date" under **s. 37(1)¶1**. An order under **s. 9(1) of O. Reg. 302/18** is required in order to stop the time running.

15. Once this order has been obtained, the party who obtained it (usually the plaintiff) must serve a properly worded notice of trial (and because masters require it, a copy of the order) on all persons described in **s. 9(2) of O. Reg. 302/18**.[4]

16. A notice of trial may be in Form 33, but it must be served.[5] This notice of trial is a critical document. The person serving this notice of trial, and all persons served with it are "parties to the action".[6]

17. Once a master conducts the first "pre-trial", he or she is seized of the reference (trial) but is not so seized by reason only of having appointed the day, time and place for the trial (first "pre-trial") under **O. Reg. 302/18, s. 9(1)**.[7]

18. As a matter of practice, Toronto construction lien masters do not order settlement meetings to take place, under **O. Reg. 302/18, s. 9(1)**, in Toronto lien actions, because the first "pre-trial", which is supervised by the master, is a more effective procedure than an unsupervised settlement meeting under **O. Reg. 302/18, s. 10**.

19. Sometimes, the trial master may establish a Vetting Committee to scrutinize the various lien claims and report back, but this procedure is totally different from a settlement meeting under **O. Reg. 302/18, s. 10**. Outside of Toronto, in some jurisdictions, settlement meetings are often ordered. The practice varies across the Province.

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4 **O. Reg. 302/18, s. 9(4)**.

5 **O. Reg. 303/18, s. 2(29)**.

6 **O. Reg. 302/18, s. 6(1)**.

7 *Construction Act*, R.S.O. 1990, c. C.30, **s. 52**.

4.2 Order of reference

The jurisdiction to refer an action, or part of an action from a judge to a master of the court has been with us for well over a century, borrowing from long-standing practice and procedure.[8]

Lien cases can be disproportionate consumers of judicial resources. For this reason, it was thought that lien proceedings were best left to a specialist panel. This conclusion was reached with respect to construction cases generally some time ago in the United Kingdom, where they have established a specially equipped Technology and Construction Court, with specially selected and assigned judges.[9]

In Toronto, a reference to the lien master imports *de facto* case management.[10] The lien master understands how the construction industry works and how lien issues arise in that industry. From long and specialized experience with construction lien cases, the lien master is able to isolate issues, give guidance on pleadings. The lien master orders, prioritizes and effectively supervises all productions and discoveries in a lien action. The lien master becomes seized with the referred lien action at the first pre-trial conference, even though the lien master will ultimately hear the parties' evidence and rule on the case on the merits. The lien master deals with all interlocutory aspects of the case, including refusals and undertakings.

It is important to understand the role of the lien master on a reference. Whereas a case management master will supervise the interloc-

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8 See, generally, the present *Construction Act*, R.S.O. 1990, c. C.30, **s. 58**, but the idea of importing references was not without its initial problems. The original idea, imported wholesale from the British experience, was to refer the entire adjudication to the Master or official referee. That eventually ran afoul of the Constitution: *Ontario (Attorney General) v. Victoria Medical Building Ltd.*, 1959 CarswellOnt 87, [1960] S.C.R. 32, 21 D.L.R. (2d) 97, and it became necessary to interpose the idea of a "judgment of reference", to maintain the fiction that the adjudication was that of the federally appointed judicial officer. The constitutional validity of the present section has been considered and upheld: *Snowmont Investments Corp. v. Elliott*, 1997 CarswellOnt 4333, 36 C.L.R. (2d) 240, 13 C.P.C. (4th) 305, 153 D.L.R. (4th) 305 (Gen. Div.).

9 Bowsher, "A Specialist Court — The Technology and Construction Court — The High Court, England and Wales" (1999), 46 C.L.R. (2d) 153.

10 Lien actions are expressly exempted from formal Case Management, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 77.01(2)(e)**.

utory process that brings a case to trial, but will not conduct the trial, the lien master does both. As a result, the lien master performs both a supervisory as well as a judicial and inquisitorial function.[11] The lien master may enquire into the merits of the case and the defences. The lien master may, of his or her own motion, split cases into their components, try them consecutively or serially as the circumstances require, and even manage lawyer-client issues in some cases.[12]

This broad inquisitorial power allows the lien master to be instrumental in promoting early settlement.[13]

Once a reference is ordered under the *Act*, the procedure on the reference is determined by the *Rules of Civil Procedure*[14] unless that procedure is "inconsistent with" any provision of the *Act* (**s. 67(3)**).

A list of procedures available to a construction lien master or other person to whom a lien action is referred can be summarized as follows:

1. The referee can add parties on the referee's own motion (**s. 6(2) of O. Reg. 302/18**). A person brought into a lien proceeding in this way must then move before a judge, within seven days, to set aside the judgment directing the reference if they object to being included (**s. 58(5)**), or, alternately, move to set aside the referee's order that added them.

2. The referee can order that parties with the same interest be represented as a class by the same lawyer, and can designate that lawyer and set such terms "as are just", including compensatory orders against parties that refuse to comply with such an order (**Rule 55.02(8)**), provided that the exercise of the jurisdiction under the *Rules of Civil Procedure* to make such an order is not inconsistent with the specific provisions of **ss. 7** and **8 of O. Reg. 302/18**. This power, although it appears to exist, is rarely exer-

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11 Glaholt & Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

12 In *Melgold Construction Management Ltd. v. Banton Investments Ltd.*, 1988 CarswellOnt 519, 32 C.L.R. 216 (S.C.), the Master ruled on the sufficiency of a lawyer's authority to commence the underlying lien action.

13 See *821962 Ontario Ltd. v. 1002476 Ontario Inc.*, 1995 CarswellOnt 3175, [1995] O.J. No. 3283 (Gen. Div.).

14 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 55.02**.

cised in practice. It is conceivable, however, that the referee may have to intervene in this way to prevent a limited fund from being consumed by unnecessary legal costs involved in the representation of identical interests.

3. The referee can grant leave to amend pleadings under **s. 58(4)** (a remedial after-thought added to the statute in order to allow the master to amend to add an "un-referred" pleading, i.e., a pleading that was not specifically contemplated at the time the order of reference was made).

4. The referee keeps a "procedure book". The procedure book contains the referee's orders for the conduct of the reference. The referee's orders are binding if entered into the procedure book and "need not" be embodied in a formal order (**Rule 55.02(11)**). Some orders, however, must be physically issued and entered because they have a life outside of the lien reference, such as orders vacating liens, or paying money out of court, and nothing prevents a formal order being taken out if and when required.

5. The referee can compel the attendance of witnesses and can also decide whether their evidence need be taken orally or not.

6. The referee is bound by the same rules as to the admissibility expert evidence as is a court. A referee has the additional benefit of **s. 14 of O. Reg. 302/18** to "obtain the assistance of" any expertise the referee requires (but only as an advisor, not as an expert witness).

7. The referee on the referee's own motion can require "any party" to be examined and to produce "such documents as the referee thinks fit" and can give directions for their inspection by "any other party".

8. The referee can be requested to give a written ruling as to admissibility of evidence or any other matter relating to the conduct of the reference in the form of a report or, in the discretion of the referee (and not the parties), an *interim* report so that the party who objects to the ruling can "appeal" by motion to oppose the confirmation of that interim report, before proceeding with the case (**Rule 55.02(18)**).

9. An interesting issue arises as to whether a referee on a construction lien reference can issue an order for contempt against a

witness who has failed to respond to a properly served summons to witness. The contempt rule, **Rule 53.04(7)**, provides that where a witness properly summoned fails to attend at the trial or to remain in attendance in accordance with the requirements of the summons, the "presiding judge" may by a warrant for arrest (**Form 53B**) cause the witness to be apprehended anywhere within Ontario and forthwith brought before the court. Because **s. 58(4)** states that a master or case management master or person agreed on by the parties to whom a reference is directed has all the jurisdiction, powers and authority of the court to completely dispose of the action "and all matters and questions arising in connection with the action", it is arguable that the master or other referee does indeed have authority to issue a warrant for arrest in such circumstances.

10. The master can "state a case" for the opinion of the Divisional Court (**s. 70(1)**).[15]

The *Act* also provides for references to case management masters and for consent references to any persons agreed to by the parties.[16] The bar is slowly waking to the possibilities presented by this remedial provision and is beginning to refer lien actions to "persons agreed to by the parties", such as retired lien masters and senior practitioners.

The most recent changes to the *Act* provide for a reference to a Deputy Judge of the Small Claims Court or to the Small Claims Court Administrative Judge if the action is for an amount that is within the monetary jurisdiction of that court. That judge also has all

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15 See *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*, 2003 CarswellOnt 210, [2003] O.J. No. 304 (S.C.J.).

16 The reference section of the present legislation is *Construction Act*, R.S.O. 1990, c. C.30, **s. 58**; the amendments are to be found at S.O. 1994, c. 27, s. 42; S.O. 1996, c. 25, s. 4(3) to s. 4(7). Some caution must be used here. For example, while there is geographical limit on the jurisdiction of a "master" as a referee, there is no such obvious geographical limitation on a case management master. Thus, a creative counsel might try and forum shop, for example, by having a case in some other jurisdiction referred to a case management master at Toronto. If this is attempted or accomplished without the prior consent of the court, counsel may expect that the Regional Judge in the area will be contacted and will intervene to restore the case to the proper geographical jurisdiction.

the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action.

The "judgment of reference" can be obtained by motion at any stage of a proceeding, even during the trial if necessary. A judgment of reference is usually obtained on the motion of one or all of the parties, but it need not be so. The present statutory scheme allows a judge at the trial of a lien action, on his or her own initiative, to direct a reference to a master assigned to the area in which the premises or part of the premises are situate, to a case management master or to a person agreed to by the parties, even if none of the parties has moved for such relief before.[17]

The powers of the referee once a reference has been directed are extremely wide. The lien referee has all of the powers of a trial judge over any matter properly referred to the master. Masters gown for references (lawyers do not). In Toronto, lien masters sit in formal courtrooms and conduct complex and often lengthy trials.[18] There is no appreciable difference in the look and feel of a trial by reference and the look and feel of a Superior Court trial. Court is convened, a reporter is in attendance, opening statements are delivered, witnesses are called, exhibits are marked, rulings are made, the case is summed up, argued and a "Report" issued.

The construction lien referee has the power and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.[19]

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17 *Construction Act*, R.S.O. 1990, c. C.30, **s. 58(1).**

18 It is worth noting here that the reference section, **s. 58(1)** refers specifically to a judge referring "the whole action or any part of it *for trial*", so that it is more appropriate to speak of subsequent proceedings before the Master as a trial than as a reference.

19 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 58(4), 58(4.1)**; see, in this connection, *Metric Excavating Ltd. v. Ghods Builders Inc.*, 1993 CarswellOnt 4380, [1993] O.J. No. 2682 (Gen. Div.), where because of the reference, the Master was obliged, and entitled, to rule on issues that would not otherwise have been part of the referred lien action, i.e., work done on improvements other than the improvement to which the referred lien related.

It has been asked whether a master on a reference is bound by decisions of a single judge of the Superior Court of Justice. In *Biotechnik Inc. v. O'Shanter Development Co.*[20] and *GTA Structural Steel Ltd. v. 20 Ashtonbee Holdings Ltd.*,[21] two masters held that since **s. 58(4)** of the *Act* provides that "a master . . . to whom a reference has been directed has all the jurisdiction, powers and authority of the court (i.e., a judge) to try and completely dispose of the action . . .", and since single judge of the Superior Court of Justice is not bound to follow a judgment of another judge of coordinate jurisdiction although such decision is to be considered persuasive and is to be given much respect, it followed that if, by statute, a master had the "powers and authority" of a judge, the master could treat rulings on matters of law by other single judges of this court just as a judge could under the law of *stare decisis*. However, in *RSG Mechanical Inc. v. 1398796 Ontario Inc.*,[22] without referring to the earlier cases, the Divisional Court held that "the Master continues to have the status and place that comes from being a Master. He does not, for the purposes of the reference, obtain the standing of or become a judge. On this basis, he would be bound to follow the decision of a single judge of the Superior Court."

4.3 Setting aside an order of reference

The statute contemplates that if a judgment of reference is made and not set aside, any subsequent parties "to the action" are bound by the judgment directing the reference as if they had been a party to the action at the time the reference was directed.[23]

This underscores the significance of service of notice of trial in a lien action. After the lien and statement of claim itself, perhaps the most important document in a lien action is the notice of trial. If you are one lien action among many arising from a given improvement, you may move for a judgment of reference, in either **Form 22 or 23**, in your own action. It is not necessary to involve persons in this mo-

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20 2003 CarswellOnt 1895 (S.C.J.).

21 2005 CarswellOnt 6820 (S.C.J.).

22 2015 ONSC 2070, 2015 CarswellOnt 7504 (Div. Ct.).

23 *Construction Act*, R.S.O. 1990, c. C.30, **s. 58(6)**.

tion who are not parties to your own action. When you obtain your judgment of reference and order for trial under **s. 58(1)**, you then serve notice of trial on all other parties to all other lien actions with respect to the improvement. The simple act of serving this notice of trial on such persons makes all such persons parties to your referred lien action, all in accordance with s. **57(1)**.

Persons served with notice of trial in a lien action can bring a motion to a judge of the court that directed the reference within seven days of becoming a party to the action (i.e., within seven days of being served with notice of trial) to set aside the judgment directing the reference. Where no motion is made under **s. 58(5)**, or the motion is made and dismissed, all such persons are bound by the judgment directing the reference as if they had been a party to the action at the time the reference was directed (**s. 58(6)**).

Thus, at the first trial management pre-trial conference, an important enquiry by the lien master is as to proof of service of the notice of trial, as it establishes the master's jurisdiction over those parties that have been served. If proper service has not been made, the master will direct that it be done.

A judge has jurisdiction to set aside a judgment of reference under which a master has been proceeding, on proof of a reasonable apprehension of bias.[24] As one might expect, this is exceedingly rare in

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24 *Snowmont Investments Corp. v. Elliott*, 1997 CarswellOnt 4333, 36 C.L.R. (2d) 240, 13 C.P.C. (4th) 305, 153 D.L.R. (4th) 305 (Gen. Div.) at pp. 246-247 [C.L.R.] [Brennan J.], citing the test laid down in *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. *Snowmount* began as a motion to vary (set aside) a judgment of reference and resulted in a detailed review of the constitutional basis for the Master's jurisdiction: "The final position taken by the Attorney General would dispose of the question of the constitutional validity of the *Construction Lien Act*, but for a position taken on behalf of the defendants in the Notice of Constitutional Question, and the arguments made in support of that notice. Mr. Solmon argued that consideration of disqualification by reason of apprehension of bias is part of the "core jurisdiction" of s. 96 judges and cannot be removed from the superior courts by either level of government, without amending the constitution: ". . . (T)he power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance to the rule of law itself." *MacMillan Bloedel Ltd. v. Simpson* (1995), 1995 CarswellBC 974, 1995 CarswellBC 1153, [1996] 2 W.W.R. 1 (S.C.C.) per Lamer C.J.C. If the *Construction*

practice. A challenge for bias is made at first instance to the master to whom the reference has been directed.

4.4 Consolidation, connection, carriage, salvage costs

Reference, consolidation, carriage and salvage costs are fundamental concepts in any lien action and a genuine advantage over all non-lien debt collection proceedings. The number of lawyers who make full use of these concepts appears to have diminished. Ask a lien lawyer whether they have ever used salvage costs to take control of an otherwise uneconomical lien action and turn it into a positive outcome for all lien claimants, for one fee, payable rateably amongst all lien claimants, and many are likely to say "No".

This would not have been the case prior to 1983. Under the *Mechanics' Lien Act*, the lien bar used the concepts of consolidation, carriage and salvage costs to take control of and to manage through to settlement or trial some of the largest and most complex lien actions,

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Lien Act were interpreted as purporting to remove that jurisdiction from the judge and bestow it exclusively upon the Master, it would be *ultra vires*. I do not interpret it so. While I am persuaded that the *Construction Lien Act* validly empowers the Master to deal with such matters as disqualification on the ground of reasonable apprehension of bias, I hold that the legislation could not remove from the superior court the power to exercise that part of its "core jurisdiction". Having concluded that the *Construction Lien Act* contains no provision calculated to derogate from the jurisdiction of a superior court judge, I would accept readily the proposition that the jurisdiction delegated to the Master is sufficiently broad that a motion to disqualify Master Clark on the ground of reasonable apprehension of bias could have been made returnable before him and that he would have had jurisdiction to rule on it. I have no hesitation in holding that I also had jurisdiction to hear that motion as an exercise of the inherent jurisdiction conferred upon a judge of this court. I dispose of the constitutional question of the validity of the *Construction Lien Act*, by holding that the Act is valid. It passes the tests set out in *Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31*, 1996 CarswellNS 166, 1996 CarswellNS 166F, *(*sub nom. *Reference re Amendments to the Residential Tenancies Act)* [1996] 1 S.C.R. 186, and in the *Victoria Medical* case, precisely because it does not purport to remove any of the jurisdiction of a s. 96 judge. Rather, it clearly preserves such jurisdiction while allowing construction lien matters to be dealt with by Masters in their role as referees.

in a way that spread the cost of these proceedings rateably among all claimants. All a lawyer needed was one lien claimant on a given job, however small or remote from the owner in terms of privity of contract, and through that lawyer's industry the entire proceeding would be settled, or tried as required, with a substantial award of costs "off the top" to indemnify that lawyer for their efforts.

These concepts remain relevant under the *Construction Act*, where they are managed by the lien court, as part of its enhanced, supervisory jurisdiction over the progress of lien actions toward trial.

What is the lawyer's duty to the client with respect to reference, consolidation, carriage and salvage costs? "Little or none" is likely the correct answer. There is nothing mandatory in these concepts. They are procedural and permissive. The real question is whether a lawyer needs instructions to assume the costs risk involved in undertaking carriage of a consolidated lien action, or whether it is something a lawyer may undertake on their own as an officer of the court. The practice under the *Mechanics' Lien Act* was that as the lawyer benefitted directly from carriage, instructions from the client were required before assuming carriage. Now, under the *Construction Act*, with the increasingly supervisory role of the lien court, the role is seen more as one of an "officer of the court", and the same degree of advice and instruction may not be necessary.

Another issue emerges as a result of the "class action" aspect of the modern lien action and the recent refinement by the Supreme Court of Canada of conflict of interest rules.[25] A lawyer having carriage of

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25 See the discussion undertaken by Binnie, J. in *R. v. Neil*, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, 168 C.C.C. (3d) 321 (S.C.C.) at pp. 336-337 [C.C.C.]: "More recently in England, in a case dealing with the duties of accountants, the House of Lords observed that '[t]he duties of an accountant cannot be greater than those of a solicitor, and may be less' (p. 234) and went on to compare the duty owed by accountants to former clients (where the concern is largely with confidential information) and the duty owed to current clients (where the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information). Lord Millett stated, at pp. 234–35: 'My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one

a consolidated lien action may come from a firm that has had a relationship with some other lien claimant on a project. This may give rise to a duty of "loyalty". The Supreme Court expanded on the issue of a lawyer's duty of loyalty in *3464920 Canada Inc. v. Strother*.[26] The court held that a lawyer-client relationship is overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. Fiduciary responsibilities were said to include the duty of loyalty, of which an element is the avoidance of conflicts of interest. If a lawyer undertakes carriage, this may put the lawyer in an awkward position if the lawyer or his or her firm has ever acted for any of the other parties to the consolidated lien action. It may put the lawyer in a difficult position later if the lawyer or his or her firm is asked to act

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client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation . . .' [Emphasis added.] [*Bolkiah v. KPMG* (1998), [1999] 2 A.C. 222 (U.K. H.L.)] In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broadminded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied. The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient. Nevertheless it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — even if the two mandates are unrelated — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other." See also *Toddglen Construction Ltd. v. Concord Adex Developments Corp.*, 2004 CarswellOnt 1689, 34 C.L.R. (3d) 111 (S.C.J.).

26 2007 CarswellBC 1201, 2007 CarswellBC 1202, [2007] S.C.J. No. 24.

against such parties. The answer may be that the lawyer accepting a client who has carriage of a lien action is acting *only* as an officer of the court and is therefore free of conflict.

Until these issues are sorted out, current "best practice" would seem to require counsel to consider carefully with the client all concepts of reference, consolidation, carriage and salvage costs in every multiple-party lien case.[27]

The considerations that may be involved in a decision as to whether to consolidate or not include the following:

1. How many lawyers are there? If many lawyers are involved, consolidation will make life easier for everyone, including the court and the parties to the lien proceeding. Consolidation and carriage will speed the lien proceedings to trial as quickly and inexpensively as possible. Anyone who has participated in a first lien pretrial of any reasonably sized lien proceeding will likely agree that unless one or two lawyers are authorized to build consensus and organize the proceedings, the proceeding becomes expensive and inefficient.

2. How many interests are there? If you are dealing with two or three contracts directly with a single, solvent owner, there may be little to be gained by consolidation or carriage. On the other hand, if you are dealing with a wide variety of conflicting interests, such as mortgagees, statutory "owners", several tiers of subcontractors and maybe receivers or trustees, then reference, consolidation, carriage and salvage costs are probably mandatory in

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27 Most lawyers, when asked, consolidate every lien proceeding as a matter of course, but it is not always necessary or desirable to do so. For example, it is true that upon service with a notice of trial, a person becomes a party to a lien action (**O. Reg. 302/18, s. 6(1)**) so you rarely need consolidation to get everyone before the court. In Toronto, the Master will then see to it that all persons are before the court and that all liens related to the improvement are dealt with in the most expeditious fashion and that as an administrative matter, the final report is filed in each of the actions to which it relates. Outside of Toronto, the order of consolidation may be considered the only sure and certain means of making sure that all parties are before the court. Although **Rule 6** speaks only in terms of consolidation, hearing one after the other, or stay of any one or more of the proceedings, the Master at Toronto will sometimes "connect" proceedings by simply scheduling them one after the other on the list for scheduling references, whether or not any formal order under **Rule 6** is sought or obtained.

sorting out the issues and interests of the group.

3. Are there non-lien proceedings? If the lien issues arise in the context of an ongoing or pending *Companies' Creditors Arrangement Act* or *Bankruptcy and Insolvency Act* proceeding,[28] or if a monitor has been put in place under that statute, or if there is any kind of private receivership in place or threatened, consolidation of the lien actions and the representation of the various tiers of lien interests by one designated lawyer at each level is strongly indicated. If the lien claimants do not organize themselves in this way voluntarily, it is likely that a judge in Bankruptcy Court or on the Commercial List will do so around about the time of their first attendance in that court, and perhaps not with the same understanding of the salvage costs and other *Construction Act* provisions as would otherwise be the case.

4. Are there mortgage enforcement proceedings? This includes foreclosure proceedings, sale proceedings, private exercise of power of sale remedies, receiverships both public and private, and the like. If there are priority claims to be put forward, then all lien claimants should band together to take the benefit and bear the burden of establishing these important rights.

5. Does the case meet the test for consolidation? At first glance, **Rule 6** would seem to apply, requiring a question of law or fact in common and relief arising out of the same transaction or occurrence or series of transactions or occurrences. The court under **Rule 6** would usually look for common parties as well. Neither of these tests apply to **s. 8 of O. Reg. 302/18** of the *Act*, which requires *only* that there be more than one action to enforce liens in respect of the same improvement and that the master concurs that it would serve some purpose to consolidate. It is not at all uncommon to have a lien master canvas the lawyers attending the first pre-trial conference to find someone willing to undertake carriage, and appoint someone if there are no volunteers.

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28 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

4.4.1 Consolidation and connecting orders generally

In practice, the registration of one lien is often followed by the registration of many liens, and many lien actions commenced by lawyers having differing levels of experience in such matters. There can be considerable duplication of effort unless one lawyer takes carriage and the court steps in to make supervisory orders.

One of the supervisory orders contemplated by the *Construction Act* is the consolidation of many lien proceedings into one lien proceeding for the efficient determination of all lien issues arising from a given improvement.[29] The practical result of a consolidation order is that the court office removes the individual court file numbers from the consolidated lien actions and they become, for the purposes of court administration at least, one action with one court file number.

Consolidated actions may later be deconsolidated by court order if circumstances require. When a consolidated action is set down for trial within two years, and one action is later severed from the consolidated action, that deconsolidation does not result in the deconsolidated action not having been set down for trial.[30]

There is another way of achieving the same result without actually consolidating the physical court files. "Connection" of lien actions describes an order that co-ordinates the interlocutory steps in two or more actions, one of which is a lien action. "Connection" is not the same as consolidation, and there is no express statutory provision for the "connection" of lien actions.

Nevertheless, "connection" is now relatively common. While "connected" lien actions are not consolidated, they have common discoveries and productions and are managed by the same master so as to avoid a multiplicity of proceedings. When cases are "connected" in this way, they retain their separate court file numbers but are managed together by the master as if they were one proceeding. The different procedures involved in consolidating lien actions and "connecting" lien actions with other lien or civil actions are discussed in the following sections.

Master MacLeod, as he then was, has commented on the fact that

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29 **O. Reg. 302/18, s. 8**.

30 *T.R. Renovations Ltd. v. Mississauga (City)*, 2003 CarswellOnt 843, 29 C.L.R. (3d) 295 (S.C.J.); additional reasons 2003 CarswellOnt 1213 (S.C.J.).

consolidations are usually unnecessary and that the results intended by consolidation may be better achieved with alternative relief. The Master's comments on this issue are worth citing at some length:

> 11 The motion by the plaintiff was to transfer all of the North Key court actions to Ottawa for consolidation or trial together and also to consolidate all of the subcontractor lien claims wherever the court file may currently be located with the respective North Key action. The reason for this was to ensure that the actions proceeded on a common timetable in an orderly fashion under case management and to ensure that timetables and deadlines in each individual action did not conflict. These goals make eminent sense and are also in accordance with the scheme of the Act.
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> 12 While the goal of designating a main action for each project and ensuring orderly adjudication of each lien claim is important, and while transfer and consolidation are options, I think there may be a better way to achieve this. The administrative burden on both courts administration and counsel of actually transferring each of these actions and consolidating them in Ottawa seems unnecessary.
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> 13 Construction lien actions proceed under a modified version of the Rules of Civil Procedure and the court is charged to limit procedural steps to those reasonably necessary to achieve the objectives of the Act. This is set out in s. 67 of the Act which provides that the court is to adopt a procedure "as far as possible of a summary character having regard to the amount and nature of the liens in question". The section also provides that no interlocutory step not specifically provided for in the Act may be taken without leave of the court and provides that the Rules of Civil Procedure and the *Courts of Justice Act* apply only to the extent they are not inconsistent with the Act.
>
> 14 The Act then contains a number of provisions designed to provide the court with great flexibility in determining lien actions. One of those provisions is s. 59 which permits the court to assign carriage of a lien proceeding to one of the lien claimants and also permits an order consolidating all lien actions in relation to a single improvement into one action. This provision permits the court to ensure that various lien claimants do not work at cross purposes and may be used to avoid duplication of counsel fees and other costs.
>
> 15 Consolidation is an option but it is not mandatory. Indeed it is usually unnecessary. True consolidation results in combining all of the proceedings under a single court file number. The prospect of combining 45 or 47 sets of existing pleadings and sorting out which claims should become cross claims, counter claims or third party actions has little appeal. A true consolidation would likely result in a confusing amalgamated proceeding and require costs to be run up unnecessarily on pleading amendments.
>
> 16 It is not necessary to consolidate the actions because all lien claimants ultimately are parties to every lien action. S. 57 of the Act provides that all persons served with notice of trial become parties to the action and s. 60

requires notice of trial to be served on all lien claimants who have registered liens against the land. S. 51 requires the court to dispose of all questions necessary to determine the rights and liabilities of all parties to the action and to grant necessary relief. Thus every lien action acquires aspects of a class action and is an action in which every other lien in relation to the same improvement may be tried.

17 In my view it lends itself to more efficient organization to keep the separate actions but to designate the "main action" which is the action in which notice of trial will be served. The other actions may be stayed for the time being but if, as is frequently the case, several liens are settled prior to trial then the individual actions can be dismissed and those lien claimants let out of the main action. The court files in relation to the subsidiary actions will not be active and can be left to act as a sort of bookmark to ensure all of the issues are ultimately dealt with. The pleadings in those actions define the issues in relation to each subtrade lien and remain readily available.

18 Similarly it is not necessary to transfer each of the subtrade lien actions to Ottawa. An order to transfer the file only authorizes transfer. The party seeking a transfer must then file a praecipe with the local court, pay an administrative transfer fee and any courier charges. The registrar in the local court must prepare the file for transfer and send it to the Ottawa court where the Registrar in Ottawa must open a new file and data enter the events that have already occurred out of town. Given that the subtrade lien actions will be subsumed in the main actions, no purpose is served by imposing such an administrative burden and cost on either the Ministry or on the parties. Those files can stay where they are subject to orders I will issue indicating that the files are to be stayed and are not to be subject to any sort of automatic administrative dismissal.

19 It may not even be necessary to transfer the main actions to Ottawa. I have recommended to the plaintiff that it obtain a judgment of reference in relation to each of the projects. S. 58 contains no geographic restriction on the authority of a judge to refer a lien action to a case management master for trial. If the matter proceeds by reference there is no need to transfer the action from the local court to Ottawa. The reference file will be in the Office of the Master in Ottawa but ultimately the decision of the master will become a judgment in the original proceeding upon confirmation of the report. As I understand it, all parties have been advised of the intention of the plaintiff to move for a judgment of reference and no one has indicated they are opposed to that manner of proceeding. Under the reference procedure the master is imbued with all of the powers of the court under the Act to organize, case manage and adjudicate the issues in dispute.

20 I wish to be clear that I am not encouraging a flood of lien references from across the province. Though the Act permits references to a case management master of any lien action in Ontario, judges sitting outside the centres to which case management masters are assigned (Ottawa, Toronto and Windsor) would not ordinarily make such orders without first discussing the

transfer of work with the Regional Senior Justice. In this case however because there are already Ottawa actions, because the actions will have to be tried together and because the lands on which the improvements are located are five separate parcels of land located in at least two other counties, all in the East Region, it makes sense to centralize the proceeding in Ottawa. If there is ultimately a trial, the physical location of the trial will have to take into account such factors as the location of witnesses and counsel but that need not be determined today.

4.4.2 How do you consolidate lien actions?

Consolidation is provided for both by the *Rules of Civil Procedure*, **Rule 6**, and by Regulation to the *Construction Act* in **s. 8 of O. Reg. 302/18**.[31] Note that the *Rules* are more restrictive than the *Act* in providing for consolidation of actions. The *Act* simply requires that more than one action be brought to enforce liens with respect to the same improvement. The *Rules* require a common question of law or fact in common, relief claimed arising out of the same transaction or series of transactions, or any other good reason. Because of the general application of **s. 59(2)**, it is difficult to conceive of any good reason to oppose the consolidation of lien actions on any multi-party construction dispute. Any reasonable objection could be addressed by terms.

It is often mistakenly suggested that it is sufficient to oppose a consolidation order that one or more of the actions has been referred to the master and one or more of the others has not. This is a mere procedural difficulty, at best, and probably not a reasonable objection at all.[32] Problems of this nature are easily overcome either by a judge

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[31] Where more than one action is brought to enforce liens in respect of the same improvement, the court may "(a) consolidate all actions into one action; and (b) award carriage of the action to any person who has a perfected lien." Compare **Rule 6.01(1)** of the *Rules of Civil Procedure*: "Where two or more proceedings are pending in the court and it appears to the court that (a) they have a question of law or fact in common; (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or (c) for any other reason an order ought to be made under this Rule, the court may order that, (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or (e) any of the proceedings be stayed until after the determination of any other of them, or asserted by way of counterclaim in any other of them."

[32] Once one action is referred, then "any person" served with notice of trial is automatically a party (**O. Reg. 302/18, s. 6(1)**) and has a right to move to set

on a motion to consolidate,[33] or, more likely, simply by serving the parties to the "un-referred" lien actions with notice of trial in the referred lien action, making them parties to that action by statute.[34]

Motions to consolidate have occasionally resisted on more substantive grounds, for example, because the various defendants' interests were so varied,[35] or because one of the plaintiffs claimed a personal remedy only.[36] One possible ground to oppose, or at least stay, consolidation for a period of time would be the arbitration of some or all of the issues in one or more of the proceedings that would otherwise be consolidated.

Once the order for consolidation is made in each lien action, thereby consolidating all of the lien actions under one comprehensive title of proceedings and one court file number, the consolidated title of proceedings is thereafter used in all documents, including the final judgment or report unless the court orders otherwise (as would be the case where some but not all of the consolidated lien actions settled before the evidentiary portion of the trial). This explains why law reports of construction lien cases are sometimes reported under titles of

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aside the order of reference within seven days of being served with notice of trial (**s. 58(5)**); therefore, the existence of a non-lien action should not be allowed to impede service of notice of trial and *de facto* consolidation in this rather simple manner.

33 See *Justwork Construction Ltd. v. Groomes*, 1991 CarswellOnt 806, 48 C.L.R. 183 (Gen. Div.), which arose out of a renovation, and where a first action was referred, on consent, then a second non-lien action was commenced and not referred. The owner, as opposed to the lien claimants themselves, moved successfully to consolidate. Notwithstanding the parties' original consent, R. 59.06(2) allowed the court to consider the new facts and set aside the consent order. The order of reference was set aside and both actions proceeded before a judge. They could have done it the other way around and referred the non-lien action under Rule 54, and had them both dealt with by reference. Alleged prejudice was addressed and removed. Note that a Master cannot set aside a judgment of reference (**Rule 37.02(2)(b)**), but a Master can hear a motion to consolidate (**Rule 6, s. 8 of O. Reg. 302/18**).

34 **O. Reg. 302/18, s. 6(1)**.

35 *355304 Alberta Inc. v. Dot Energy Ltd.*, 1991 CarswellSask 238, 44 C.L.R. 137 (Q.B.).

36 *Olson & Johnson Co. v. McLeod*, 1913 CarswellAlta 231, 13 D.L.R. 945 (T.D.).

proceeding that bear no obvious relation to the parties involved in the issues that are the subject of the report.

Although the *Construction Act* clearly provides for consolidation, it does not specifically provide for the motion to consolidate.[37] In any event, the motion to consolidate is most commonly brought informally at the first lien pre-trial. The motion can and often is made by the owner as opposed to an individual lien claimant,[38] and equally often the order is made by the lien master entirely upon his or her own motion.

A motion to consolidate a lien action with a non-lien action may also be possible in some limited circumstances. If the lien action has been referred to a master for trial, the order of reference may be set aside, if necessary, to allow the court to make procedural orders that remove possible prejudice and achieve procedural uniformity, or, al-

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37 See *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*, 2003 CarswellOnt 210, [2003] O.J. No. 304 (S.C.J.) [Sandler]:

> By contrast, other sections use the word 'motion', e.g., sections 44(1), 44(2), 44(3), 44(4), 45(1), 45(2), 46(1), 46(2), 47(1), 53(2), 53(3), 56, 60(1). It is clear to me that a Master has jurisdiction to hear each of these 'motions'. Certain other sections contemplate motions by the court but do not use the word 'motion', e.g., sections 54(3), 57(2), 59(1), 59(2), 61(5)(c) and (d), 65 and 67. Again, it is clear to me that a Master has jurisdiction to hear motions under these sections as well. This is because of s. 67(6) which reads as follows: 'Where in this Act the court is empowered to do anything upon motion, the motion may be made in the manner provided for in the rule of court for the making of motions, regardless of whether any action has been commenced at the time the motion is made.' This section specifically refers to the situation where the court is empowered to do anything 'upon motion' (as distinct from 'may apply').
>
> In such a case, the 'Rules of court' apply, i.e., the Rules of Civil Procedure, and particularly, Rule 37 regarding motions, and especially, Rule 37.02(2) dealing with the jurisdiction of a Master to hear a motion." Note that as the *Act* clearly contemplates an order for consolidation, it must contemplate the proceedings necessary to obtain that order and, in the event that the motion to consolidate is brought formally, no leave of the court under **s. 13 of O. Reg. 302/18** need be obtained.

38 See, for example, *Justwork Construction Ltd. v. Groomes*, 1991 CarswellOnt 806, 48 C.L.R. 183 (Gen. Div.). *Justwork* dealt with two actions arising out of a major renovation project. One action was a lien action. One was not.

ternatively, the non-lien action could be referred to the master under the *Rules*.[39]

4.4.3 How do you connect lien actions?

The preceding discussion of consolidation is premised upon there being a multiplicity of lien actions with respect to the same improvement. This, however, is a simplistic view of construction lien litigation.

What about the possibility of an action against the labour and material payment bonding company for the defaulting payer, or an action against the builder's risk insurer for the damages "resulting" from faulty design or workmanship that is, itself, the subject of a pleaded defence or set-off?

Would it not be more expedient if these factually related, non-lien proceedings could be co-coordinated with the proceedings in the lien action? What about the situation in which there are common parties on several projects, and set-offs are pleaded, but the projects span several jurisdictions? What about the situation where there is a companion civil non-lien action in debt, either in the same geographical area as the lien action, or in some other jurisdiction? All of these situations raise the prospect of a multiplicity of proceedings and an unnecessarily expensive set of overlapping, or conflicting, pre-trial procedures, productions and discoveries.

The masters in Toronto will use the jurisdiction granted by **s. 50(2)** of the *Act*, and **Rule 6.01** of the *Rules of Civil Procedure*, to fashion "connecting orders" to resolve conflicting and duplicated procedures and schedules, and to speed all related matters to a hearing on their merits. Consider the following examples of orders that have been made in such circumstances:

> 1. The master in Toronto has "connected" a referred Toronto lien action with a referred Toronto labour and material payment bond action. In this case, the issue of entitlement was common to both actions, and it made sense that the pretrial procedures not be duplicated.[40]

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39 *Ibid.*

40 See *SIPGP No. 1 Inc. v. Eastern Construction Co.*, 2010 CarswellOnt 2414, [2010] O.J. No. 1597 (S.C.J.); additional reasons 2010 CarswellOnt 2962

2. The master in Toronto has "connected" a referred Toronto lien action with a non-referred Toronto non-lien action for debt. Once again, the central, common issue was entitlement, which made it desirable that the cases have common pre-trial procedures and that they be tried together, subject, of course, to the over-riding discretion of the presiding judge at trial to order otherwise (*Rule 6.02*).

3. The master in Toronto has "connected" a referred Toronto lien action with a non-referred St. Catharines non-lien civil action between the same parties, in debt, for the same reasons as immediately above, and notwithstanding the different geographical jurisdictions.

4. The master in Toronto has "connected" three referred Toronto lien actions, with respect to three separate improvements, with one non-referred Newmarket lien action involving the same defendant general contractor, where a central issue in the case was going to be the general contractor's ability to account among the four separate improvements.

These are examples only. Counsel and the court can apply the concept of "connection" to any combination of proceedings, on appropriate terms. A typical endorsement connecting a lien action with a non-lien action might be as follows:

> (The lien action) and (the non-lien action) are to be tried together with common productions and discoveries, and with one affidavit of documents from each party, bearing the titles of proceedings in all actions, to stand as the affidavit of documents of those parties in all actions, with the order of trial and order of evidence at trial to be determined by further direction at a trial management conference.

(S.C.J.), in which, on consent of the parties to the action, the judge referred a bond action to the construction lien master at Toronto having carriage of the construction lien action, to be tried together, or one after the other, as the construction lien master may direct, on terms similar to that of the judgment of reference in the construction lien action. In *Ontario Electrical Construction v. Stern*, 1997 CarswellOnt 703, 31 C.L.R. (2d) 150 (Gen. Div.), Master Sandler observed that Toronto masters are having lien and related non-lien proceedings such as bond actions and trust actions, referred to them for disposal together, much more frequently.

4.4.4 Carriage of a lien action

Whether the motion for consolidation is brought formally as a separate stand-alone motion, or informally as part of the first pre-trial conference, consolidation is an opportunity for enterprising counsel to take charge of a group of connected lien actions.

At one time a distinction was made between "conduct" of a lien action and "carriage" of a lien action. "Conduct" of a lien action was a term usually used only in multiple un-consolidated lien proceedings, whereas "carriage" tended to be applied to consolidated proceedings. If there ever was a legitimate distinction between these terms, it is now universally ignored. The term "conduct" in this technical sense is obsolete, and the term "carriage" is to be preferred. The title of this book, for example, uses the word "conduct" in its most general, non-technical sense.

Consolidation and carriage are procedural concepts only. They do not effect substantive change. The essential character of the consolidated lien actions remains the same, even if, by consolidation, a counterclaim raising non-lien issues becomes part of the consolidated lien proceedings.[41]

The statute provides that carriage may be awarded to "any person who has a perfected lien", thus carriage is properly awarded to a lien claimant and not to that lien claimant's lawyer.[42] As a matter of day-to-day practice, however, it is the lawyer for the lien claimant who is awarded carriage, not the lien claimant itself. The chief duty of the lawyer having carriage is simply to properly serve notice of trial and get all necessary and proper parties before the court. Lawyers who take out the judgment of reference and see to the service of notice of trial on all necessary and proper parties therefore have *de facto* "carriage" of the consolidated lien action until the time of the first lien pre-trial. There the issue is re-visited. If the actions are factually and

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41 *Bruce-Grey Roman Catholic Separate School Board v. Carosi Construction Ltd.*, 1998 CarswellOnt 1586, 39 C.L.R. (2d) 75 (Gen. Div.). It must be recalled that under **s. 2(1) of O. Reg. 302/18**, there can be no counterclaim against a non-party in a lien action, see: *Wharton Enterprises Ltd. v. Brompton Financial Corp.*, 1990 CarswellOnt 345, 37 C.L.R. 121 (H.C.), and *Vinpat Construction Ltd. v. Henze Holdings Inc.*, 2002 CarswellOnt 2274, 18 C.L.R. (3d) 307 (S.C.J.).

42 **O. Reg. 302/18, s. (8)**.

legally distinct, carriage may become irrelevant.[43] The real debate about carriage, therefore, must await the first lien pre-trial.

In many cases before the master at Toronto, the quantum of holdback is either agreed to by the owner in advance of trial or the lien claimants decide they are not willing to dispute the 10% owner's holdback, as they receive only a "dime on the dollar" for their efforts to increase that number. The only issue in many lien cases is therefore the validity of individual liens and their quantum, in which case each claimant is on their own for proof and argument, and consolidation and salvage costs have very little relevance. Carriage of a lien proceeding, or series of lien proceedings, whether consolidated or not, can be split among two or more lien claimants if it is reasonable in the circumstances to do so.[44]

Lawyers having carriage of a lien action may choose to discharge their obligation to the court passively or actively.[45] The passive exercise of carriage involves the mere clerical function of seeing to it that the right paper flows to and from the right people at the right time. The active exercise of carriage involves marshalling counsel, parties and resources to achieve early settlement, narrowing issues using all resources available, and making the most efficient use of court time during the trial (which, as we have seen in referred actions, commences at the first lien pre-trial). A lawyer may perform the follow-

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43 An example may help. In a case in which there was an insolvent general contractor, liens by a handful of subcontractors and suppliers, and an agreed holdback in the hands of the owner, carriage (and, as a result, the right to claim and recover salvage costs as a first priority in the lien claimants holdback fund) will be denied. The Master in such a case will be managing the case so as to maximize the distribution for each individual lien claimant and will not want to see this fund eroded by salvage costs. The Master may well choose to exercise effective "carriage" him or herself.

44 See the endorsement of Ground J. in *Livent Inc., Re*, 1998 CarswellOnt 4928 (Gen. Div. [Commercial List]); affirmed 1999 CarswellOnt 3623 (C.A.).

45 *B.A. Robinson Plumbing & Heating Ltd. v. Dunwoodco Ltd. (Trustee of)*, 1968 CarswellOnt 219, [1968] 2 O.R. 826 (S.C.), *Bre-Aar Excavating Ltd. v. D'Angela Construction (Ontario) Ltd.*, 1975 CarswellOnt 132, 8 O.R. (2d) 598 (S.C.), *Nor-Min Supplies Ltd. v. Canadian National Railway*, 1980 CarswellOnt 576, 28 O.R. (2d) 663 (H.C.), *Gilvesy Construction v. 810941 Ontario Ltd.*, 1994 CarswellOnt 1109, 22 C.L.R. (2d) 203 (Gen. Div.).

ing tasks in actively carrying out their mandate of carriage:

1. Develop a common e-mail list or file transfer protocol website, carefully logging all communications and will use this list to communicate with everyone about everything. This level of reporting and communication function is fundamental to an award of salvage costs. If anyone is left out of the loop, they will not be asked to contribute to salvage costs in the final result, as they will not have had the full benefit of the services provided by the lawyer having carriage.

2. Develop a complete, accurate, reliable spreadsheet or chart showing the participants in the lien proceeding in their degrees of privity of contract with the owner and in relation to each other. A good spreadsheet or chart is not a merely a mailing list of names, addresses, telephone and facsimile numbers. It is also a diagrammatic representation of the entire construction pyramid (including the names of owners, tenants, mortgagees, any third parties if relevant, and the defendants in other lien actions related to the improvement) that contains all relevant information at a single glance. "All relevant information" usually means all lien claimants' correct names, correct lien registration number(s), correct certificate of action registration number(s), correct court file number(s), correct lien amounts, and counsel's firm and personal names, telephone numbers, fax numbers and e-mail addresses, all in a single diagrammatic information box at the top of the spreadsheet or chart, with each information box linked together in tiers of priority, connected by lines just like a family trees. If there are multiple owners, or a complex title, this would be shown in a second box on the same sheet and if there were miscellaneous parties or proceedings not yet "connected" to the lien proceedings, they would be listed in a third box on the same sheet. It is important to try to fit all of this information on a single sheet of paper, even if that sheet of paper has to be 11x17 or larger in size so that it can all be taken in at a single glance. This spreadsheet or chart will allow everyone to see at a glance who is who, what is what, and how big an interest each has in the holdbacks, and at what level. A good spreadsheet or chart of this type is an important first step for the next important exercise required of the lawyer taking active carriage of a consolidated lien action: good

mathematics. This spreadsheet should be given to the court at the first pre-trial conference not as an exhibit, but merely as an aid to counsel and the court.

3. Do the math. Good mathematics are essential. It may be possible for the lawyer having carriage to make some assumptions about the amount and distribution of holdback and circulate these assumptions among the parties in advance of one of the pretrial attendances.

If the holdback issue can be resolved, the case may come down to individual actions in debt over a fixed share of holdback, in which case the actions may well be deconsolidated. Therefore, it is an important function of active carriage of a consolidated lien action that a draft, multi-tier distribution sheet should be prepared showing the likely distribution of holdback.

If the parties do not do this in advance of the first pre-trial, it is likely to be required of them at the first pre-trial by the presiding judge or master. This chart should make a reasoned assumption about the value of holdback and answer the question: "how much does each person on the chart get, given these reasonable assumptions about the value of holdback".

4. Become a focal point for the vetting committee process. The nature and purpose of the vetting committee is described in detail above. The lawyer having carriage of a lien action should also be the initial chairperson and secretary of the vetting committee. This vetting committee will establish threshold proof of timeliness, lienability and quantum, which may all lead to a narrowing of issues or the complete or partial settlement of the lien action.

5. Assume responsibility for any motions to be brought for orders for specific directions, or for summary resolution of issues. Any weakness in any of the lien claims should be brought forward by the lawyer having carriage and either settled by negotiation, or motion if possible, prior to trial or reference.

6. Prepare, circulate, finalize and file a "Scott Schedule" and make an on-going, well-documented, consistent series of efforts to broker some kind of consensus as to what the real issues are, among which parties, and requisite of what proof.

7. Lead all subsequent pre-trials and case management confer-

ences, as a kind of "master of ceremonies", having first circulated an agenda for the pre-trial among all interested parties, updated the "cast of characters" spreadsheet or chart, provided the court with an up-to-date, non-controversial chronology and brief of relevant correspondence.

8. Convene and conduct a formal settlement meeting at the appropriate time, if necessary.

9. Serve notice of trial[46] and report to the trial judge or master at the opening of the trial on the conduct of the matter to that point and as to the suggested order of witnesses and issues at trial. All of this, of course, is subject to any specific court directions that have been given, and is also subject to variation in local practice. In Toronto, the case is usually so refined by the time any evidence is heard, that the organization of the evidentiary portion of the ongoing trial will already have been determined.

10. Keep separate, detailed, itemized dockets of their services and disbursements and should send this information to all lien claimants' lawyers on a regular, cumulative, interim basis. Awards of interim salvage costs can and will be made if the costs of carriage become significant or in any way burdensome to counsel for the lien claimant having carriage. The more active and demonstrably productive the role of counsel in carriage of the consolidated lien action, the more likely the interim award of salvage costs.

11. Draft the judgment or report in the prescribed statutory form, and see it through to entry and confirmation.

12. Lead the response to any motion to oppose confirmation of the master's report, or appeal of any aspect of the final disposition. In such a case, costs are at large and in the discretion of the appellate court or the court hearing the motion to oppose confirmation of the report of the referee. Note that counsel successfully

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46 This can be more onerous than it sounds, and it is a very important step in a lien action. Be sure to have your order of reference in place if you intend to move before the Master to fix a trial date, preparatory to serving a notice of trial. In this regard see: Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference at p. 9.

resisting such an appeal or motion should specifically request an endorsement making the fixed costs of the appeal or motion part of the underlying lien judgment, so that the costs award can be enforced against the land. Although **s. 14** speaks only of a lien for the price of services and materials supplied to an improvement, the forms of judgment and report, **O. Reg. 303/18**, **Forms 19 and 21**, paragraph 1 in each case, contemplate that the lien claimant will have judgment for the amount in "Column 5", which, again in each case, appears to include both the principal amount of the lien and costs. Notwithstanding the express provision of **s. 62(1)** that the results of the trial shall be embodied in a judgment in the prescribed form, or in a report in the prescribed form, the prescribed forms themselves are expressed in the regulation to be permissive, not mandatory, and practice varies as to how they are adopted and relied on from case to case.

4.4.5 Salvage costs

As we have just seen, "carriage" describes the activities of a lawyer, or small group of lawyers, in marshalling the parties and issues toward settlement or trial on their merits. As we have also seen above, an award of carriage can entail a significant obligation on the part of that lien claimant's lawyer to the court as well as to the other litigants. Who pays?

It is common to speak of an "award" of carriage, as if it was a prize of some kind. In fact, for many years, this was exactly how it was perceived by lawyers practising in the area. There was occasionally competition over who could obtain carriage of a large or high profile lien action. An award of carriage was something to be pursued and "won" because it meant that the lawyer for that lien claimant could reasonably be assured of "salvage costs" payable out of the gross proceeds recovered in the lien proceedings. The basis of an award of "salvage costs" was one of complete indemnity, on the theory that an agent's indemnity from a principal and should be complete. Salvage costs could be substantial.

Thus, experienced lien lawyers in relatively small, or minor lien matters, say by a remote supplier in the construction pyramid, could involve themselves into a much larger lien proceeding, obtain an award of carriage and be assured of a fee by virtue of a claim for salvage costs. That lawyer would then emerge as lead counsel in the

overall litigation, with responsibility for the conduct all lien claims and argument of many interesting and challenging issues, all with relative security for payment.

This kind of initiative is not seen much any more, for several reasons. The court is much more "hands-on" now than it was those many years ago. Our lien courts are far more active in giving detailed directions for the conduct of the matter than they were in the past, removing much of this responsibility from counsel. This is consistent with case management principles. Much less is left to counsel. Also, courts have also become more cost conscious. They do not want to see holdback consumed by the costs of the proceedings. The court is sensitive to the relative positions of the disputants, and is reluctant to burden conciliatory parties with the costs of proceedings incurred by disputing parties, in which they took no substantial or active part.[47]

Nevertheless, salvage costs are a well-recognized feature of construction lien litigation, even though they are not expressly provided for by the statute.[48] They may be awarded on an interim basis in the right case and are a matter for the final Report or Judgment.

The right to salvage costs is usually expressly recognized and affirmed in the order or direction of the court regarding carriage. The assessment and award of salvage costs can be made at any time but usually occurs at the end of the proceeding, whether by settlement, judgment or report.

Lawyers whose clients have carriage of a consolidated lien action or who work with a series of unconsolidated lien actions are usually entitled to "salvage costs" from the funds that would otherwise be payable to the lien claimants. However, it is not enough to show that he or she did work for the benefit of lien claimants to be entitled to salvage costs. In the absence of an appointment as carriage counsel or agreement by all parties, simply doing work that benefits other lien claimants is not sufficient reason or basis at law to "force" parties to

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47 Furthermore, the *Construction Act* has made lawyers particularly susceptible to costs awards against them, personally. With *Pineau v. Kretschmar Inc.*, 2004 CarswellOnt 6072, 42 C.L.R. (3d) 56 (S.C.J.), we see the current high water mark of such awards, in that case upon expiration of a lien under s. 37 of the *Act*.

48 *Gilvesy Construction v. 810941 Ontario Ltd.*, 1994 CarswellOnt 1109, 22 C.L.R. (2d) 203 (Gen. Div.) at p. 211 [C.L.R.], at paras. 51–53.

pay for another counsel's legal services.[49] In rare and fact-specific cases, awards of salvage costs have been made against owners and mortgagees.[50] When it comes to actually having to pay salvage costs, which may be substantial, many lien claimants forget the benefits they have enjoyed. If carriage has been handled properly throughout, these objections will usually form no impediment to the assessment and award of an indemnity for salvage costs.

Salvage costs were formerly described as a "solicitor and his own client" costs referable to carriage of the lien action. If there was no recovery of costs in the lien proceedings, there would be no fund out of which to pay salvage costs, notwithstanding that all parties would have saved money by having one lien claimant's lawyer bear that burden. In such cases, salvage costs have been awarded and fixed against others who notionally benefited from the work done. An interesting question arises, which, to the author's knowledge, has never been judicially considered: What happens if the costs of proceedings taken by a lawyer having carriage are awarded against that party, or the lien claimants generally? Presumably, the assessment of such costs against the lien claimants would be the matter of an exercise of discretion, but the primary responsibility for such costs would fall and remain upon the nominal, individual lien claimant named as having carriage.[51]

In considering the amount to award for salvage costs, and who should pay, the court will consider the following:

1. Who benefited and to what degree?
2. How effective were the services provided?

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49 *Quality Rugs of Canada Ltd. v. Sedona Development Group (Lorne Park) Inc.*, 2016 ONSC 7896, 2016 CarswellOnt 20473 (S.C.J.); additional reasons 2017 CarswellOnt 3183 (S.C.J.).

50 The general practice is that if the owner and the mortgagee have performed their statutory obligations with respect to the retention of holdback, no order of salvage costs will be made against them. Even if insufficient funds are recovered among the lien claimants to satisfy an order for salvage costs (itself a rare event), it will not be sufficient to turn to the owner or mortgagee simply because they have the means to pay. The argument that a party should pay because it can is a specious argument, but it is still made from time to time.

51 As for the interaction between **s. 86** and **Rule 57**, see *Pineau v. Kretschmar Inc.*, 2004 CarswellOnt 3189, 42 C.L.R. (3d) 37 (S.C.J.).

3. Was the least expensive course taken under **s. 86(2)**?

The principal authority in the area is still the decision of Master D. McRae in *B.A. Robinson Plumbing & Heating Ltd. v. Dunwoodco Ltd. (Trustee of)*.[52] The decision is often relied upon in lien cases[53] and is worth quoting at length:

> With respect to the objection to the amount claimed for salvage costs, it has been suggested that some written direction might be given to the profession or their guidance in the conduct of actions brought pursuant to the *Mechanics' Lien Act*. First, the term "salvage costs" as used in this context denotes those additional costs over and above the costs fairly referable to the realization of the plaintiff's claim, the results of which benefit all of the lienholders equally.
>
> A mechanics' lien action, while it is a class action, i.e., is brought on behalf of all lien claimants, differs from other class actions in that not only is a fund recovered in which all lien claimants are entitled to share but the individual lien claims are resolved as well so that the distribution of the fund is also determined. While there are questions as to which the lien claimants are in the same interest, e.g., the amount of the holdback and/or the amount properly owing by the owner to the person or persons through whom the individual lien claimants claim, there are also questions as to which the lien claimants are adverse to one another, e.g., the right of any other lien claimant to share in the holdback when the total lien claims exceed the holdback.
>
> It is, one supposes, in recognition of the difficulties inherent in such actions that the judge or officer who tries the action is given such wide powers as those granted to him by s. 42. [. . .]
>
> There are two courses open to the plaintiff. He may adopt the view that his function is only to get all the parties before the Court at the pre-trial hearing, in which case it is usually found to be desirable to appoint some group from among the lien claimants to review the various lien claims, the question of the owner's liability, etc., and make recommendations to the lien claimants when the matter is again brought on. In such a situation it is usual to recompense the solicitors who constitute the committee by an award of "salvage costs". Counsel for the plaintiff in this case has adopted the alternative mode of proceeding, i.e., before the trial he has thoroughly canvassed the lien claimants, reached conclusions as to the probable validity of their claims and by reason thereof, all the various lien claims have been resolved.
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> In addition, he has conducted inquiries and interviewed witnesses on the question of the hold back and by virtue thereof an agreement has been

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52 1968 CarswellOnt 219, [1968] 2 O.R. 826 (S.C.).

53 See, for example, *Chown, Cairns v. 601039 Ontario Ltd.*, 1994 CarswellOnt 3809, [1994] O.J. No. 2982 (Gen. Div.).

> reached between all parties as to the amount thereof. He is asking for salvage costs in the amount of $4,500 plus $181 disbursements and having regard to the complexity of the issues, the number of claimants and the time spent by him in the resolution of these claims, I fix the salvage costs at the amount requested.

The actual procedure for assessing salvage costs can be problematic. What if some of the lien claims have settled prior to the assessment and some have not?[54] How is the value that they obtained from a lawyer's carriage taken into account? What if all of the liens have been settled? Where does the money come from to pay salvage costs in those circumstances?

These questions have been answered, but the decisions were rarely, if ever, reported as they arose post-judgment in dealing with costs and not as part of the substantive order or proceeding. The following is a guide only.

The cases all turn on their facts:

1. If an owner has settled with individual lien claimants, but not all of them, the owner may be responsible to some degree for salvage costs portions attributed to the settled claimants.

2. If some but not all of the lien claimants have settled amongst themselves, some kind of equitable apportionment of salvage costs will be achieved.[55]

3. If a fund must be distributed, the salvage costs will be charged against the fund, regardless of what arrangements may have been made in settlements between and among some of the parties.[56]

4. The basis for liability and assessment is that of an agent who is taxing an account against a principal on a solicitor and client

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54 See *Nor-Min Supplies Ltd. v. Canadian National Railway*, 1980 CarswellOnt 576, 28 O.R. (2d) 663 (H.C.).

55 In *Nor-Min Supplies Ltd. v. Canadian National Railway*, 1980 CarswellOnt 576, 28 O.R. (2d) 663 (H.C.), the court held that where prior to trial certain claims were settled, and where the owner was entitled to benefit from a 25% limitation on maximum available costs under the *Act*, the fund available for the remaining plaintiffs had to be reduced. In the absence of an agreement, the reduction had to be made on the basis of the percentage of the costs fund, which the settled claims as found bore to the total claim so found.

56 *Livent Inc., Re*, 1998 CarswellOnt 4928 (Gen. Div. [Commercial List]); affirmed 1999 CarswellOnt 3623 (C.A.).

basis.[57]

5. The lawyer who assumes carriage without an order specifically providing for the interim and final award of salvage costs may fare less well than lawyers who move or apply for and get an initial order permitting, or at least acknowledging an entitlement to salvage costs. This initial order usually provides that the lawyer is entitled to "salvage costs" from such parties and in such amounts as the court may later determine.

6. A lawyer who can no longer continue with carriage due to a falling out with their client, or some conflict or other circumstance, can apply for leave under **s. 13 of O. Reg. 302/18**, and directions under **Rule 55.01(1)**, removing their client as lien claimant having carriage, and appointing another lien claimant in their place, and awarding and assessing interim salvage costs.

4.5 Section 37

4.5.1 Expiration of the perfected lien

If there is one section in the *Construction Act* that takes more lawyers by surprise than any other, even though it has been around since 1937, it is **s. 37**. **Section 37** is a provision designed to prevent abandoned liens from cluttering title indefinitely. **Section 37** extinguishes liens upon mere passage of time. **Section 46** permits the necessary order to be obtained *ex parte* declaring the lien expired, 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.

Section 37 provides that a perfected lien expires immediately after the second anniversary of the commencement of the action that perfected the lien, unless 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 within that period. These requirements are not cumulative, so that meeting either will suffice.[58]

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57 *Nor-Min Supplies Ltd. v. Canadian National Railway*, 1980 CarswellOnt 576, 28 O.R. (2d) 663 (H.C.).

58 *Sayers & Associates Ltd. v. United Centre Inc.*, 1994 CarswellOnt 937, 13 C.L.R. (2d) 42 (Div. Ct.); leave to appeal refused *Forest Carpentry Ltd. v. Shoppers Trust Co*, 1994 CarswellOnt 4565 (C.A.); leave to appeal refused 1994

Local practices vary considerably as to how to set an action down for trial. Reference should be made to Appendix IV of this volume, a procedural guide to all Ontario court offices. It is crucial, however, that the precise requirements of **s. 37** be met. In *Pineau v. Kretschmar Inc.*,[59] Master Sandler set out the requirements to be followed in Toronto:

> If the premises are situate within the legal limits of the City of Toronto, the action must be commenced by the issuing of a statement of claim in the Toronto office of the Superior Court of Justice — s. 53(1). The statement of claim must then be served, within 90 days, subject to extension — see s. 53(2).
>
> The exchange of pleadings is governed by sections 54(1) and 53(3), and sections 55 and 56. Noting in default is provided by s. 54(2).
>
> At this point, a decision must be made as to whether the case is to be tried by a *judge* or by a *master*. The election is usually made by the plaintiff but can, in fact, be made as well by any defending party.
>
> If any party wants a *judge* to hear the case, it sets the action down for trial under Rules 48.01 and 48.02, (serving and filing a trial record), but it must also have regard to Rule 48.04 about not thereafter initiating or continuing any form of discovery or any motions (except with leave of the court). And leave (consent) for any discovery or any motions is, in any event, required by s. 67(2), so any discovery or other interlocutory proceeding must be proceeded with first. Such leave (consent) is dealt with by the Toronto construction lien motions master (currently, Master Saunders) on Mondays. This party must then also serve a notice of trial (statutory form) as required by s. 60(4), on all persons described in s. 60(2). This is a requirement of the Act and not the Rules. Presumably, the form of notice of trial for Toronto lien actions to be tried by judges must be modified so that it is returnable in Trial Scheduling Court at the same date/time as the Trial Scheduling Unit's notice and this is because of the use of the Trial Scheduling Court procedure in Toronto. (It is to be noted that s. 67(3) of the Act provides that the *Courts of Justice Act* and the Rules of court (i.e., the Rules of Civil Procedure) apply to cases under the Act, except where inconsistent with the Act, and subject to s. 67(2).) Once the trial record has been served, and proof of service filed, the Toronto Trial Scheduling Office will issue a Trial Scheduling Court Notice which eventually results in the case ending up in Trial Scheduling Court (every Wednesday), about 5 to 6 months after the trial

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CarswellOnt 4092 (C.A.); *Creative Design Consultants v. Dawson*, 1993 CarswellOnt 4341 (Gen. Div.).

59 2004 CarswellOnt 548, 37 C.L.R. (3d) 29 (S.C.J.); additional reasons 2004 CarswellOnt 3189 (S.C.J.); additional reasons 2004 CarswellOnt 6072 (S.C.J.).

record was filed. While there is no case or practice direction on point, I think the s. 60(4) notice of trial, duly modified, should be returnable for the scheduled Trial Scheduling Court date. The case will be assigned to one of the four Toronto Teams and the presiding Trial Scheduling Court judge will fix a trial date in the presence of counsel for all parties and other affected persons such as other lien claimants, or possibly, give other directions. For who are the other affected persons, see s. 60(4) and especially, s. 60(2).

This path is very rarely followed in Toronto. Even if it is, s. 58(3) of the Act provides that, at trial, (or presumably at Trial Scheduling Court), the trial judge may, on his or her own motion, direct a reference to a Toronto master, or to a case management master. This has often been done by Toronto trial judges, especially where there are multiple parties, or, in a two-party dispute, or where the trial will be lengthy, or where there are a large number of disputed extras and deficiencies in issue, often in a house construction or house renovation case or where the amount in issue is small.

If any party (usually, the plaintiff) wants a *master* to hear the case, (the usual procedure), then this party must obtain a judgment of reference under s. 58(1) of the Act to a Toronto master or case management master. Section 58(1) and s. 67(6), detail how the motion for this judgment of reference is to be made. Either all parties must consent *or* notice of the motion must be given to any defending party who won't consent. (For non-defending parties who have been noted in default — see s. 54(4).)

The form of this judgment of reference is mandated by Ont. Reg. 175, R.R.O. 1990, s. 2(16) and Form 16. Note that this Regulation provides that the judgment under s. 58 "shall be in Form 16". Form 16 contains four specific paragraphs, the most important of which provides that ". . . this action be referred to the master at Toronto . . . for trial" who is to issue a report that must then be confirmed — see s. 62(1)(b) and Rules 54.07(1) and 54.09(1).

Once the judgment of reference has been obtained, then the party obtaining that judgment (or, in fact, any other party) must make a motion to the court (a master), without notice, to have a date, time and place fixed for the trial of the action. This is a routine motion. The date so fixed is called, colloquially the "first construction lien pre-trial" but is really the first day of the trial. I have previously described this procedure in the case of *Ontario Electrical Construction v. Stern* (1997), 31 C.L.R. (2d) 150 (Ont. Master), *at pp. 166-167, and this procedure* has also been described and approved of by Beaulieu J. in *York Marble, Tile & Terrazzo Ltd. v. Exim Group of Canada Inc.* (1998), 41 C.L.R. (2d) 110 at pp. 112 (Ont. Gen. Div.).

Once this order has been obtained, the party who obtained it (usually the plaintiff) must serve a properly worded notice of trial (and because masters require it, a copy of the order) on *all* persons described in s. 60(2) — see s. 60(4). This is, in the main, all other lien claimants, if any. A notice of trial *may be* in Form 17 but it *must* be served — (see the word "shall" in s.

60(4)). This notice of trial is a critical document. The person serving this notice of trial, and all persons served with it are "parties to the action" — see s. 57(2).

Once a master conducts the first "pre-trial", he or she is seized of the reference (trial), but is not so seized by reason *only* of having appointed the day, time and place for the trial (first "pre-trial") under s. 60(1) — see s. 52. So I became seized with this case on November 28.

As a matter of practice, Toronto construction lien masters do not order settlement meetings to take place, under s. 60(1), in Toronto lien actions, because the first "pre-trial", which is supervised by the master, is a more effective procedure than an unsupervised settlement meeting under s. 61. (Sometimes, the trial master may establish a Vetting Committee to scrutinize the various lien claim and report back but this is a totally different procedure than a settlement meeting under s. 61). Outside of Toronto, in some jurisdictions, settlement meetings are often ordered. The practice varies across the Province.

It is critical to note that under s. 37(1) of the Act, there is a provision that if, within two years after the date of the statement of claim, *the* action, or *an* action in which the lien may be enforced (a subtle distinction) has not been set down for trial, or an order has not been made fixing a trial date under s. 60(2), the lien expires, and a motion may then be brought to declare the lien expired under s. 46. This motion may be brought without notice, unless costs are claimed (or unless notice is directed to be given on the original without-notice motion, by the court, because of the peculiar circumstances something I sometimes do and now seem to be doing more frequently.).

I have previously ruled that a judgment of reference under s. 58(1) is *not* an "order fixing a trial date" under s. 37(1) 1. An order under s. 60(1) is required in order to stop the time running. But I have seen an order of a judge that combined both a s. 58(1) order and a s. 60(1) order, this being done when the time limit was about to expire. But it was on consent.

It is not enough to stop the **s. 37** period to merely convene a settlement meeting or schedule a pre-trial conference.[60] Nor is a default judgment obtained from a registrar over the counter sufficient to meet the requirements of **s. 37**.[61] Nor is it enough to obtain a judgment of reference. It is only when the entered judgment of reference is taken to the master on an *ex parte* motion and the master fixes a date for the first lien pre-trial that "an order for the trial of an action in which the

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60 *Ionion Construction Inc. v. Christo*, 1991 CarswellOnt 787, 46 C.L.R. 135 (Gen. Div.).

61 *Built-Con Contracting Ltd. v. Lisgar Construction Co.*, 2016 ONSC 1720, 2016 CarswellOnt 3494 (S.C.J.).

lien may be enforced" has been made.

Outside of Toronto, it is common to proceed under the second arm of **s. 37** and to simply set the action down for trial on a fixed date.

The action in which the lien may be enforced need not be the very action which perfected the lien in question. As long as a lien claimant sets down its action for trial within the two years stipulated by **s. 37**, that action is an action in which any other lien claimant working on or supplying to the same improvement on the same premises may enforce its lien.[62]

It is submitted that this result properly reflects the scheme of the *Act*, since all other lien claimants, by virtue of having been served with the notice of trial are "parties to the action" that was set down.[63]

This is not to say that lien claimants may always rely on the actions of other lien claimants to preserve their rights. The actions which perfect liens or protect a perfected lien from expiring must occur within the times set out in the *Act*. If a particular lien has expired at the time the step is taken, it will not be saved by the actions of the other lien claimant.[64]

The appropriate date from which to count the two-year period is the date the action was commenced, not the date the certificate of action was registered or issued. If your lien is sheltered, the two-year period runs from the date the action under which it is sheltering was commenced, not the later date on which the lien claimant's own action

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62 *Deslaurier Custom Cabinets Inc. v. 6383009 Canada Inc.*, 2012 CarswellOnt 7205 (S.C.J.); additional reasons 2012 CarswellOnt 12700 (S.C.J.). The decision in *D.W. Buchanan Construction Ltd. v. Bruce (Township)*, 1996 CarswellOnt 423, 27 C.L.R. (2d) 180 (Gen. Div.), *which has been relied upon for the proposition that "an action in which the lien may be enforced" means "the action" which perfected the lien, was* held by the court in *Deslaurier* to be "so confusing and the procedural history so convoluted that it is impossible to determine what principles the court has applied". It is submitted that *Buchanan* should be confined to its facts, whatever they were, and that it does not create a binding authority for the cited proposition. See also the editorial note following the reported decision in H. J. Kirsh, *Kirsh's Construction Lien Case Finder*, Vol. 3 (Markham: LexisNexis, 1992) at 37.38.

63 O. Reg. 302/18, s. 6(2).

64 Quoted from *Deslaurier Custom Cabinets Inc. v. 6383009 Canada Inc.*, 2012 CarswellOnt 7205 (S.C.J.); additional reasons 2012 CarswellOnt 12700 (S.C.J.).

may have been commenced.[65] For this reason, if the plaintiff in the sheltering action later settles, the plaintiff may not be able to get its certificate of action off title without giving notice to the sheltered lien claimant and appropriate directions under **s. 47(2)**. Notwithstanding what would appear to be the clear language of **s. 47(2)**, parties settling lien claims are often surprised that settlement funds will not move unless and until the certificate of the settled action is vacated and the settled lien action dismissed with appropriate directions under **s. 47(2)**.

Once the two-year period has expired without any of the actions required by **s. 37** having taken place, it will not matter that you are in the middle of discoveries, or if you are in the middle of the appeal process on other matters,[66] or if the party taking advantage of the process is itself in actual contempt of court orders important to the progress of the action toward trial.[67] It will not matter that you are in the middle of settlement discussions.[68] It will not matter that you are in arbitration and the underlying action is stayed.[69] There are no eq-

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65 *Rainone Construction Ltd. v. American Barrick Resources Corp.*, 1991 CarswellOnt 771, 43 C.L.R. 259 (Gen. Div.). For a discussion of what is and is not necessary when perfection is under a sheltered claim and s. 37 is invoked, see *J. Sousa Contractor Ltd. v. Kinalea Development Corp.*, 1994 CarswellOnt 946, 17 C.L.R. (2d) 94 (Gen. Div.); additional reasons 1994 CarswellOnt 954 (Gen. Div.); affirmed 1996 CarswellOnt 1312 (Div. Ct.).

66 See, for example, *Mohiuddin v. Ahmadiyya Movement in Islam (Ontario) Inc.*, 1995 CarswellOnt 954 (C.A.).

67 *Golden City Ceramic & Tile Co. v. Iona Corp.*, 1991 CarswellOnt 811, 48 C.L.R. 266 (Gen. Div.); affirmed 1993 CarswellOnt 826, 12 C.L.R. (2d) 1 (Div. Ct.).

68 *Graham Brothers Construction Ltd. v. Correct Building Corp.*, 1991 CarswellOnt 789, 46 C.L.R. 205 (Gen. Div.).

69 *Automatic Systems Inc. v. Bracknell Corp.*, 1994 CarswellOnt 226, 13 C.L.R. (2d) 171 (C.A.). In those cases, a lifting of the stay should be sought and will be granted for the purpose of complying with the expiration provisions. It will not matter how unfair the circumstances seem.

uities.[70] There is no room for discretion.[71] If the period passes, the lien expires and "any person" can move before the court, *ex parte*, to declare the lien expired and dismiss the action and vacate the registration of the claim for lien and certificate of action.[72] Even if the parties agree to a date beyond the two-year period, it will not save the lien. In *QH Renovation & Construction Corp. v. 2460500 Ontario Ltd.*,[73] the court declared a lien expired for failure to set down the action down for trial within the two-year period mandated by s. 37 of the *Construction Lien Act*, even though the parties had agreed to a timetable order providing for a later date to set down the action. The Master held that there was no authority for the proposition that parties could, through mutual agreement or by a consent court order, agree to extend the mandatory time period set out in s. 37. The section has been unsuccessfully challenged as discriminatory under the

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70 There appears to be a single case that approached the issue as a matter of liberal interpretation of the section, and that would appear to be anomalous: *K-W Blair Readymix v. Matsias*, 1993 CarswellOnt 5707 (Gen. Div.).

71 *Benjamin Schultz & Associates Ltd. v. Samet*, 1991 CarswellOnt 792, 4 O.R. (3d) 771, 46 C.L.R. 317, 83 D.L.R. (4th) 574 (Div. Ct.); *Bird Construction Co. v. C.S. Yachts Ltd.*, 1990 CarswellOnt 689, 46 C.L.R. 192 (Div. Ct.); *Eurocor Ltd. v. Vernich*, 1992 CarswellOnt 848, 9 O.R. (3d) 631, 2 C.L.R. (2d) 208 (Gen. Div.); additional reasons 1995 CarswellOnt 4534 (Gen. Div.).

72 As an example of just how draconian the statute can be, consider *UMA Engineering Ltd. v. P.O.L. Developments Inc.* (September 27, 1994), Eberhard J. (Ont. Gen. Div.), in which a trial record was actually prepared and filed and served on the last possible day, but, because service of the trial record was not immediately effective under r. 16.06(2), the liens expired. An appeal was taken but the case settled before it was heard. And see: *Burnt Hill Developments Ltd. v. Eglinton Village Ltd.*, 1992 CarswellOnt 874, [1992] O.J. No. 2545 (Gen. Div.), where the lien claimant actually got an order "trial to be expedited, Assignment Court Sept.8/92", but as no formal order was ever taken out, the lien failed. But see: *Jordan Construction Management Inc. v. Simcoe (County) Roman Catholic School Board*, 1996 CarswellOnt 2631, [1996] O.J. No. 2535 (Gen. Div.), where service was timely, but by facsimile and without the necessary consent to render it effective. The court there dispensed with the requirements of r. 16.05(3.2) and validated service, saving the lien.

73 2019 ONSC 3237, 2019 CarswellOnt 8577 (S.C.J.); additional reasons 2019 CarswellOnt 10988 (S.C.J.).

Charter.[74]

There is one decision that granted relief where service of a trial record was effected one day after the two-year period expired,[75] but that decision has been questioned in commentary.[76] It has also been held in *1475707 Ontario Inc. v. Foran*[77] that an attempt to set an action down for trial by filing a defective trial record was sufficient compliance with s. 37.[78]

Does any part of a s. 37-barred lien action survive? The Court of Appeal has now reconciled the case law in this area.[79] Not every dismissal under **s. 46** defeats a claim for personal judgment. Where the lien has expired, and an order is made under **s. 46(1)** disposing of the lien action, the court has discretion whether to dismiss the claim for

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74 *U.C.L. Underground Construction Ltd. v. High Glen Development Ltd.*, 1990 CarswellOnt 670, 42 C.L.R. 1 (Gen. Div.).

75 *MacKenzie Group Inc. v. Hobby Jewellery Ltd.*, 2007 CarswellOnt 3489 (S.C.J.).

76 Bristow, Glaholt, Reynolds & Wise, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed. (Toronto: Carswell, 2005) at 7.3.

77 2013 CarswellOnt 15238, 117 O.R. (3d) 772 (Div. Ct.); affirmed 2014 CarswellOnt 16470, 36 C.L.R. (4th) 1 (C.A.).

78 On that point, the court expressly overruled *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 CarswellOnt 721, 90 C.L.R. (3d) 250 (S.C.J.).

79 See: *Teepee Excavation & Grading Ltd. v. Niran Construction Ltd.*, 2000 CarswellOnt 2335, 49 O.R. (3d) 612 (C.A.). The earlier cases were *A.J. (Archie) Goodale Ltd. v. Risidore Brothers Ltd.*, 1975 CarswellOnt 834, 8 O.R. (2d) 427 (C.A.); *Bird Construction Co. v. C.S. Yachts Ltd.*, 1990 CarswellOnt 689, 46 C.L.R. 192 (Div. Ct.); *Mast Construction (Ontario) Inc. v. Appleton* (November 5, 1990), Campbell J., Granger J., O'Driscoll J (Ont. Div. Ct.); *Benjamin Schultz & Associates Ltd. v. Samet*, 1991 CarswellOnt 792, 4 O.R. (3d) 771 (Div. Ct.); *612354 Ontario Ltd. v. Tonecraft Corp.*, 1991 CarswellOnt 799, 5 O.R. (3d) 764 (Gen. Div.); *Eurocor Ltd. v. Vernich*, 1992 CarswellOnt 848, 9 O.R. (3d) 631 (Gen. Div.); additional reasons 1995 CarswellOnt 4534 (Gen. Div.); *Golden City Ceramic & Tile Co. v. Iona Corp.*, 1993 CarswellOnt 826, 106 D.L.R. (4th) 532 (Div. Ct.). These cases must be read carefully in view of the result in *Teepee*. It is clear that the reasoning of the court in *Tonecraft*, *Golden City*, *Eurocor* and *Mast* is approved, and that the cases of *Benjamin Schultz and Bird Construction Co. v. C.S. Yachts Ltd.* are no longer representative of the current state of the law.

breach of contract made in the same action pursuant to **s. 47(1)(d)**.[80] The differences between **s. 46(1)** and **s. 47(1)(d)** are substantial. Under the former, the court has no discretion, and is required to dismiss a lien claim where the lien has expired. Under the latter, however, the court has discretion whether or not to dismiss the balance of the action, and is directed to exercise that discretion "upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances".[81] While the Court of Appeal in *Teepee* held that the guiding principle in interpreting s. 46(1) and s. 47(1)(d) was the avoidance of multiplicity of proceedings, the Divisional Court, in *1339408 Ontario Inc. v. 1579138 Ontario Inc.*,[82]

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80 *Teepee Excavation & Grading Ltd. v. Niran Construction Ltd.*, 2000 CarswellOnt 2335, 49 O.R. (3d) 612 (C.A.). Carthy J.A., for the court, held as follows: "The broad purpose of the legislation is to provide an efficient means of dealing with trade claimants that would otherwise be left behind without security if unpaid on a building project where payments typically flow from above and follow performance. On a failing or failed project, there may be many such claimants. In setting down the rules, the Act does not go so far as to restrict claims thereunder to lien claims. Contract claims by the plaintiff and counterclaims of any kind are permitted, presumably to avoid duplication of proceedings. In my view, avoidance of multiplicity of proceedings is the element of the Act that provides the direction for the interpretation of s. 46(1) and s. 47(1)(d). Howland J.A., in *A.J. (Archie) Goodale Ltd.*, set the tone for interpretation by observing that the Act should not be available as a subterfuge for pursuing an ordinary action by summary procedure; but where all of the steps have been taken and a conclusion reached at a hearing, the court should not dismiss the action for lack of a lien claim and thus compel a further proceeding concerning the same issue. The same reasoning suggests that the court has available the discretion to dismiss or to permit the action to proceed without the lien claim, as the circumstances dictate. All of the arguments against denying a defendant the procedures and protections of the usual form of litigation can be answered by the court's discretion under s. 47(1)(d) to dismiss the action because the defendant will be prejudiced or because little has transpired in the action that would be duplicated or by imposing conditions for continuance to assure protection of the defendant. The legislature intended more than claims for liens to be litigated in lien claim actions and that intention is best served by an interpretation of s. 46(1) and s. 47(1)(d) that leaves it to the court to monitor the interests of the parties and the procedure to be followed."

81 *1339408 Ontario Inc. v. 1579138 Ontario Inc.*, 2007 CarswellOnt 9443, 71 C.L.R. (3d) 13 (Div. Ct.).

82 2007 CarswellOnt 9443, 71 C.L.R. (3d) 13 (Div. Ct.).

held that with the advent of the *Limitations Act, 2002*, the avoidance of a multiplicity of proceedings was no longer a factor. The court held that if the two-year period for setting the action down for trial has expired, it follows that the two-year limitation period relating to an action in contract will also have expired, thereby precluding any subsequent action in contract. Thus, a plaintiff who sued the defendants within the prescribed limitation period would be denied access to the courts to pursue its claim, if the claims in contract are dismissed under s. 47(1)(d). In *1339408 Ontario Inc.*, the Divisional Court allowed the action in contract to proceed based in part on the enormous prejudice if the entire action were dismissed after expiry of the two-year limitation period.

Based on these precedents, it has now been held that if the two-year limitation period under the *Limitations Act, 2002*, has expired, as would always be the case if the lien action were to be dismissed under ss. 37(1) and (2) and 46(1) of the *Act*, then a court should allow the contract claim to continue in the existing action and direct what procedure is to govern. If the limitation period has not expired, the *Teepee* case, *supra*, makes it clear that the court has discretion as to whether to allow the contract claim to go forward in the existing action or to dismiss the entire action with the possibility of the contract claimant starting a new non-lien contract action. If the contract claim is to continue in the existing action, the court should provide what procedure is to govern.[83]

The cost consequences of missing a **s. 37** period can be severe. As a result of the 2004 decision of Master Sandler in *Pineau v. Kretschmar Inc.*,[84] these costs may be visited upon the responsible lawyer and not on the parties themselves. At least three important principles emerged from the *Pineau* decision:

> 1. The conduct of the *defendants* in a **s. 37** situation is irrelevant. It will either be excused or not considered in the decision to allocate costs to the plaintiff's lawyers, unless some high-handed, intentional or misleading conduct is involved;

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83 Quoted from *2183164 Ontario Inc. v. Gillani*, 2012 CarswellOnt 7261 (S.C.J.); additional reasons 2012 CarswellOnt 8627 (S.C.J.); reversed on other grounds 2013 ONSC 1456, 2013 CarswellOnt 2891 (Div. Ct.).

84 2004 CarswellOnt 3189, 42 C.L.R. (3d) 37 (S.C.J.).

2. **Rule 57.07** of the *Rules of Civil Procedure*, and **s. 86** of the *Construction Act* mutually reinforce one another. They are *each* available to the court to sort out a **s. 37** issue;

3. **Section 86** requires no element of intention, reprehensible conduct, bad faith, or encouraging of prejudice or delay on the part of the responsible lawyer. All that is required is that as a result of the lawyer's actions the conduct of the action was prejudiced or delayed. Simple negligence on the part of the plaintiff's counsel is enough to attract a personal costs award. This is an objective, rather than a subjective test.

If there is a single best practice to be gleaned from this, it is that every lawyer must diarize this two-year period, giving plenty of time for compliance. The lien claimant's lawyer must ensure that s. 37 does not extinguish their client's lien rights. The defendants' lawyer will also want to diarize the date, but for precisely the opposite reason, to be in a position to move under s. 46, *ex parte* if possible, to have the lien declared expired and the action dismissed if the two-year period passes.

4.5.2 Motion to declare a lien expired, vacate registration, pay out security and dismiss an action

The motion to discharge a lien and dismiss a lien action once the **s. 37** two-year period has passed is brought under **s. 46**.[85] The motion may be brought by "any person", which would include interested parties such as mortgagees and former and current owners pursuant to undertakings exchanged on closing. The motion may be made without notice if the person bringing the motion is willing to waive costs.[86] The masters in Toronto, however, have cautioned that unless the case is absolutely clear that the lien has expired, it is advisable to bring such motions on notice.[87]

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85 It is worth noting here that the appropriate order is not an order "discharging" a lien under this section, but an order "declaring the lien expired". This simple mistake is a common cause of motion materials being returned or matters being deferred or adjourned.

86 *Construction Act*, R.S.O. 1990, c. C.30, **s. 46(3)**.

87 Master Donald E. Short and Master Todd Robinson, "Tips for a Successful Hearing Before a Construction Court Master", Presentation to the Advocates'

We have some guidance from the court as to when one would expect a **s. 46** motion to be brought. In the July 29, 2004 endorsement of Master Sandler in *Pineau v. Kretschmar Inc.*,[88] it was held that in the usual case of a lien claimant not setting a case down for trial and the two-year period expiring, the "least expensive course" that should be chosen, pursuant to **s. 86(2)**, is for a party to move under **s. 46** immediately. The court distinguished two circumstances, one where there is no privity of contract between the moving party and the expired lien claimant, and another where there is privity between them:

> 1. Where there is no direct contract between the moving party and the expired lien claimant, so that a **s. 63** judgment would be unavailable, a defendant must move under **s. 46**, and not let the action proceed to trial where expiration of the lien would then successfully be argued. If a defendant allows this, it could expose that party to severe, adverse costs consequences with respect to the entire action;
>
> 2. Where there is a direct contract between the moving party and the expired lien claimant, a party may choose not to move before trial under **s. 46** because of the option open to the court to let the action proceed to trial in any event as an action in debt.

Thus, if your client is in privity with an expired lien claimant under **s. 37**, you can choose to move or not. If your client is not in privity with an expired lien claimant, you must move immediately under **s. 46** upon becoming aware that the two-year period has expired or risk adverse costs consequences.

Lawyers should prepare the **s. 46** motion like any other motion, satisfying the evidentiary requirement by preparing a competent affidavit that exhibits the statement of claim and certificate of action in issue, exhibits copies of the abstract of title, and deposes that a search has been made at the appropriate court office stating precisely who made this search, when and where so that the court can evaluate the quality of the information being provided and stating that the action has not been set down for trial and no notice of trial has been served or that no judgment of reference has been obtained and no order for

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Society, April 30, 2019, reproduced with permission of the masters as Appendix XII.

88 *Pineau v. Kretschmar Inc.*, 2004 CarswellOnt 3189, 42 C.L.R. (3d) 37 (S.C.J.).

trial has been made or served.[89]

The affidavit should also set out in detail all communications, written and oral, between the plaintiff's counsel, or the plaintiff itself, and the moving party and its counsel over the preceding two-year period. The court will require this information to consider fairly and on a complete record whether notice is required, and the terms that may be appropriate under **s. 47(2)**.[90]

Lawyers should be aware that the court will look at the supporting material critically, given the serious consequences of the order sought. In the event the motion is brought *ex parte*, there is a high onus on the moving party to put everything before the court that could be relevant to the issues. It is therefore a "best practice" that the affidavit in support of the motion be a lawyer's affidavit, and, ideally, a lawyer senior enough and with conduct and full knowledge of the file so as to canvass all possible issues.[91] If information and belief are going to be relied upon, the court will require strict compliance with **Rule 39.01(4)** that the source of the information and belief, and the fact of the belief be stated in the affidavit itself.

Because of local variations in the practice of setting down lien actions for trial, masters at Toronto are hesitant to deal with out of Toronto actions under **s. 46** unless the facts are crystal clear. If the

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89 This can present practical problems. What if there has been a judgment of reference and the order fixing the date for trial is in the Master's procedure book (r. 55.02(11)) and not in any other place? How can the lawyer bringing the motion or swearing the affidavit in support of the motion be sure that the time period has passed? The answer is this: *first*, obtain and exhibit a computerized case history report — they are available for a small fee; *second*, search the court file for any order or judgment of reference and exhibit this, if it exists, in the affidavit; *third*, in Toronto, you may want to enquire of the Master's office itself if there is any scheduled pre-trial conference, or search the Master's procedure books, or, in other jurisdictions, enquire of the Trial Coordinator.

90 The author is indebted to Master Sandler at Toronto for the text of this paragraph and, generally, for his assistance in describing the practice on such a motion.

91 The court will treat the motion as if it was a R. 20 motion. Careful attention should be paid to the quality of the material put before the court. If there is "good, better and best" evidence available, only the best evidence should be put forward, or counsel may find themselves returning over and over again until the record is complete, even if the motion remains *ex parte*.

events are relatively fresh (i.e., not a 10-year-old lien, for example), the master at Toronto may require counsel to bring the motion before a judge at the place where the action would have been tried. The statement of claim will be consulted for venue selection. If there is any doubt on the subject, notice will be required so as to allow the affected lien claimant the right to attend, file material, and make submissions. In Toronto construction lien *ex parte* court, s. 46 motions will be heard regarding only a Toronto proceeding. If the proceeding is not a Toronto proceeding, s. 46 motions must be brought in the jurisdiction where the action was commenced.[92]

Finally, it is important to consider the provisions of **s. 46** in drafting the motion material. Be sure that all loose ends, such as monies or security in court, are properly tied up in the request for relief *and* in the supporting material. The master will require that the fullest, most accurate particulars of monies or security moving out of court be provided in the affidavit material.

The consequences of an order under **s. 46** include the possibility of a negligence action by the expired lien claimant against its lawyer. It is courteous to provide the unfortunate lawyer in such circumstances with at least a telephone call to explain what has happened, or is happening as the case may be.[93]

Are there ever occasions where it is right or proper to notify a lien claimant or its lawyer about the **s. 37** issue *before* the two-year period expires? The short answer is most likely "no". Yet there are times when it certainly seems like the right thing to do. You may be in mediation, for example, representing a general contractor in subtrade lien actions. The parties are on the brink of settling on terms that are fair and reasonable and will avoid years of acrimonious litigation, but it is the pressure of a large sum of your client's money in court with respect to subtrade liens under **s. 44** that is causing your client to consider settlement. The two-year period expires the next day. What

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92 Master Donald E. Short and Master Todd Robinson, "Tips for a Successful Hearing Before a Construction Court Master", Presentation to the Advocates' Society, April 30, 2019, reproduced with permission of the masters as Appendix XII.

93 Reference should be had to the Law Society of Upper Canada's new Civility Complaints Protocols, designed to improve civility and professionalism among lawyers appearing in court proceedings. See <www.lsuc.on.ca>.

do you do? Subject to terms of the mediation agreement to the contrary, you owe it to your client to inform them about the expiration period, take instructions and act on those instructions. Those instructions may be to abort the settlement discussions and obtain a without notice order under **s. 46** discharging the lien, dismissing the lien action without costs, and ordering the money in court paid out.

What does a mediator or arbitrator do in the same circumstances? If the mediator or arbitrator becomes aware of the issue, does the mediator or arbitrator raise it with the lien claimants in order to remove this potential barrier to settlement? What if one party seeks to adjourn the mediation or arbitration to a date *after* the two-year period has expired? Does the mediator speak up then? Would a judge or master do so in similar circumstances? Consultation with mediators and arbitrators on this point reveals divided opinion. One group agrees that it is the mediator's or arbitrator's duty *not* to raise the issue. This group believes that the mediator or arbitrator takes the case as he or she finds it. The mediator or arbitrator does not remake the issues for the parties. Another group believes that unless the mediator or arbitrator has been obliged by the parties in the mediation or arbitration agreement to refrain from raising issues not raised by the parties themselves, the mediator or arbitrator is free to do whatever is necessary including disclosure of a **s. 37** issue. Both groups agree that there are ways of guiding proceedings that would lead the lien claimant or its lawyers to ask the right questions and come to the right conclusions themselves. One thing is certain: whichever way the mediator or arbitrator goes in these difficult circumstances, one side or the other will be upset.

4.5.3 Salvaging a s. 37/s. 46 situation

When a lien has expired under **s. 37** and a motion has been brought under **s. 46**, it is often too late to do anything to salvage the situation.

If you are the lawyer responsible for missing the two-year period, you will notify your professional errors and omissions insurer at once giving full details. You are not to make any statements to your client or the court or the other side about your own or your firm's responsibility for the error unless and until you have your insurer's consent. You will advise the client what has happened and recommend that they consult independent counsel at once.

Your insurer will retain counsel to attempt to repair the negligence,

but there is rarely anything that can be done. The insurer's position will likely be that the lien claimant has not suffered damages unless and until it recovers an uncollectible personal judgment, and thus does not have a complete cause of action in negligence.

When a lien expires, the release of security posted or money paid into court for the lien back to the payer is mandatory. There might be an argument that this release from court and the subsequent cancellation of the security could trigger a payment to the payer, which results in the payer's receipt of s. 7 or 8 trust funds.[94] Such an argument could apply in the case of cash security. It could also apply in case of a letter of credit if the cancellation of the letter of credit leads to the release of funds impressed with a trust used to back up the letter of credit, as happened in the *Kasper* case. However, the argument would likely not assist in case of a lien bond.

Another remote possibility for relief is a declaration under **Rule 45.02**[95] that the money in court is a "specific fund" on the basis of the trust sections of the *Construction Act*. This motion has its own difficulties and complexities, even outside of the lien context,[96] and is rarely successful. It stands a remote chance of success if there is privity of contract, a strong *prima facie* case as to entitlement, and sufficient facts to support the imposition of a trust under either **s. 7** or **s. 8** of the *Construction Act*.

The assumption is often made by the client's new lawyer that the client's damages are equal to the amount of the client's claim. This is possible but unlikely. It would be so only if the claimant had privity with an owner who subsequently became insolvent or sold the land so as to render itself asset free, subject of course to the "vendor's trust" provisions of **s. 9** of the *Construction Act*. It might also be so in the rare case where the lien claimant client's lien was equal to its share of

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94 *Kasper Land Drainage Inc. v. Spectrum Realty Inc.*, 1991 CarswellOnt 794, 47 C.L.R. 44 (Gen. Div.).

95 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 45.02**: Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

96 *LeBrun Northern Contracting Ltd., Re*, 2001 CarswellOnt 387, 8 C.L.R. (3d) 150 (S.C.J.). See also *Rotin v. Lechcier-Kimel*, 1985 CarswellOnt 405, 3 C.P.C. (2d) 15 (H.C.), *Tom Jones Corp. v. Mishemukwa Developments Ltd.*, 1996 CarswellOnt 641, 46 C.P.C. (3d) 77 (Gen. Div.).

holdback and the debt was proven uncollectible as a personal judgment. Usually the lien claimant client will be obliged to mitigate its loss by proceeding to obtain and realize up as a personal and trust judgment before the negligent lawyer's insurer will be able to identify and pay a claim.

As a result of **s. 37**, the remedy *in rem* is lost, but the *in personam* remedy in debt and breach of trust survive. When the action *in rem* is dismissed, as it must be under **s. 46**, what becomes of the *in personam* component of the lien action? Can a lien claimant that has lost its lien rights under **s. 37** continue to seek personal judgment in the lien action itself?

This issue has been addressed by the Court of Appeal.[97] The court has discretion to let a claim in contract proceed in a lien action, even if the underlying lien is discharged under **s. 46**. Until the enactment

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97 *Teepee Excavation & Grading Ltd. v. Niran Construction Ltd.*, 2000 CarswellOnt 2335, 49 O.R. (3d) 612 (C.A.) at 618-619 [O.R.]: "The broad purpose of the legislation is to provide an efficient means of dealing with trade claimants that would otherwise be left behind without security if unpaid on a building project where payments typically flow from above and follow performance . . . In my view, avoidance of multiplicity of proceedings is the element of the Act that provides the direction for the interpretation of s. 46(1) and s. 47(1)(d). Howland J.A., in *A.J. (Archie) Goodale Ltd.*, set the tone for interpretation by observing that the Act should not be available as a subterfuge for pursuing an ordinary action by summary procedure; but where all of the steps have been taken and a conclusion reached at a hearing, the court should not dismiss the action for lack of a lien claim and thus compel a further proceeding concerning the same issue. The same reasoning suggests that the court has available the discretion to dismiss or to permit the action to proceed without the lien claim, as the circumstances dictate. All of the arguments against denying a defendant the procedures and protections of the usual form of litigation can be answered by the court's discretion under s. 47(1)(d) to dismiss the action because the defendant will be prejudiced or because little has transpired in the action that would be duplicated or by imposing conditions for continuance to assure protection of the defendant. The legislature intended more than claims for liens to be litigated in lien claim actions and that intention is best served by an interpretation of s. 46(1) and s. 47(1)(d) that leaves it to the court to monitor the interests of the parties and the procedure to be followed." See to the same effect, but with reference to *Construction Lien Act*, R.S.O. 1990, c. C.30, **s. 54(4)** of the *Act*, *Rentshop Inc. v. Tekke Thermal Inc.*, 2000 CarswellOnt 3576, 6 C.L.R. (3d) 99, [2000] O.J. No. 3700 (Div. Ct.).

of the *Limitations Act, 2002*,[98] the exercise of the court's discretion is directed toward avoiding a multiplicity of proceedings. It is exercised on terms so as to relieve any of the procedural steps that are applicable only to the lien aspect of the action.[99]

Cases decided before the *Limitations Act, 2002*, must be read with caution. The avoidance of multiplicity of proceedings is no longer a factor as, by definition, actions in debt would likely be statute-barred at the end of the same two-year period. The issue now is prejudicial delay and the factors under Rule 24.01 are relevant.[100]

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98 S.O. 2002, c. 24.

99 The reader is referred to *Cornerstone Estates Ltd. v. Polaris Restorations Inc.*, 2001 CarswellOnt 2582, 13 C.L.R. (3d) 174 (S.C.J.), where the lien had expired and the court ruled that the action "as commenced shall henceforth be continued as an action under the Rules". Remarkably, the court effectively set aside the provisions of the *Construction Lien Act* that prohibit counterclaims against non-parties, limit the ambit of crossclaims, limit joinder, limit third-party claims, bar interlocutory proceedings not otherwise provided for without prior leave on proof that the steps are necessary or would expedite the resolution of the issues in dispute, bar appeal from interlocutory orders, and provide liberal right of appearance by non-solicitors. If it was this easy to simply remove an action commenced "In the Matter of the *Construction Lien Act*" into the ordinary stream of actions commence under the Rules of Civil Procedure, one is left wondering why we bothered with *Teepee*. It seems that the course of prudence is not to rely on *Cornerstone*, and to either carry on with a claim for a personal judgment *in the lien action*, using *Teepee* as a guide for terms, or simply to re-commence as a civil action in debt and breach of trust (or both and obtain an order for trial together).

100 *1339408 Ontario Inc. v. 1579138 Ontario Inc.*, 2007 CarswellOnt 9443, 71 C.L.R. (3d) 13 (Div. Ct.).

CHAPTER 5

SETTLING A LIEN ACTION

5.0

5.1 Guide

It has been observed that "the client cares little for a beautiful case; the client wishes it settled somehow on the most favourable terms

they can obtain".[1]

If a complex, multi-party lien action is allowed to progress through months and even years of litigation, trades will fall away through bankruptcy or simply upon the realization that they are throwing good money after bad. One leading lawyer in the area refers to such claimants as "innocent bystanders". If there is no dispute about their debts, and if there is plenty of holdback to pay them, why are they not paid immediately?

The likely answer is because there is too little information available to the parties. Information is not uniformly distributed throughout the construction pyramid. Lien claimant subcontractors and suppliers suspect that the owner is being unjustly enriched by their services and materials, creating an asset for the owner that it has not paid for. The owner suspects that the general contractor is trying to improve on the "low ball" bid it used to win the tender. The general contractor is faced with "pass through" claims up from its trades and down from the owner. Each trade suspects the others of inflating their accounts to get a greater share of the holdback.

An atmosphere of misinformation and suspicion is likely to cause the general contractor to say to the owner: "pay or I'll lien and tie up your financing and your closings;" and the owner is likely to respond with: "lien and I'll bond you off and make you wait for years".

If settlement is the goal, it is the lawyer's task to get the client beyond these positions to a common understanding that their best interests are usually served by compromise.

The framers of the *Act* appear to have understood this concept and created the "settlement meeting".[2] The section that follows is an effort to fill in what the lien statute does not, by providing a practical, hands-on, step-by-step guide as to how to settle a lien action.

Lawyers settle cases every day of the week. How is settling a lien action different?

1. Lien actions are class actions. It is necessary to think of the broader picture when settling with an individual lien claimant. What happens to the money in court? Is it to be used to fund the

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[1] Miller, "The Data of Jurisprudence", as quoted by Cardozo in *The Nature of the Judicial Process* (Yale University Press, 1921).

[2] Now O. Reg. 302/18, ss. 9 & 10.

settlement? When and how is this done? How are the rights of other lien claimants affected by this settlement? Do I need their consent or approval? How do you get the right people together, at the right time, and in the right way to implement settlement? Lien proceedings also give the lawyer more entry points to settlement than other civil proceedings. Such innovations as lien pre-trials and the requirement for leave for discoveries, for example, help the parties focus on key issues first, which promotes settlement.

2. The trust scheme must be considered.[3] This trust scheme is an overlay on all lien proceedings. Settlement funds must be applied in strict accordance with **Part II**. You can assign a lien claim (**s. 73**), but can a trust claim be assigned as part of a lien settlement? If so, how is this done? Does the beneficiary of the settlement have the power to direct the settlement proceeds anywhere other than within the project, to their lawyer, for example, in payment of fees? What is the role of the lien claimant's lawyer in such circumstances?[4]

3. The construction industry is highly regulated. The *Workplace*

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3 The idea that trust claims are anything but incidents of privity of contract was supposed to have been completely eliminated when the *Construction Lien Act* expressly overruled the authority of *Bre-Aar Excavating Ltd. v. D'Angela Construction (Ontario) Ltd.*, 1975 CarswellOnt 132, 58 D.L.R. (3d) 654 (S.C.), but the idea, although insupportable at law, is tenacious and still survives.

4 There had been some doubt as a result of two Court of Appeal cases, *Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co.*, 2001 CarswellOnt 3138, 55 O.R. (3d) 783 (C.A.) and *Don Park Inc. v. S.E. Mechanical Engineering Ltd.*, 1998 CarswellOnt 4718, 43 C.L.R. (2d) 7 (C.A.), as to whether or not privity of contract was a necessary incident of a trust claim. Thus, a payer on a settlement might need to be concerned about non-privy beneficiaries, even if there was no notice of trust claim at the time of the payment of settlement proceeds. There is now a trial decision of Justice Stinson, in Toronto, *1150402 Ontario Inc. v. Delfino*, 2003 CarswellOnt 87, [2003] O.J. No. 183 (S.C.J.), that would appear to correctly sort out the decisions in those two cases and clarify that privity of contract is very much a requirement of being a beneficiary under the Act's trust provisions. Thus, it would now seem that the Attorney General's Advisory Committee did achieve what they had set out to achieve in the *Construction Lien Act*, which was, in part, to do away with the old case of *Bre-Aar Excavating Ltd. v. D'Angela Construction (Ontario) Ltd.*, 1975 CarswellOnt 132, 8 O.R. (2d) 598, 58 D.L.R. (3d) 654 (S.C.).

Safety and Insurance Act, 1997[5] allows garnishment of payments otherwise ear-marked to settle a construction lien case. This must be borne in mind when implementing a settlement. Source deductions may be owed to Canada Revenue Agency. There may be third-party demands. At one point in the 1990s the Canadian construction industry owed the federal government more than $300 million in unremitted source deductions. The federal government responded by enacting "super-priority" provisions to collect them, which provisions remain in place.

4. Mortgage monies used to fund a settlement may not be available until the title is clear. Title cannot be cleared until the mortgage monies are available, but mortgage monies cannot be made to fund settlements until the title is clear. This is a true "Catch-22", but there are solutions, as will be discussed in detail below.

5. Consider the bonding company: Bonding companies guarantee construction credit for a fee. They can be an excellent partner in a complex lien settlement, always as a source of expertise and sometimes as a source of funds. How does one access the surety to achieve a settlement? Can the bonding company be used to bring pressure on parties to settle? These questions must all be considered and answered in the settlement of a lien action.

6. Consider the *Rules*: **Rule 49** of the Ontario *Rules of Civil Procedure* applies in lien actions.[6] Thus, failure to accept offers to settle in a lien action triggers the general cost consequences outlined in that Rule.[7] Remember that the first lien pre-trial before a master on a referred lien action is actually the opening of the trial for the purposes of R. 49.

Whose job is it to settle? Is it the lawyer's job or the client's? Some aspects of the answer to this question are relatively easy. Each lawyer

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5 S.O. 1997, c. 16, Sched. A.

6 See *Rock Construction & Management Ltd. v. Ganatra Holdings Ltd.*, 2004 CarswellOnt 1095, [2004] O.J. No. 1137 (Div. Ct.), *Summers v. Harrower*, 2006 CarswellOnt 674, [2006] O.J. No. 452 (S.C.J.), *JDM Developments Inc. v. J. Stollar Construction Ltd.*, 2006 CarswellOnt 817, 51 C.L.R. (3d) 293 (S.C.J.).

7 See generally Tighe, "Rule 49 — Offers to Settle" (2000), 22 Adv. Q. 500.

owes a duty to his or her client to consider and advise on settlement;[8] but is there any duty to the group of lien claimants? For example, if you are the lawyer with carriage of a consolidated lien action, is it your duty to put the settlement process in motion with respect to all claimants, or just your own client? If you have carriage, and if you make such efforts but with indifferent success, will you be entitled to claim and be paid salvage costs for your efforts in this direction? It is the duty of the lawyer or lawyers having carriage to consider and recommend settlement to the group wherever and whenever it is reasonable to do so, and to implement procedures that may achieve a settlement, and it is a proper item of salvage costs to claim an indemnity from the group for such services, if they are reasonable, and even if they are unsuccessful.

With all of this in mind, we turn to the actual process of organizing, achieving and implementing the settlement of a lien proceeding.

5.2 Reaching terms

It is not necessary to settle everything in a lien action. It is enough to settle some things, or get rid of some of the innocent bystanders. Settling even one fundamental point or issue in a lien action may pave the way for an overall settlement. Interim or partial settlements and partial distributions are perfectly acceptable outcomes. If a partial settlement keeps even one "innocent bystander" from going broke, it was worth the effort.

An important point to remember is that unlike other cases, subtrade lien actions are often merely a fight over "a dime on the dollar". In other words, for every uncompensated dollar of the work they did, they can only count on accessing, with others, a dime in the "holdback pot". Even if the value of the general contractor's work ends up being twice the original contract price, for example, the holdback in the owner's hands will still only be only twice 10% of the original contract price. In the case of subtrades and suppliers, that can mean a

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[8] **Rule 2.02(2)** of the **Law Society of Upper Canada** ***Rules of Professional Conduct*** provides as follows: "A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings."

lot of expensive litigation for very little real gain.

Sections 17(1) and **(2)** limit the value of liens, and **s. 23** of the *Act* limits the personal liability of the owner. No matter how much is owed to a subcontractor, the subcontractor's lien cannot attach to the land itself for more than the greater of statutory holdback and the least amount owed by the owner to the contractor.[9] In terms of "personal liability" of an owner to subcontractors (as opposed to exposure of the land to the liens of subcontractors) the owner's personal liability to a lien claimant or to a class of lien claimants cannot exceed the value of the holdbacks the owner was required to retain.[10]

The first step in achieving a settlement, in whole or in part, therefore, is to ensure that *all* parties understand these basic dynamics of the statute.

Once the time is right for settlement, the next decision is as to process. Do you encourage open negotiation between principals? Do you seek a facilitated negotiation between principals (mediation)? Is the process adjudicative in any way (conciliation)? Do the CEOs meet privately? Do the engineers get together in a confidential setting ("hot-tubbing") to get the objective engineering facts out of the way first? Do you backstop your negotiations with a fixed process like arbitration? There is no "one size fits all" solution.

In some cases the parties are better off to go through some of the litigation process first, such as "mini-discoveries" before mediating. "Mini-discoveries" might consist of an exchange of core documents and an hour or two of examination of each side. Some cases are resolved by counsel at or shortly after the first lien pre-trial. Some cases need nothing more to induce settlement than a comment on the merits from the master or judge at the first lien pre-trial. Cases have even settled as a result of the collaborative effort to prepare a Scott Schedule.[11]

There is no right answer for every case. There are three tools that

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9 *Construction Act*, R.S.O. 1990, c. C.30, **s. 17(1)** with respect to individual liens, and **s. 17(2)** with respect to the liens of members of a class, as defined by **s. 79** of the statute.

10 *Construction Act*, R.S.O. 1990, c. C.30, **s. 23**.

11 This is actually a settlement mechanism that is recognized internationally. Under the ICC *Rules of Arbitration*, for example, the obligation for counsel to get together and prepare "Terms of Reference" achieves this purpose. See D.W.

will assist in reaching the right answer through:

1. Good spreadsheets. Finding a good spreadsheet is not a mere list of names, addresses and telephone numbers. It is a diagrammatic representation of the construction pyramid, specific to the improvement at issue, containing all relevant information at a glance. "All relevant information" includes all lien claimants' correct names, correct lien registration number(s), correct certificate of action registration number(s), correct court file numbers, correct lien amounts, correct dates and amounts of any orders and payments into court, and counsel's co-ordinates all in a single text box, with each text box linked together by lines representing privity of contract, just like birth and marriage lines in a family tree. Try to fit all of this on a single sheet of paper, even if that sheet of paper has to be 11 x 17 or larger. This allows everyone to see at a glance who is who, and how big an interest each has in the outcome. This also helps see at a glance the level or "class" as defined by **s. 79**. A good spreadsheet of this type is an important first step for the next important exercise: good mathematics. This spreadsheet should be given to all counsel and the court at the first opportunity. This is the kind of work product that attracts an award of salvage costs if settlement fails.

2. Good mathematics. As noted above, most subtrades and suppliers do not realize that they are fighting over a dime on the dollar. As far as possible, claims should be broken out into their constituent parts to see how much is true "balance due" and how much is general damages, interest or cost. It often turns out that when everyone possesses an accurate spreadsheet and accurate mathematics, the inescapable conclusion is that there is not enough money at stake to fight over. This can be enough to settle many routine lien matters. The mathematics of potential recovery should recognize the statutory priority scheme among classes of lien claimants[12] and should be "Without Prejudice" and "E & O E". The mathematics can be incorporated into the spreadsheet and circulated to all parties, and even some non-parties like the

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Glaholt, M. Rotterdam, "An ICC Model for the Resolution of Complex Construction Disputes" (2002), 14 C.L.R. (3d) 173.

12 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 79, 80, 81**.

payment bond surety.

3. Good communications. We began this section by identifying information asymmetries and unfounded assumptions as being at the root of many seemingly unsettleable lien proceedings. The lawyer having carriage should set the stage for settlement by establishing reliable channels of communication at the earliest possible moment, so that everyone begins to hear the same story, from the same reliable source, at the same time. This is easily done with group e-mails and facsimiles much like an insolvency proceeding. Another excellent tool is the "File Transfer Protocol" or "FTP" commonly used by insolvency and litigation lawyers to have one repository of all current information. This is the level of activity and organization that is needed to attract salvage costs.

5.3 The role of the payment bond surety

On many improvements of any size there may be a labour and material payment bond. The new *Act* requires both labour and material payment bonds and performance bonds on public contracts priced at $500,000 or more.[13] On a typical project the labour and material payment bond will protect payment by the contractor to persons with whom the contractor contracts (i.e., subcontractors) and, is usually issued together with a performance bond. The performance bond assists an owner if the contractor fails to perform. The labour and material payment bond protects persons who contracted with the contractor, whether the owner is in good standing with the contractor or not. It is a valuable source of credit protection for subtrades and suppliers.

Payment bonds are often in "trustee form". The expression "trustee form" simply means that the "obligee" under the bond, i.e., the owner in most cases, holds the bond as trustee for all beneficiaries, i.e., the bonded contractor's direct subcontractors and suppliers. If there is a payment problem, the owner, as trustee under the bond, can then file a claim on behalf of all unpaid subtrades and prosecute the bonding company for payment in its own name, but as trustee for the subtrades. This rarely happens in practice. Usually the subtrades must claim upon the payment bond themselves. On public contracts, the

13 *Construction Act*, R.S.O. 1990, c. C.30, **s. 85.1**; O. Reg. 304/18**, s. 12**.

forms for both payment and performance bonds are prescribed.

The surety will likely have taken indemnities from its principal and others. When a demand is made upon the surety to honour the bond, the surety calls upon the indemnitors to make good on their indemnities by paying the claim or depositing cash or other security if the claim is to be disputed. The existence of a labour and material payment bond gives the subtrades another way to affect persons with whom they do not have privity of contract.

A discussion of the law of labour and material payment bonds is beyond the scope of this book, but is compendiously treated elsewhere.[14] The basics of engaging the surety on a labour and material payment bond claim are as follows:

1. Find the bond: **Section 39(1)1(iv)** of the *Act* allows any person having a lien or who is the beneficiary of a trust under the *Act* or who is a mortgagee to make written request "at any time" for a copy of "any" labour and material payment bond or performance bond on respect of the contract posted by the contractor with the owner.

2. Formally notify the surety: The law in this area is favourable to the claimant, but it is still technical. Give notice *exactly* as required by the bond. Usually, this is by prepaid registered mail to each "principal" (i.e., usually the general contractor, or whoever it was that actually took out the bond), the "surety" (i.e., the bonding company itself) and the "obligee" (usually the owner, or whoever is holding the bond), within the time specified on the face of the bond itself (usually either 90 or 120 days following last supply or some other relatively objective event). As we have seen, most such bonds are in "trustee form" which allows the "obligee" (owner in most cases) to give notice to the surety on behalf of all possible claimants.

3. Comply with the surety's requests for information: Notwithstanding that the surety likely sent out "contract status enquiries" to the contractor during the course of the project, it will have a lot of catching up to do. This is often done by hiring a licensed, independent professional claims adjuster. Co-operate with the

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14 See Scott & Reynolds, *Scott & Reynolds on Surety Bonds*, looseleaf (Toronto: Carswell, 1993), chapter 11.

surety. Give them what they ask for, when they ask for it, even if the requests are redundant. The surety's claims adjuster will be the one recommending whether and how to settle, and the surety will follow this recommendation. Document all your interaction with this surety bond adjuster. Ask for regular reports on the progress of your claim.

4. Engage the surety: Invite the surety to everything. Invite the surety to vetting committee meetings, mediations or settlement meetings, and invite the surety's lawyer to any meetings of counsel. Copy the surety's adjuster with every piece of paper that is not privileged, and all pleadings and proceedings.

5. Settle with the surety: Why take less than 100% from the bonding company? After all, their bond was a "payment" bond was it not?

There are a number of reasons why you might choose to take less than 100 cents on the dollar from a payment bond surety. Your client's claim may be, in whole or in part, a damage claim (not bondable) as opposed to a claim in debt for work, services or materials supplied to the improvement (bondable). The bond has "penal sum" limitations meaning that no matter how many legitimate claimants there are, the surety never has to pay more than the face value (the "penal sum") of the bond. Usually this penal sum is expressed in a raw dollar amount The bond has equal to 50% or so of the original contract value. If the surety has paid out this amount, it does not have to pay more, no matter how legitimate the claim upon the bond may be.[15] Every offer from the surety should be considered carefully, even if it is less than 100 cents on the dollar.

5.4 Trust issues

What do you do with a settlement that provides that monies are to be paid to the lien claimant "or as the lien claimant may direct" and a

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15 *Construction Act*, R.S.O. 1990, c. C.30, **s. 85.2(3)** provides that nothing in the section makes the surety liable for an amount in excess of the amount that the surety undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is made against the surety.

lien claimant directs its share of the settlement proceeds outside of the construction pyramid? Is this sufficient notice of a breach of trust or potential breach of trust?

The language of **s. 13** of the *Act* is important. It provides that in addition to the persons who are otherwise liable in an action for breach of trust, any person who has "effective control" of a corporation or its relevant activities (distribution of settlement monies?) who assents to, or acquiesces in conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

For example, if money is payable to an electrical or mechanical subtrade and the money is directed to a landlord, or leasing company, or financial institution, is this not an "assenting to or acquiescence in" conduct that a person knows or reasonably ought to know amounts to a breach of trust? On the other hand, is it not a breach of the minutes of settlement to pay settlement proceeds otherwise than in accordance with an apparently valid direction? It has been held that trust monies may not be used to pay overheads, including legal fees.[16]

The counsel of perfection in the circumstances is to ignore the direction and make the claim settlement cheque payable directly to the trust beneficiary. Some counsel make the cheque jointly payable to the correct beneficiary and to the party to whom the funds have been directed. The better answer, although considerably more expensive, may well be to seek directions from the court under **s. 12** of O. Reg. 302/18.

5.5 Costs on settlement

As long as counsel have been settling lien actions, they have needed a guide as to costs. A well-known Toronto lien and insolvency lawyer of the time, Nathan Strauss Q.C., popularized a table of costs, which soon became known to practitioners as the "Strauss Scale". This modest sliding scale received judicial approval in 1979

16 *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*, 1998 CarswellOnt 3970, 41 C.L.R. (2d) 1 (C.A.); *Tam-Kal Ltd. v. Stock Mechanical Inc.*, 1999 CarswellOnt 3686, 50 C.L.R. (2d) 224 (C.A.); *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CarswellOnt 266, 45 C.L.R. (2d) 178 (C.A.); *RSG Mechanical Inc. v. ABCO Construction Inc.*, 2000 CarswellOnt 4215, 5 C.L.R. (3d) 294 (S.C.J.).

in *Cecil F. McKay & Sons Ltd. v. 302231 Ontario Ltd.*[17]

In 1990, the learned authors of *Construction Builders' and Mechanics' Liens in Canada*,[18] Douglas Macklem Q.C. and David I. Bristow Q.C., modernized this scale of costs. The 1990 "Bristow Scale" was as follows:

Suggested Revised Guide to Schedule of Costs Where Lien Filed — Preparation, Appearance and no Actual Trial

Client's Claim	Costs
$ 100 to 200	50.00
201 to 300	60.00
301 to 400	70.00
401 to 500	80.00
501 to 600	100.00
601 to 800	125.00
801 to 1,000	150.00
1,001 to 1,500	175.00
1,501 to 2,000	200.00
2,001 to 3,000	250.00
3,001 to 4,000	300.00
4,001 to 5,000	350.00
5,001 to 7,000	400.00
7,001 to 10,000	450.00

A further update, particularly in view of the legislative and judicial recognition of the realities of the costs of modern litigation, is obviously necessary.[19] The pace and scale of construction spending has rendered such charts or guides of historical interest only.

The author suggests a flat $2,500, plus disbursements and taxes,

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17 1979 CarswellOnt 269, 32 C.B.R. (N.S.) 309 (S.C.).

18 D. N. Macklem, D. I. Bristow, *Construction Builders' and Mechanics' Liens in Canada*, 6th ed. (Toronto: Carswell, 1990, looseleaf).

19 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Tariff A. Part I of Tariff A was substantially amended on January 1, 2002. See M.M. Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, looseleaf).

per lien, for all liens with a settlement value (regardless of the face value of the claim for lien, or action that perfected that lien) of up to $50,000; a flat $5,000, plus disbursements and taxes, per lien, for all liens with a settlement value between $50,001 and $100,000; a flat $10,000, plus disbursements and taxes, per lien, for all liens with a settlement value between $100,001 and $500,000; a flat $25,000, plus disbursements and taxes, for all liens with a settlement value between $501,000 and $1,000,000; and 3.5% of the settlement value, plus disbursements and taxes, for all liens in excess of $1,000,000.

Thus, for a $2.5 million lien that settled before trial for $1.75 million, the costs to be added to the settlement amount would be $61,250 ($1.75 million × 3.5%), plus actual disbursements and taxes.

This proposed update can be set out in tabular form as follows:

Settlement Value of Lien	Costs
Up to $50,000	$2,500 plus disbursements and taxes
$50,000 to $100,000	$5,000 plus disbursements and taxes
$100,000 to $500,000	$10,000 plus disbursements and taxes
$500,000 to $1,000,000	$25,000 plus disbursements and taxes
$1,000,000 and up	3.5% of settlement value, plus disbursements and taxes

5.6 The funding dilemma: What comes first, cash or clear title?

The money needed to fund a lien settlement often comes from project financing secured in the land. Unless all of the liens are vacated, therefore, settlement proceeds will not be available. But lien claimants are unwilling to remove their liens simply on the promise that settlement funds will be forthcoming if they do. Once their liens are gone, they are gone forever.

Most lenders will also require an order dismissing any action against them before advancing money, even if it is money needed to

settle the action being dismissed.

One solution is for the parties to trust each other, but trust is often in short supply. There are at least two other solutions to this problem, and many variations on each of these solutions:

1. The "escrow" solution: Settlement funds are escrowed with one of the lawyers involved, who is directed, in writing, by all parties, including the mortgagee advancing the funds, to distribute the money in a stated way upon the happening of a stated event, such as the registration on title of a good and valid pre-approved form of order discharging all scheduled liens and vacating all lien and certificate of action registrations, and dismissing all actions against all parties without costs. If the financier requires that its own lawyer be escrow agent, as is very often the case, they will also require that the costs of this escrow be borne by the lien claimants and deducted from the settlement proceeds.

2. The "closing" solution: This approach is also common. The financier's lawyer attends at the appropriate registry office, or at a lawyer's office for the purpose of electronic registration of the necessary order, with trust cheques, or *certified* cheques or bank drafts in hand payable by prior written direction to each of the relevant lien claimants. The lien claimants' individual lawyers, or a lawyer having carriage on behalf of all lien claimants, attends with an issued and entered order discharging all liens and vacating all lien and certificate of action registrations, and dismissing all actions against all parties without costs. The cheques are distributed, but no one leaves until all registrations are complete. As this is done in an instant, there is virtually no chance of intervening notice, or third-party claim.

5.7 Documenting the settlement

It is crucial to document all settlements immediately. Minutes of settlement can be prepared, in handwriting if necessary, and should be signed by the clients themselves wherever possible. Mediators will usually not let the parties leave the room without executed minutes of settlement. A "statement of settlement" is different than "minutes of settlement".

A "statement of settlement" results from a formal settlement meeting conducted under the statute. A statement of settlement under the

Construction Act is intended to summarize those issues of fact and law which have been settled by the parties.[20] It is filed with the court and forms part of the record and is binding upon all persons served with notice of the settlement meeting, and anyone against whom pleadings have been noted closed. The court retains a broad jurisdiction to vary or set aside statements of settlement, on terms, but this is rarely seen in practice.

Minutes of settlement on the other hand merely evidence a contract.[21] They attempt to record a meeting of the minds. They are interpreted and enforced like any other contract. As such, they do not deal with issues of law, as do statements of settlement. Minutes of settlement signed by lawyers can bind their clients whether or not the lawyer had authority to make the settlement in the first place. Our courts have uniformly protected the reasonable expectation that lawyers act with the authority of their clients.[22]

5.7.1 Releases: exceptions for unperformed work and unexpired maintenance and warranty obligations

Care must be taken to think about the breadth of releases promised as part of settlement. Standard mutual full and final releases are rarely appropriate in construction lien cases. Settlement can occur long before the expiration of relevant warranty periods, and warranty and maintenance obligations should be expressly excluded from any release document. If the settlement is of lien issues only and preserves rights against a labour and material payment bond surety,

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20 O. Reg. 302/18, s. 10(4) & (5).

21 The idea of settlement being a contract has consequences at law. Among these consequences is that the court will not go behind the authority of counsel to conclude a settlement, no matter how at odds with the underlying instructions that settlement turns out to be.

22 See *Scherer v. Paletta*, 1966 CarswellOnt 119, [1966] 2 O.R. 524 (C.A.). This case has been applied often, most recently in the Court of Appeal in *Bogue v. Bogue*, 1999 CarswellOnt 3619, 46 O.R. (3d) 1 (C.A.). See also *Belanger v. Southwestern Insulation Contractors Ltd.*, 1993 CarswellOnt 507, 16 O.R. (3d) 457 (Gen. Div.), in which the court enforced minutes of settlement accepted by the lawyer for the plaintiffs with the apparent and actual authority of the plaintiffs, who then changed their minds and did not permit their lawyer to take steps to implement the settlement.

these rights should be expressly excluded. The basis of the surety's liability is the contractual joint liability, so that any release of the principal debtor will likely release the surety for that debt.

If the owner holds a bond for the contractor's ongoing maintenance obligations, and you are settling lien issues as between the owner and the contractor, it is an open question whether or not the surety may rely on an owner's broad form of release of the contractor, as a third-party beneficiary. The terms of most such bonds would require that the principal be and be declared to be in default of some existing contractual obligation and this could be voided by any broad form of release. These matters should be expressly dealt with at the time of settlement and not left for interpretation later. Be very thoughtful about the wording of releases.

5.7.2 Workplace Safety and Insurance Board releases

The *Workplace Safety and Insurance Act, 1997* provides for the collection of arrears in assessments by notices to third parties.[23] Out of an abundance of caution, many lawyers require a form of release or report from the Workplace Safety and Insurance Board ("WSIB") that there are no outstanding assessments that might otherwise attach to the disbursement of settlement funds as a condition precedent to the release of settlement funds. If the payment is made before notice is received of any claim by the WSIB, there is no jeopardy in making the payment. The most prudent course of action is to ask for such a release in the minutes of settlement.

As with other third-party claims that get in the way of completing a settlement, the minutes of settlement should contemplate the innocent party's (payer's) option to affirm or deny the settlement in the event of a WSIB, or CRA claim, or any other claim on the settlement funds. The minutes of settlement could provide that the payer, if it is in receipt of such notice, can affirm the settlement and honour the third-party demand on its face, or deny the settlement and respond to the third-party demand on the basis that there is no amount due. This draftsmanship is considered below in dealing with CRA third-party notices.

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23 S.O. 1997, c. 16, Schedule A, Part XII.

5.7.3 Revenue Canada third-party notices

The federal government has enacted "super-priority" provisions to collect the massive unpaid taxes and misapplied source deductions, particularly those of the construction industry.[24]

If a third-party demand has been served by the federal government on a payer under the *Construction Act*, or a payer under a settlement, then the portion of any payment by that payer equal to the amount of the demand goes to the federal government. There is nothing that can be done about it. It does not matter that it is statutory holdback under the *Construction Act*. The theory behind this super-priority is hard to argue. If there are arrears in a taxpayer's remittance of the federal government's money (G.S.T. for example), collected by the taxpayer but not remitted to the federal government, then the taxpayer was financing its operations using the federal government's money. The government should be repaid in priority to the persons that notionally received the benefit of this misappropriation, including the lien claimants whose lienable debts would no doubt have been larger had their payer not paid them with misappropriated money. This theory breaks down somewhat to the extent that the defaulting payer used the federal government's money personally and not corporately.

The Crown law office takes these cases on a project by project, fact situation by fact situation basis so as to avoid hardship in any given case. If you are the lawyer for a lien claimant, or the lawyer for a lien claimant that has carriage of a consolidated series of lien actions,

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24 *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, 1994 CarswellSask 451, 1994 CarswellSask 493, 18 C.L.R. (2d) 157 (S.C.C.). The legislative initiatives and the case law leading up to *TransGas* are discussed in S. Tatrallyay, "Construction Insolvencies and Revenue Canada — Life After TransGas" (1995), 21 C.L.R. (2d) 176. See also *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, 1996 CarswellAlta 366, 1996 CarswellAlta 366F, EYB 1996-66857, (sub nom. *Alberta (Treasury Branches) v. Minister of National Revenue)* 133 D.L.R. (4th) 609 (S.C.C.), *Japan Canada Oil Sands Ltd. v. Stoney Mountain Steel Corp.*, 2001 CarswellAlta 732, 9 C.L.R. (3d) 290 (Q.B.), *M.E. Quinn, Associates Inc. v. Klein*, 1998 CarswellBC 634, 40 C.L.R. (2d) 217 (S.C.), *Park v. Metropolitan Separate School Board*, 1998 CarswellOnt 795, 36 C.L.R. (2d) 202 (Gen. Div.), *Metal Fabricating & Construction Ltd. (Trustee of) v. Husky Oil Operations Ltd.*, 1997 CarswellSask 628, 37 C.L.R. (2d) 159 (C.A.); leave to appeal refused (1998), (sub nom. *Metal Fabricating & Construction Ltd. (Bankrupt), Re)* 227 N.R. 292 (note) (S.C.C.).

bring the Crown law office into the picture early. Deal with them openly. Involve them in your lien settlement.

As stated above, well-drafted minutes of settlement may deal with this situation proactively. The minutes of settlement may provide the innocent party with an option to affirm or deny the settlement in the event of a WSIB, or CRA claim, or, for that matter, any other third-party claim on the settlement funds. The minutes of settlement may provide that the payer in receipt of a third-party demand can affirm the settlement and honour the third-party demand in its face amount; or deny the settlement and communicate this to the third party who served the demand. In a more sophisticated settlement, the minutes may provide for the tax debtor, for example, to be given notice and to take the election away from the payer by indemnifying the payer and securing this indemnity with a letter of credit to "stand by" while the tax debtor sorts out CRA's demands.

Where do you go to resolve such a claim? The federal crown is entitled to be sued in the appropriate arm of the Federal Court, with a route of appeal to the Federal Court of Appeal. On the other hand, the lien court has statutory jurisdiction, which has been ruled constitutional, to try the action, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it, or upon whom notice of trial has been served.[25] It may well be that the CRA can be and should be served with notice of trial in a lien action in response to their service of a third-party notice, but this will make them a party in a court that may have no jurisdiction over them.

It is easy to conceive of an example whereby the lien court would need to resolve the issue of tax arrears and a third-party demand ($100,000 in hold-back, $90,000 CRA third-party demand against contractor, served on owner, $90,000 in subcontractor lien claimants, another $10,000 of "workers' priority" claims under **s. 81**). Is the lien action stayed, while the lien claimants (assuming they have standing) take the issue to the Federal Court? Or is the federal crown served with notice of trial and asked to attorn to the jurisdiction of the lien court, so as to allow the master to exercise his/her jurisdiction over either $10,000 or $100,000 in holdback on the above example? In

25 *Construction Act*, R.S.O. 1990, c. C.30, **s. 51(a)**.

Toronto, at least, the practice at the first lien pre-trial is to enquire into the existence of CRA third-party demands. If they exist, then the master will formally add "Her Majesty the Queen in Right of the Dominion of Canada, as represented by the Minister of Revenue" as a party defendant and the Crown law office is thus engaged and given notice of all further proceedings.

As a practical matter, subcontractors and subtrades on a job will often be aware, informally at least, or have some advance warning of the possibility of a third-party demand on the owner with respect to the contractor's arrears in source deduction remittances. In such circumstances, it is occasionally possible to obtain the co-operation of the owner to a quick, consent payment into court of holdback. When the third-party demand is eventually served, the owner can respond that it has none of the tax debtor's (contractor's) money, and state that it was paid into court for the benefit of subcontractors and trades pursuant to a court order issued and carried into effect prior to service of the third-party demand. There are no guarantees that such a scheme will work, although it is known to occur.

5.7.4 Assignments of lien and trust claims

A lien may be assigned by an instrument in writing and, if not assigned, a lien may pass to a person's personal representative on death.[26] Note the use of the phrase "a person having a lien". By statutory definition,[27] this includes both a lien claimant (i.e., someone who has preserved a lien before it has expired) and a person with an unpreserved lien.

The situation with trust claims (as opposed to lien claims) is different. Trust claims may not be assignable on their own. It would not be open to an owner to buy up assignments of sub-trade trust claims (i.e., expired lien claims perhaps) for so many cents on the dollar, so as to launch a personal action under **s. 13** of the *Act* against officers, directors and persons in control for the full face value of the trust claim. It has been held that an assignment of a mere chose in action, such as a bare right to claim as beneficiary of even a statutory trust,

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26 *Construction Act*, R.S.O. 1990, c. C.30, **s. 73**.

27 *Construction Act*, R.S.O. 1990, c. C.30, **s. 1(1)**.

unaccompanied by any underlying property right, is void at law.[28]

You need to ensure that the person you have settled with has not assigned their claim. If they have, the assignee must join in the settlement.

5.8 Settlement meetings under the *Construction Act*

5.8.1 Process

A "settlement meeting" under the *Act* is purely a creature of statute for which a complete code exists in **ss. 9** and **10 of O. Reg. 302/18**. As a result of **s. 50(2)**, this complete code displaces the case management provisions provided by the *Rules of Civil Procedure* that would otherwise provide for a "case conference" (**Rule 77.08**).

Does this mean that a trial management pre-trial conference can no longer be used for the purpose of settlement? After all, it is likely the first occasion when all the lawyers will be in the same room together, prepared and ready to go. The policy of lien courts is to encourage settlement before trial and any opportunity to discuss settlement is taken seriously, regardless of when it occurs. Informal settlement discussions at lien pre-trials, however, are to be distinguished from the formal, statutory settlement meeting process under **ss. 9** and **10 of O. Reg. 302/18**.

In some jurisdictions, a settlement meeting is a step that must be taken before the case will be listed for trial. After canvassing sitting judges and practicing lien lawyers in jurisdictions around the province, it became clear that the settlement meeting process is alive and well all over Ontario, except for Toronto. In Toronto, the intense case management and discipline effected in lien proceedings through se-

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28 *Ellis-Don Ltd. v. Norton*, 1982 CarswellOnt 712, 5 C.L.R. 281 (H.C.) at p. 305 [C.L.R.]: "Returning to the test enunciated in 6 Hals. (4th ed.), in these terms: 'In every case it is a question whether the purchaser's real object was to acquire an interest in the property, or merely to acquire a right to bring an action, either alone or with the vendor.' I would find the answer to that question in this case to be that the purchaser's real object was to acquire a right to bring an action. Accordingly, I conclude that the assignment, insofar as it pertained to the trust funds and any rights with respect to those trust funds was of a bare right of action which was not assignable and that in consequence the plaintiff did not have status to bring this action."

quential lien pre-trials has entirely displaced the settlement meeting. Settlement meetings require an enabling order.[29] The statute provides that "any *party*" (as opposed to "any *person*") may apply without notice to any other person, after all defences, including defences to crossclaims, counterclaims and third-party claims, are in, or the time for them has expired, to have a day, time and place fixed for the holding of a settlement meeting. A careful reading of **s. 9(1)2** and s. **5 of O. Reg. 302/18** discloses that noting any defendant in default is not required to exclude a party from the order for a settlement meeting. It is sufficient for the purposes of the *Act* that the time for defence has expired. The most important limiting factor in the settlement meeting process is that it must be fully consensual, and therefore any defect in service is fatal to the utility of a settlement meeting.

The agenda for the settlement meeting is determined at first instance by **s. 10(8) of O. Reg. 302/18**. The statutory issues include lien validity, amount of holdback obligation of the owner, and legitimacy of set-offs claimed by payers. Nothing prevents the party that obtained an order for a settlement meeting from preparing and circulating a more formal and comprehensive agenda. This tends to limit the number of items that can be included on a settlement meeting agenda.

There is no indication in the statute or the case law as to any basis for a court outside of Toronto refusing an order for a settlement meeting, but there is little doubt that one could be refused on proper grounds, even though the motion is made without notice. In Toronto, a settlement meeting would only occur if it was ordered by the master at a lien pre-trial.

If you have knowledge of events that argue against the holding of a settlement meeting, such as where a lien claimant has said they will oppose any relief sought at the settlement meeting, this information must be disclosed to the court on the "without notice" motion to obtain the enabling order for a settlement meeting. The court is entitled to the full picture. If the idea of a settlement meeting has been canvassed by counsel and rejected, whether or not in writing, this must be disclosed.

This requirement for full disclosure can be subtle. For example, if a payment bond surety is actively attempting to settle lien claims

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29 O. Reg. 302/18, s. 9.

against a given payer, this must be disclosed to the court. This fact may argue against the granting of the order at that point in time and the court may adjourn the motion and require that notice of the motion be given to the payment bond surety. A settlement meeting, in the face of an active investigation by the surety, especially in remoter jurisdictions where travel by parties and counsel would be necessary, could require significant expenditure of time and money with no real benefit. The payment bond surety will attempt to settle all claims against its principal (i.e., the person who took out the bond), whether or not they are lien claims, and will be looking to subrogate to lien claims under **s. 85.2(5)** of the *Act*.[30] The surety will be looking to settle lien claims at the least expense, just like the parties and the court itself.

There is no requirement in the *Act* that the order for a settlement meeting be served, but analogy to the *Rules of Civil Procedure* would seem to suggest that this should be done as soon as the order is obtained.[31] Although not mandated by the *Act*, it is a "best practice" to serve the order for the settlement meeting together with the notice of settlement meeting, just like the order fixing the trial date and the notice of trial itself.

Unlike the vetting committee process[32] and the lien pre-trial procedure, the settlement meeting exists entirely for the benefit of the lien claimants themselves. There is a complete statutory code for the conduct of the settlement meeting, the purpose of which is to structure a meeting in which the parties can help themselves. **Section 10(3) of O. Reg. 302/18** specifically talks about "a person" conducting the settlement meeting (which would appear to contemplate active attendance by a client representative, or a paralegal for example).

The first step in convening a successful settlement meeting is for the person who obtained the enabling order to serve notice of the settlement meeting on:

> 1. The owner and every other person named as a defendant in every statement of claim in respect of the action, unless they are

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30 *Construction Act*, R.S.O. 1990, c. C.30, **s.** 85.2(5).

31 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 37.07(4)** which is not, on its face at least, inconsistent with anything in the *Act* in this regard.

32 See chapter 5.9.

actually noted in default of defence.

2. Where "the" lien (read: "any" lien) remains registered against the title to the premises, any person with "a registered interest in the premises" must be served. This includes execution creditors of anyone having a registered interest in the premises and could include someone with a registered certificate of pending litigation for example.

3. Any person having either a preserved or a perfected lien against the premises (for this purpose **O. Reg. 302/18, s. 9(3)** allows the party obtaining the appointment to request from the owner the identity of any lien that does not attach to the premises).

4. Any person joined as a third party.

There is a prescribed form for notice of the settlement meeting.[33] While use of the form is not mandatory, it should be used.

The next step is to conduct the settlement meeting itself. Once again, a complete code for this unique procedure is provided by **O. Reg. 302/18, s. 10** under the heading "conduct of settlement meeting". This code, however, is written in fairly general and flexible terms. The following may assist:

1. The tone of the settlement meeting is conciliatory, as if at a mediation. This is not a quasi-judicial or judicial forum, like a trial, reference or arbitration.

2. The purpose of the meeting is to resolve or narrow any issues to be tried in the action. This will include issues of timeliness, lienability and quantum.[34] The parties can agree on issues of fact and on issues of law (**O. Reg. 302/18, s. 10(4)**), subject to the overriding discretion of the court in enforcing such agreement (**O. Reg. 302/18, s. 10(8)**).

3. The settlement meeting is a meeting like any other meeting, except that there does not seem to be any provision for a quorum. If the notice of settlement meeting is properly served and persons served do not attend, some limited relief can still be obtained (**O. Reg. 302/18, s. 10(8)(a)**), declaration of a lien as valid). Most

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33 O. Reg. 303/18, s. 2(18), **Form 34**.

34 O. Reg. 302/18, s. 10(1).

other relief would be impossible.

4. The settlement meeting needs a Chair. Unless a majority of the persons present (i.e., served or not served, and present) at the settlement meeting resolve otherwise, the person who took out the appointment acts as the Chair.

5. The meeting is usually run like a business meeting in accordance with the generally accepted rules of order for business meetings, but nothing in the statute says that it must be so.

6. A properly run settlement meeting should record both its successes and its failures. This is because its failures may indicate to the court that certain issues could be expedited for trial (**O. Reg. 302/18, s. 10(8)(b)**). No plurality of votes cast by attendees at such a meeting can deprive a party of substantive rights under the statute.

7. The results of the settlement meeting are "embodied" in a statement of settlement which shall summarize the issues of fact and law "which have been settled by the parties". Common issues that could be dealt with by statement of settlement include amount of holdback at each level, personal liability of the owner for holdback, priority of mortgages or mortgage advances, validity of liens, classes of lien claimants (**s. 79** and **s. 80**), non-lien personal judgment against certain parties, and all items of account between or among the parties. The statement of settlement must be signed by all of the attendees to indicate, conclusively, their unanimity on all points of settlement. Circumstances can be envisioned, however, where an owner might not want to sign minutes of settlement where its holdback and personal liability had been agreed but where it had no interest in or participation in the balance of the agreements or such items as timeliness, lienability and quantum of the individual lien claims. Such circumstances could be dealt with by an appropriately worded preamble. The court would likely enforce the statement of settlement under **O. Reg. 302/18, s. 10(8)** in any event.

Much of what is said above about the settlement meeting is applicable elsewhere in the province. In the Southwest Region, Essex County, Chatham, Sarnia and, shortly, London and surrounding areas, settlement meetings are sometimes held without the participation of a judge. If the parties wish the judge's participation, they invite the

judge to attend by prior appointment, obtained on consent through the judge's administrative office. These meetings are usually held as soon as possible in a lien action. At the settlement meeting, whether held with or without judicial assistance, the lien claimants consent to carriage of the lien action(s) and any matters not in issue. An order for consolidation, or trial together one after the other, may be made on consent. An order authorizing salvage costs to the party having carriage of the action is often made. Anecdotal evidence indicates that a good number of smaller cases settle at this point. It appears that much the same procedure, with much the same outcome in terms of settlement, is in force in Ottawa, Kenora and Thunder Bay.

5.8.2 Enforcing the outcome of a settlement meeting conducted under the *Construction Act*

The results of a settlement meeting have their basis in consent and agreement. A statement of settlement filed with the court becomes binding on everyone who attended, everyone who was given notice and failed to attend, and everyone who was not given notice because they were at the time in default of defence (see **ss. 61(4)** and **(5)**).

Essentially the only default relief available by settlement meeting is a declaration that a lien of a given lien claimant is valid. Any other relief must be on the basis of settlement "by the parties".

The court retains a broad power to vary or set aside statements of settlement on whatever terms it considers appropriate. Courts are aware of the remedial nature of the settlement meeting provisions and actively support the work and outcome of a properly convened and conducted settlement meeting. The court will make whatever orders are necessary to enforce a regularly obtained statement of settlement, in pursuit of the court's policy of enforcing settlements generally.[35] The court will be reluctant to interfere if the meeting was regularly constituted and conducted,[36] although it has the power to do so. If an

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35 See *Rotstein v. Rotstein*, 1999 CarswellOnt 195, 44 R.F.L. (4th) 358 (Div. Ct.) [O'Leary J.]: "The motions court judge correctly stated that 'Generally, it is the policy of the court to enforce settlements.' We agree and that is what we must do here."

36 See, for example, *Heritage Contracting & Design London Ltd. v. Bayley-Hay*, 1990 CarswellOnt 658, 39 C.L.R. 1 (Gen. Div.), where the court refused to intervene when judgment pursuant to a Statement of Settlement had been taken out

order obtained by settlement under the *Construction Act* affects other proceedings, such as mortgage enforcement proceedings, the beneficiary of the order will have to establish by evidence in these other proceedings that the settlement was reasonable before it will be given effect.[37]

The court is given specific discretion to make any order necessary to give effect to any judgment or report that is issued on the basis of a filed statement of settlement. This includes a money judgment, a declaration or any other necessary order. This rule can be used to effect partial summary judgment in the right case, even if contentious liens remain in the settled class of claimants left for trial.[38] It is not known how far this jurisdiction might go, such as, for example, to allow the lien court to issue Mareva or Anton Piller orders in furtherance of a settlement order made at an early stage of a lien action.

5.8.3 Consequences of default in attendance at a settlement meeting conducted under the *Construction Act*

The failure to attend a formal settlement meeting in a lien action can have surprisingly serious consequences, whether the failure is advertent or inadvertent.

Section 10(4) of O. Reg. 302/18 states that the results of the settlement meeting shall be embodied in a statement of settlement which shall summarize "those issues of fact and law which have been settled by the parties". **Section 10(5) of O. Reg. 302/18** then goes on to provide that the statement of settlement shall be filed with the court and shall be attached to and form part of the record, and:

> . . . is binding on all persons served with notice of the settlement meeting, and on all defendants who have been noted in default.

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against a party in default, even though there was some evidence that the outcome was unfair to the defaulting defendant. O. Reg. 302/18, s. 10(8)(d).

37 *Dorsam Investments Ltd. v. Counsel Trust Co.*, 1993 CarswellOnt 820, 11 C.L.R. (2d) 76 (Div. Ct.).

38 *Moffatt & Powell Ltd. v. 682901 Ontario Ltd.*, 1992 CarswellOnt 860, 49 C.L.R. 205 (Gen. Div.). In this way, the use of O. Reg. 302/18, s. 10 is much better than the use of **Rule 20**, even if **Rule 20** is available in such circumstances.

Section 10(8)(a) of O. Reg. 302/18 then provides that:

> . . . on the filing of the statement of settlement with the court, the court may, if there was no dispute at the meeting to a claim for lien, declare the lien valid and give such further judgment as it considers appropriate.

Section 10(8)(b) of O. Reg. 302/18 allows the court to enter a judgment or make a report "upon consent on those issues which have been settled by the parties". It would seem, therefore, that the only substantive event that can occur at a settlement meeting in the absence of consent of the parties is the declaration of a lien as valid. Anything else seems to require the consent of the parties, whether they attend the settlement meeting or not.

In practice, therefore, it is enough that someone (an agent, a clerk, a secretary, anyone really) attend the settlement meeting and "dispute" anything that the attendees purport to do. This dispute will be recorded in the minutes and should be sufficient to prevent an order contrary to the interests of the disputing party. Nothing in **s. 10(8)** says that the dispute has to be substantive, or even reasonable, although one might expect an arbitrary or otherwise unreasonable position to attract costs, perhaps on a substantial indemnity basis, and perhaps against the lawyer involved, under **s. 86** and **s. 86(1)(b)(ii)**.

5.9 Vetting committees

What is a vetting committee? What does it do? How does it function? What responsibilities rest on the vetting committee members once the committee is established? These questions are answered in this section.

In *Urbacon Building Groups Corp. v. Guelph (City)*,[39] the court explained the function of such committees as follows:

> The construction bar often uses a "Vetting Committee", appointed at a settlement meeting. [. . .] The goal of the Vetting Committee is to identify issues that can be resolved, including, in this case, the technical sufficiency, timeliness and quantum of subcontractor liens. It is expected that the Vetting Committee's report will identify the gross amount of subcontractor lien claims, the portion of these that is agreed, the portion that is disputed, and any technical challenges to the validity of liens.

There is no express statutory authority in the *Construction Act* for

39 2009 CarswellOnt 8127, [2009] O.J. No. 5531 (S.C.J.).

the creation of vetting committees. If necessary, authority could be found in the court's power under **s. 50(3)** (procedure in a lien action to be as far as possible of a summary character, having regard to the amount and nature of the liens in question), and in **s. 51(b)** (mandate to do all things necessary to dispose finally of the lien action, and give all necessary relief to all parties to the action), as well as by reference to **Rule 55.01(1)(a)** (referee shall devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may give such directions as are necessary, a Rule not inconsistent with the *Act*) and in **Rule 55.02(3)** (power of referee at the hearing to give whatever "special directions" are necessary concerning the parties that are to attend and what evidence is to be received and how documents are to be proved, another Rule not inconsistent with the *Act*).

Like other procedures unique to lien actions, the vetting committee is a creature of necessity. There has to be some way of attempting to reach a consensus among the lien claimants themselves to present to the court on issues of timeliness, lienability and quantum. The appointment and empowerment of vetting committees, by the court, as an adjunct of the court itself, answers this need.

The theory is that the trades on any given improvement are likely to know who did what and when on the job. Lien claimants might be able to fool the owner or a mortgagee as to the date of their last work, but they are much less likely to be able to fool another subcontractor. The "vetting committee", therefore, is a committee composed and empowered by the court on a case-by-case basis, usually but not always with representation from all tiers in the construction pyramid, to winnow out good liens from bad. The court is in no way bound by the vetting committee report, but it is often a persuasive and helpful document.

The only real difference between a vetting committee and a formal settlement meeting under **ss. 9 and 10 of O. Reg. 302/18** is that the vetting committee is directed by the court itself and is required to report back to the court that created it, whereas a settlement conference is requested and run by the parties themselves with access to but no mandatory reporting back to the court. The parties to a settlement meeting are on their own. The vetting committee is an adjunct of the court itself. The settlement meeting is a specific statutory right of the parties, granted to them by the *Act*. The vetting committee derives

from the general power of the court to devise helpful procedures in lien actions.

The vetting committee is a group of lien claimants (and sometimes an owner or mortgagee, if appropriate) and their lawyers that reviews and renders a report on various aspects of the liens of the various claimants. The vetting committee tries to build consensus on the basic issues of timeliness, lienability and, in some cases, quantum.

The vetting committee is set up by the judge or master at the first lien pre-trial, usually as part of the process that consolidates and awards carriage of the overall lien proceedings. The tone of the vetting committee is inquisitive, but also conciliatory and non-adversarial. The vetting committee is not adjudicative in any way. It is advisory only. The vetting committee builds broad lines of consensus and consent, and establishes facts with the full participation of the parties involved, and by reference to admitted documents. There are no restrictions as to what the vetting committee may consider in their deliberations or as to what they can and cannot recommend in their report. Vetting committees may and often do refer to whatever evidentiary material they consider appropriate, including things and statements that would not otherwise be evidence in court (hearsay, opinion etc.). Sometimes this "non-evidence" is important in building consensus in a vetting committee. If the vetting committee runs into difficulty in obtaining access to relevant documents or evidence of any kind, the master at Toronto will make such orders for production of documents as may be necessary, including, in a very rare case, inspections of property or examination of non-parties.

The following are the basics of vetting committee structure and function:

1. Participation in the vetting committee is voluntary. The court might choose among volunteers, but it will not (and likely can not) compel participation in a vetting committee. The committee is intended to make its report to the court on the basis of unanimity and consent as far as possible. Unwilling participation is thought to be counter-productive. Once the vetting committee is established, the court will assist with orders and directions, for example, requiring lien claimants, owners or the general contractor, to assemble and submit documents, or provide information and particulars of claims.

2. The vetting committee should contain at least one representative from each stakeholder, including each "class" of lien claimant[40] and the owner (even if all liens have been vacated by the contractor). This would include the contractor and secured creditors if they are parties. The broader the stakeholder representation, the more comprehensive, productive and satisfactory the result of the vetting committee's work.

3. Choose the party represented by the most experienced counsel, even if that claimant does not have the largest claim in absolute dollar amount.

4. The owner and mortgagees may be reluctant to be represented on the vetting committee. They usually have no interest in how the subtrades divide up the holdback. Usually the holdback figure can be "bracketed" between 10% of the value of the work claimed by the general contractor, and 10% of the value of the work claimed by the owner. To the extent that the value of the holdback can be "bracketed" in this way, the owner becomes an interested party and will likely want to be represented on the vetting committee. If the owner has a set-off, it will be interested in the issues of the validity of the larger lien claimants. To the extent that their liens are less than "holdback", there is more money available to satisfy the owner's set-off.

5. The chair of the vetting committee is usually selected by the court in giving the directions that constitute the committee, failing which the lawyer having carriage will assume that role. The chair will convene the first meeting of the vetting committee. Thereafter the committee members themselves will choose their own chair. Lawyers participating in the "vetting" of claims must abstain from vetting their own client's claim.

6. Minutes of vetting committee meetings should be kept and circulated. They should recite the authority of the committee by referring to the order constituting the committee. The chair will conduct a roll call to confirm participation. There is no formal "quorum" for the vetting committee. It is an open question, and

40 "Class" under the *Construction Act*, R.S.O. 1990, c. C.30, is an incident of relative degree of privity of contract with the "owner", see **ss. 79** and **80**.

perhaps a matter for direction of the court in the order establishing the vetting committee, as to what a proper quorum might be on any given issue. The committee will read and approve the minutes of any previous meeting and approve an agenda of the day. The minutes of the proceedings of the vetting committee should be complete and accurate and approved as a preliminary order of business at each subsequent vetting committee meeting. These minutes will evidence the conduct of the committee. They should be appended as a schedule to the final vetting committee report. These minutes assist the lawyer having carriage in assessing salvage costs.

7. The court order establishing the committee will direct all parties to provide full documentary backup and other information required to support their claims. Issues of compliance will be dealt with by motion for directions. The court will assist the vetting committee in carrying out its duties to the court. The master at Toronto has ordered the preparation and circulation of witness statements as an aid to a vetting committee's deliberations.

8. The vetting committee considers threshold issues of timeliness, lienability and quantum, class by class, starting with the most remote class in degree of privity from the owner, (i.e., the first class to benefit from any distribution of holdback, **s. 80**), until all classes of lien claims have been "vetted". The issues in a lien action tend to be more easily "vetted" the farther away from the owner the lien claimant is on the construction pyramid. Suppliers are usually able to document the price and delivery to a specific improvement. They are therefore relatively easy to verify. General contractors, on the other hand, usually have more complex claims and are hardest to resolve by a vetting committee.

9. Timeliness is usually the easiest question to resolve. Issues of lienability are hard to resolve in a vetting committee but are relatively easy to isolate for court determination. Issues of quantum are the hardest to resolve. The chair of the vetting committee can apply back to the court for enabling orders as required. As has been mentioned repeatedly above, these orders include requiring the production of documents or records, or the supply of additional information as required, or the physical inspection of property in a rare case. Although there appears to be no authority on

this point, the vetting committee could presumably cross-examine the deponent of an affidavit under the statute (if this had not been done previously) and seek salvage costs for this exercise. This kind of activity, however, would likely require a special resolution of the vetting committee before the fact. It would also be prudent in such a case to obtain court approval in advance.

10. Quantum is the next issue. In well organized lien proceedings, the lawyer having carriage will have prepared a good spreadsheet setting out the parties and their liens and the amounts claimed well in advance of the first pre-trial at which the vetting committee is established. The activities of the vetting committee will allow the lawyer having carriage to improve this spreadsheet by recording any agreements as to timeliness, lienability and quantum.

11. The vetting committee has no decision-making power. It merely reports back to the court in the form of a formal, written vetting committee report, signed by all of the members of the vetting committee. This vetting committee report is formally presented to and accepted by the court as part of the court file, for use in resolving the issues before it. It is not unheard of for there to be a dissenting vetting committee report which is signed by the dissenting members of the committee and filed. If a dissenting vetting committee report is likely, it is recommended that the court be approached for further directions before either report is filed.

12. There is no prescribed form for the vetting committee report.[41] The only practical requirement is that it be complete, accurate and useful to the court. The report often attaches the minutes of the various vetting committee meetings. The report should also attach an updated version of the original pre-trial spreadsheet, amended to include the information found and developed by the vetting committee. The chair of the vetting committee will circulate a draft report to all committee members, whether they attended the meetings or not, and will solicit changes or corrections, failing which the report will be presented to the court for

41 An excerpt of a sample vetting committee report is included in Appendix II, Precedents.

adoption in the form circulated. The initial draft will be circulated with a covering letter from the chairman of the vetting committee. It is prudent to discuss the wording of this covering letter with the court in advance, as the court may want to include specific language clarifying the purpose and function of the report, and notifying the parties of their rights in relation to the report. The court may require broader circulation of the draft report in some cases than in others, and may require that there be strict personal or other form of service on lay litigants.

13. A motion to the court to receive the vetting committee report is usually provided for in the directions of the court that established the committee. Failing that, the vetting committee report is often simply filed at the next scheduled pre-trial. In either case, the chair will walk the court through the steps taken to constitute the committee, the work of the committee, and the findings of the committee and the reasons for those findings. The lawyer having carriage will also ask the court for any further directions that are required, or, possibly, for the incorporation of the results of the vetting committee report in an interim or final order, report or judgment.

CHAPTER 6

PRACTICE BEFORE THE COURT

6.0

6.1 Motions in lien actions

NOTE: The Superior Court of Justice has issued a Notice to Profession for the Toronto Region affecting motions in lien proceedings in Toronto during the COVID-19 pandemic (Toronto Expansion Protocol for Court Hearings During COVID-19 Pandemic). A summary of motion procedures during the pandemic can be found in **Appendix XIII**.

6.1.1 Guide

Interlocutory steps in a construction lien action — other than those provided for in the *Act* — shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.[1] Thus, unless a motion or application is expressly or implicitly provided for in the *Act*, leave must be sought and obtained. In Toronto, leave motions are often scheduled to be heard as a preliminary motion on the same day as the substantive motion, so that if leave is granted there is no additional delay waiting for a date to hear the substantive motion. By scheduling in that manner, the court is not granting leave. As pointed out by Master Albert in *MGI Construction v. Donset Construction*:

> The leave test for interlocutory motions is an important part of the framework in the *Construction Lien Act* whereby the court presiding over construction lien disputes is given tools to control its process and determine lien claims expeditiously. The leave test for interlocutory proceedings in section 67 of the *Construction Lien Act* balances fairness and justice with expeditious resolution of lien claims. It requires the court to vet whether a motion is necessary or will expedite resolution of the lien dispute. If neither

[1] O. Reg. 302/18, s. 13.

> test is met then the motion cannot proceed on its merits, thus preventing the delay inherent in interlocutory proceedings.[2]

Adverse costs orders are possible in lien proceedings against lawyers who prejudice or delay the conduct of the action by bringing unreasonable motions and applications for example.[3] Forethought is therefore required before bringing any motion or application in a lien proceeding. The following guide may assist:

1. Begin with the *Act*. Some relief under the *Act* may be obtained by motion, and some by application. This will determine whether or not the master has jurisdiction to hear the matter. This may also determine the venue of the motion:[4]

> If the motion is properly brought in Toronto, it is heard in Construction Lien Motions Court on a booked-appointment basis. Call Al Noronha or David Backes, Construction Lien Registrars, 416-327-9404 and 416-212-9783, respectively, for an appointment. The Master can hear all motions contemplated by the *Construction Lien Act except* motions under **s. 58(1)** (to refer an action to a master for trial), s. 58(3) (at trial, to refer the action to a master), and **s. 58(5)** (to set aside a judgment of

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2 2017 ONSC 4134, 2017 CarswellOnt 10281 (S.C.J.). See, however, *Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd.*, 2015 ONSC 4545, 2015 CarswellOnt 10645 (S.C.J.); additional reasons 2015 CarswellOnt 13123 (S.C.J.) to the contrary. For the leave test generally, see *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, 2016 ONSC 5107, 2016 CarswellOnt 12934 (S.C.J.); additional reasons 2017 CarswellOnt 17894 (S.C.J.).

3 *Construction Act*, R.S.O. 1990, c. C.30, **s. 86(1)(b), s. 86(2)**.

4 An excellent discussion on this topic is made by Max Shafir Q.C. and Jennifer Roberts-Logan in "Proper Venue for a motion in a Construction lien action or Proceeding", 29 C.L.R. (2d) 183, which discusses the endorsement of Justice Borins (as he then was) in *Don Park Inc. v. Windsor Western Hospital*, where the learned justice had said "in my view, because this is a *Construction Lien Act* action, concerning property in Windsor, which was commenced in Windsor, this motion should be heard in Windsor. In my view, r. 37.03(1) (sic) does not apply to the venue of interlocutory motions in lien actions . . ." The learned commentators point out that before the amendments to the *Act* in 1989 (*Courts of Justice Amendment Act*, R.S.O. 1990, c. C.55, ss 67 and 70) and 1990 (*Court Reform Statute Law Amendment Act*, R.S.O. 1990, c. C. 56), s. 51 of the *Act*, as it was at that time, required that all actions be tried by a judge of the court having jurisdiction where the premises were situate, but the amendments cited abolished this venue section. Readers are encouraged to read the reasoning in this article both on the issue of venue for the trial of lien actions and for validation of the long-standing practice regarding the venue of motions in lien proceedings.

reference).

The relief in **s. 32(1)7** (declaring a contract substantially performed), **s. 68(1)** (appointing a trustee) and in **s. 66** (directions for the disposition of trust money), is sought by application (unless there is a pending action) and not by motion. Such applications must be heard by a judge, with a possible exception where a master is operating under comprehensive judgment of reference: see *Celebrity Flooring v. One Shaftsbury* (stated case to the Divisional Court, 02-CV-223830 (Toronto)) scheduled to be heard February 26, 2003, but recently settled. See *SNC Services v. Peel* (1993), 6 C.L.R. (2d) 254 — a master has no jurisdiction to make an order under s. 32(1) 7. See also *Atlas-Gest Inc. v. Brownstones* (1992), 26 R.P.R. (2d) 233 and *G.C. McDonald v. Preston* (1991), 45 C.L.R. 293 at 294 which hold that **s. 68** proceedings to appoint a trustee can be initiated by motion in an on-going action, but the motion, in each case cited was actually heard by a judge.

A master has jurisdiction to hear motions under **ss. 44** (vacating a lien by payment into court), **45** (declaration by a court that a preserved lien has expired), **47** (court's general power to discharge liens), **53** (extending time for service, leave to deliver counterclaim or crossclaim separately from statement of defence), **54** (leave to deliver defence where defendant noted in default), **56** (leave to join as third-party claimant), **57** (adding or joining parties), **59** (carriage of action and consolidating liens), **60** (fixing date for trial or settlement meeting), **61** (settlement meeting), **63** (personal judgment), **65** (completion of sale), and **67** (procedure generally and interlocutory steps) of the Act, as well as all motions under the Rules of Civil Procedure that **Rule 37.02(2)** allows to be heard by a master.[5]

2. As of July 1, 2015, a Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region provides as follows:

Long and short motions in construction lien actions require an appointment with the Construction Lien Master to be arranged through the Assistant Trial Coordinator for the Construction Lien Masters on the 6th Floor 393 University Ave., or by telephone to 416-212-9783 or 416-327-9404. All long motions require a telephone case conference with the master who will be hearing the motion in order to determine the length of time required, set a timetable for any remaining steps before the hearing of the motion and fix a return date for the motion.

Motions made without notice and consent motions in construction lien

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5 Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference at pages 23–25.

> actions are heard daily from 9:30 to 10:00 a.m.
>
> Short motions and hearings for directions within a reference are booked through the Assistant Trial Coordinator for the master assigned to conduct the reference.

3. While in the past the Toronto lien masters' *ex parte* court had resumed its practice of hearing out of town *ex parte* motions to vacate liens upon posting security, due to the reduction in court resources available to construction lien matters, the construction lien *ex parte* court in Toronto may no longer be in a position to service the entire province for *ex parte* motions in construction lien matters. The *ex parte* court will hear Toronto matters first, so there is a chance that non-Toronto matters, although they can still be brought, may not get heard on a particular day. This practice has been subject to frequent changes over the last little while, so it may be worth checking the current practice with the court before attending *ex parte* court.[6]

4. If in doubt seek leave. If you cannot find clear jurisdiction in the language of the Act itself, seek leave of the court to bring the motion on the grounds that the motion is either "necessary", or "would expedite the resolution of the issues in dispute". About necessity, Master Sandler has this to say:

> Many lawyers believe that every motion in a construction lien action cannot be brought without leave of the court. This is wrong. It is only interlocutory steps, *other than* those provided for in the *Construction Lien Act* that cannot be taken without the "consent of the court". This excludes all the motions in the sections referred to (see #1, above). This *would include* all Rules of Civil Procedure motions that apply — **s. 67(3)**, i.e., that are not inconsistent with the corresponding provision in the Act.[7]

5. Put your best foot forward when seeking leave. Although the issue appears not to have been decided, and although the standard of evidence on most interlocutory motions is low, it would be expected that the moving party would put its best foot forward in seeking leave.

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6 Master Julian Polika, "How to 'Win' Ex Parte Motions", paper presented at Ontario Bar Association, An Evening with the Construction Lien Masters, Toronto, November 23, 2006.

7 *Ibid.*, page 25.

6. Cite the source of the Court's jurisdiction in your notice of motion. If you have a statutory basis for your motion or application, cite it in your materials right up front. If you do not have a statutory basis or are not sure, seek leave citing **s. 13 of O. Reg. 302/18**, and provide evidence to support your leave argument in your material filed in support of the motion or application. In preparing this material, answer these questions: "Is this step (a) necessary, (b) if so, why, and (c) would it expedite the resolution of the issues in dispute?"

7. Use the *Rules*. The motion or application may be made in the manner provided for in the *Rules of Civil Procedure* for the making of motions, regardless of whether any action has been commenced at the time the motion is made.[8] If the action has been referred to a master, then only that master and no other master may hear the motion.[9]

8. Have regard to local practice. If the motion is to be heard on notice, telephone the appropriate master's registrar, if any, with details of what the proposed motion is about, and ask for a hearing date and directions, if any. If the motion is on consent or *ex parte*, then go and see the appropriate master on his or her scheduled *ex parte* day or telephone or fax the master involved to make an appointment to see him or her.[10] If the master is not known, an appointment must be booked through the motions office.

9. Make it easy for the court. Organization and accuracy matter. They represent your initial advocacy on any motion. For example, the master will want to turn to a tab corresponding to an exhibit number and see the document itself, not a sheet bearing nothing but the exhibit number. Where documents must be reproduced so that the exhibit must be turned sideways to be read, make sure the top of the document is at the spine of the book or

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8 O. Reg. 302/18.

9 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 54.05(1)**, *Jondy Retail Interiors Inc. v. 832807 Ontario Inc.*, 1992 CarswellOnt 870, 50 C.L.R. 123 (Gen. Div.).

10 Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference, p. 26.

binder containing the document. Although the *Rules* expressly permit double-sided copying, it is easier for the master if copying is single-sided, presenting a blank page for notes.

Motions before the master proceed like any other motion, with the exchange of motion records containing affidavit evidence, cross-examinations, *facta* and oral argument. It is important to note, however, that the master in a referred lien action under **s. 51(b)** of the *Act* has additional, wide inquisitorial powers. In a motion in a referred lien action, the master may exercise this inquisitorial jurisdiction and apply **s. 50(3)** to keep procedures as summary as possible and do whatever is necessary to resolve the lien dispute on its merits. This could include, in an appropriate case, adjourning a motion when pivotal factual issues are unresolved, sending counsel away to review the files and report back, and any other step required to get to the merits of the core issues.[11] There is nothing to prevent a master from ordering evidence from witnesses not brought forward by the parties themselves, or to order such witnesses to attend and be heard *vice voce*.

Although this wide jurisdiction clearly exists, it has not yet been exercised to its fullest potential. It is interesting to speculate how the full exercise of this powerful, remedial jurisdiction might alleviate concerns with the expense and delay involved in trying lien proceedings.[12] The direction of the recent Rule amendments, particularly as regards **R. 20** (Summary Judgment), is to encourage engagement of the court with its process to expedite the resolution of disputes on their merits.

6.1.2 Vacating liens

(1) Vacating or discharging?

The *Act* provides a complete code for the owner, financier, contractor or subcontractor who wants to remove the lien registration using cash or some other form of security.[13] Deficiencies in the claim for

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11 *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479, 37 C.L.R. (3d) 1 (S.C.J.).

12 Glaholt & Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

13 The Master in Toronto, for example, will entertain a wide variety of forms of security, or combinations of security provided the motion is made on notice, the

lien or lien action may also support a motion to discharge the lien and remove its registration from title.[14]

There is a significant difference between "vacating" and "discharging" a lien. "Vacating" refers to the removal of the *registration* of a preserved lien under **s. 44** of the *Act* and, in the event the lien is perfected, the removal of the certificate of the action that perfected that lien.

"Discharging" has a special, statutory definition under **s. 48** of the *Act*. It refers to the extinction of the *claim* itself. Under **s. 48** a discharge of lien is irrevocable. A discharged lien cannot be revived. Language of "discharge" should not appear in any court order that is meant only to "vacate" a lien. A mistake in understanding these concepts can be fatal to the lien and result in a claim against a lawyer in negligence.

If there is one encounter that almost every lawyer has with the *Construction Act*, it is in vacating, or otherwise disposing of the registrations of claims for lien. These motions often arise urgently when a lien has been registered and there is a sale or vital mortgage advance pending. Creditors are impatient. The project is doomed if cash does not flow or the sale does not close. The phone rings. The client says "There's a lien . . . do something . . . now!" What do you do, and how do you do it?

To repeat, a "*discharge*" of lien is permanent.[15] *It can never be undone*. If language of discharge is used in an order or a consent to

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parties and the court have a chance to properly evaluate the security, and the security, when posted, leaves the parties in as good a position as they would have been in with cash, bond or irrevocable Canadian chartered bank letter of credit.

14 *Construction Act*, R.S.O. 1990, c. C.30, **s. 47**.

15 This is a very important distinction indeed. Consider **s. 48** of the statute, which renders discharges of lien, however they occur, irrevocable and incapable of revival, and see the application of this clear statutory provision in *Southridge Construction Group Inc. v. 667293 Ontario Ltd.*, 1992 CarswellOnt 847, 2 C.L.R. (2d) 177 (Gen. Div.); affirmed 1993 CarswellOnt 845, 12 O.R. (3d) 223, 2 C.L.R. (2d) 184 (Div. Ct.), and see this principle applied in *Northway Developments Inc. v. 1200946 Ontario Inc.*, 1998 CarswellOnt 3048, [1998] O.J. No. 3082 (Gen. Div.), where a registered release of lien had the effect of a discharge, even though it referred only to "vacation" of the lien. See also *N.K.P. Painting v. Polygrand Developments Inc.*, 1995 CarswellOnt 417, 22 C.L.R. (2d) 31 (Gen. Div.), *Starcevic v. Halton HillsDev.*, unreported , KCCF No. 48.2 (Ont.

order, where a permanent surrender of lien rights is not intended, the result is permanent loss of lien rights, and usually delivery up of security and dismissal of the lien action, depending on the stage of the proceeding.[16] A discharge of lien by order is a "final" order and appealable as such.

The "*vacating of the registration*" of a lien and the "*postponement*" of a lien, however, are also provided for by the statute. Vacating and postponement of liens are interlocutory procedures only and therefore not appealable, except to the extent that reduced security is ordered.

Liens can be vacated as of right if the required security is posted in the right form. This security is equal to the full amount claimed as owing in the claim for lien plus the lesser of 25% of that amount or $250,000 as security for costs.[17] The recent amendments to the *Construction Act* increased the amount required to vacate the registration of a claim for lien from the lesser of $50,000 or 25% of the claim to the lesser of $250,000 plus 25%. A party seeking to vacate a lien greater than $200,000 using the old formula will have to lead evidence speaking to the transition provisions.[18] In terms of practicality, there is no reason that a call one day, or even one morning if it was early enough, could not result in the vacating of the lien the same day or the next day, provided the client can raise the necessary security and the lawyer knows what he or she is doing. The order is mandatory if full security is posted.

Gen. Div.). *Southridge* has since been followed routinely, and attempts to distinguish the decision based on the nature of the initial error have failed: see, for example, *9585800 Canada Inc. v. JP Gravel Construction Inc.*, 2019 ONSC 7022, 2019 CarswellOnt 19773 (Div. Ct.).

16 *Southridge Construction Group Inc. v. 667293 Ontario Ltd.*, 1992 CarswellOnt 847, 2 C.L.R. (2d) 177 (Gen. Div.); affirmed 1993 CarswellOnt 845, 12 O.R. (3d) 223, 2 C.L.R. (2d) 184 (Div. Ct.).

17 *Construction Act*, R.S.O. 1990, c. C.30, **s. 44(1)**, dealing with both circumstances, where the lien does and does not attach to the premises, and see *United Dominion Industries Ltd. v. Ellis-Don Ltd.*, 1993 CarswellOnt 855, 8 C.L.R. (2d) 184, 65 O.A.C. 115 (Div. Ct.); affirming *United Dominion Ltd. v. Ellis-Don Ltd.*, 1992 CarswellOnt 871, 50 C.L.R. 125 (Gen. Div.).

18 Master Donald E. Short and Master Todd Robinson, "Tips for a Successful Hearing Before a Construction Court Master", Presentation to the Advocates' Society, April 30, 2019, reproduced with permission of the masters as Appendix XII.

The statute also allows payment into court, on motion, on notice, of a "reasonable amount" instead of the full amount of the claim for lien.[19] In order to get a lien vacated on payment of a reduced amount, however, the evidence must clearly and unequivocally prove that the lien as registered is excessive or improper.[20] Special provision is made for vacating general liens and reducing the amount paid into court in appropriate circumstances.

When an order is vacating a lien upon the posting of security under **s. 44**, the lien becomes a charge on the security posted and not on the land. Three rules apply when liens are vacated by posting security.[21]

1. If a preserved lien is vacated, an action to enforce that lien must still be commenced to perfect that lien, but no certificate of action is required;[22]

2. The security placed in court is subject to the claims of all persons "having a lien", i.e., those with subsisting, but unpreserved claims for lien, just as if the security in court had been realized

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19 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 44(2), 44(3)**, where the lien does (**s. 44(2)**) and does not (**s. 44(3)**) attach to the premises. The idea is not to have a trial before a trial, if there are substantive issues or "genuine issues for trial", they will be left for trial *Wasero Construction (1991) Ltd. v. 1024963 Ontario Ltd.*, 1994 CarswellOnt 3593, [1994] O.J. No. 2575 (Gen. Div.), see also *Landis & Gyr Powers Ltd. v. Megatech Contracting Ltd.*, 1992 CarswellOnt 3183, [1992] O.J. No. 2103 (Gen. Div.), where reduced security was ordered when a lien claim was found to include a "Delay Claim" as such. The court refused to count in a bonus due under a contract with respect to savings when vacating a lien in *Granville Constructors Ltd. v. Somerset Place Developments of Georgetown Ltd.*, 1990 CarswellOnt 680, 43 C.L.R. 36 (Gen. Div.); additional reasons 1990 CarswellOnt 2878 (Gen. Div.), and, for a compendious review of the law and authorities where some but not all of the lien claims had settled and a reduction was sought, see *M. Sullivan & Son Ltd. v. Roche Ltée*, 1998 CarswellOnt 2851, 39 C.L.R. (2d) 251 (Gen. Div.).

20 *City Star Roofing Inc. v. Abewe*, 2014 CarswellOnt 18234 (S.C.J.); *Kamali Design Home Inc. v. Bondarenko*, 2013 ONSC 5506, 2013 CarswellOnt 14896 (S.C.J.).

21 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 44(4), (5), (6), (7), (8) and (9)** respectively.

22 See *Tilar Roofing Ltd. v. John Boddy Developments Ltd.*, 1986 CarswellOnt 1026, 20 C.L.R. 161 (S.C.).

by the sale of the property;[23]

3. If some liens against a property are vacated from title by posting of security and some are not, any amount realized by the eventual sale of the land gets *pooled* with any amounts paid into court or otherwise secured, and the whole pool is distributed in accordance with the priority scheme of **s. 80**.

How does one actually go about vacating the registration of a claim for lien? Motions to vacate liens must be brought where the proceeding was commenced or in the jurisdiction to which the lien proceeding was transferred. If no proceedings have been commenced, a motion should be brought where the lands or part thereof are situate.[24] Practice in this area is local. It is wise to double check just before you bring your motion. The basic steps necessary before the lien master in Toronto are as follows:

1. Decide whether you want to proceed, without notice, in which case you will need a bank draft or certified cheque payable to the "Accountant of the Superior Court of Justice" or proper security for the full amount of the claim for lien, plus any added H.S.T. if claimed, plus the lesser of $250,000 or 25% of the claim for lien, for costs; or whether you want to try to provide security for a lesser "reasonable" amount, in which case the motion must be on notice or on consent. In either case, the motion is to a lien master in Toronto or to a judge of the Superior Court outside of Toronto;[25]

2. Calculate and have your client assemble the necessary cash (i.e., certified cheque or bank draft), or have them procure the necessary irrevocable Canadian chartered bank letter of credit or the lien bond in each case in the currently approved form.[26] If the security is to be cash, then the certified cheque or bank draft is payable to "The Accountant of the Superior Court of Justice";

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23 See *Atlas Corp. v. 617430 Ontario Ltd.*, 1988 CarswellOnt 771, 31 C.L.R. 201 (S.C.).

24 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 13.1.02.**

25 Once again, the author thanks Master David Sandler, who collaborated with the author on this list of steps. Quoted directly from remarks by Master David Sandler.

26 Forms in current use as of the date of this book are annexed as an Appendix.

3. There used to be uncertainty about the form of letter of credit to be used under this section. That uncertainty was removed in 2018. Section 44(5.1) now provides that. A letter of credit containing reference to an international commercial convention is acceptable as security for the purposes of this section, as long as the convention text is written into the terms of the credit and the letter of credit is unconditional and accepted by a bank listed in Schedule I to the Bank Act (Canada) that is operating in Ontario.

4. When lien bonds are used as security to vacate a lien, the correct bond form must be used. The lien bond surety must be duly licensed in Ontario. The bond must affix the seal of both the lien bond surety and the principal obligor of the lien bond. The name and title of the person executing on behalf of a company should be listed. The seal of the surety is required. If a corporate seal from the principal obligor is not included, then the name and title of the signing officer must at least be included, and it will be in the discretion of the presiding master whether or not the security is accepted. Where the surety is not a well-known surety company, it is advisable to include evidence of the surety's licensure, which can be obtained from the Financial Services Commission of Ontario website.[27]

5. In the Toronto construction lien court, when posting security for multiple lien claims, the court requires separate security in the exact amount required to vacate each lien claim. In other words, when posting a bond or letter of credit, each bond and letter of credit may secure only a single lien claim and not multiple lien claims. If multiple lien claims are to be vacated, a separate bond or letter of credit will be required for each lien. Of course, this would not apply to cash (bank draft/ certified cheque).

6. You do not need an abstract of title when you are just bonding

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27 https://www.fsco.gov.on.ca/en/insurance/Licensing-Registration/Pages/lic_companies.aspx. This paragraph is cited from Master Donald E. Short and Master Todd Robinson, "Tips for a Successful Hearing Before a Construction Court Master", Presentation to the Advocates' Society, April 30, 2019, reproduced with permission of the masters as Appendix XII.

off a lien.[28] What you do need is a motion record, with an appropriate backing page, and an affidavit setting out the claim or claims for lien being vacated, and the calculation of security and any other information pertinent to the particular motion. You can attend and be heard in most jurisdictions with just an affidavit, your security and an order, but "best practices" require a proper motion record.

7. The title of proceeding used in your motion will depend on whether the motion is brought before or after the lien being vacated has been perfected. If it has, use the title of proceedings and action number of the existing lien action (**Rule 4.02(1)**) and, on the backing sheet, name the place the action was commenced (**Rule 4.02(3)(d)**). If no action has been commenced, simply identify the parties by their standing, i.e., "X Co., Lien Claimant v. Y Co., Owner and Z Co., Mortgagee". In this case, you still need to obtain a temporary court file number. In Toronto, these are presently obtained, on request, from the Construction Lien Masters' administration window or the civil scheduling counter. At the time of writing, the issue of which of these counters is ultimately responsible for this task had not been finally settled. Outside of Toronto, you will need to attend at the civil scheduling counter. Note that in every case where you are vacating a Certificate of Action, you have to use the title of the action whose certificate you are vacating, not whatever title of proceeding you may have adopted to get the original lien removed.

8. An affidavit is then prepared setting out the calculation of the 25% costs, and the total of the security required and provided. This is best done as a column of figures, showing each lien amount, the H.S.T. portion of each lien amount, the calculation of the 25% or $50,000 security for costs claim, and the total of the amount of the security with respect to *each* lien being vacated. It is a good idea to put a *copy* of any bond or letter of credit in the motion record. The original bond or letter of credit must be kept loose and available so that it can be stamped, signed

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28 Verbatim from Master Sandler, Ontario Superior Court of Justice, "Lien Actions: Practiced Tips from the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference, p. 7.

by the master and filed with the Accountant. If the lien to be vacated says "plus GST", then the GST has to be calculated and the calculation set out in the affidavit.

9. If the lien claims an amount in U.S. dollars, then the security, if cash, has to actually be in U.S. dollars, or if in a letter of credit or bond, expressed in U.S. dollars. The same is true of all other foreign currencies.

10. While all of this is going on, you will have prepared a draft order, being careful to recite *exactly* what it is you have filed and paid into court and in what form. In the operative paragraphs you use the terminology "*vacate*", *not* "*discharge*".

11. The cash or security, the affidavit in support (ideally, the whole motion record) and the draft order are then gathered up and an attendance is made before the court if the motion is to proceed *ex parte*. If notice is required for any reason, then service of the motion must be effected in accordance with the *Act* and the *Rules* in that regard and the motion must be set down in accordance with the procedures of the relevant court office. Some courts operate on a "booking" basis and others have set motions date on a given day of the week, every week, so it is wise to make some enquiry of the court offices in advance.

12. You do not need an abstract of title, as such, when you are just "bonding off" a lien. You just need a certified copy of the lien or a true copy of it (paper or electronic) verified by affidavit.

13. Make sure that you have a motion record and a draft order. Never just file an abstract of title and your order, or a construction lien bond or letter of credit and your order. The last paragraph of your order should provide expressly that the order may be validly served by facsimile or by registered or ordinary mail on the lawyer for the lien claimant, and, if there is no lawyer for the lien claimant, on the lien claimant in person *at the address for service shown on the face of the claim for lien*.

14. The court will then examine and approve or reject the form of order and the security. If the form of order and form of security is acceptable, the court will issue a "requisition", which is a pre-

printed form.[29] If a letter of credit or bond is used, the court will stamp or endorse the letter of credit or bond to indicate court approval. This allows the Accountant to accept the security as an administrative as opposed to judicial act, although there is some authority to the contrary.[30]

15. In Toronto, the practice is that an attendance is then made at the Accountant's office at 595 Bay Street, at Dundas and Bay, 2nd floor, with the requisition and original security. If the security is cash, you are then directed to the branch of the Accountant's bank, where the money is physically deposited and a receipt obtained. If the security is in the form of a letter of credit or bond, the Accountant simply files the document and issues a receipt evidencing the filing.

16. In Toronto, re-attendance is then made before the master, who examines the accountant's or bank's receipt, attaches same as part of the original, filed, motion record, and then signs the pre-approved form of order. The lawyer must then arrange to have the order "entered", and registered.

17. A copy of the duly entered order is immediately served upon the lawyer for the lien claimant(s) or the lien claimant in person if no lawyer shown on the face of the claim for lien.

18. There are some nuances to this in the case of electronic registration. Essentially, what you must remember is to use the electronic form for application to amend the register by court order, as opposed to the form for discharge of a lien.

The steps to be followed in Essex County, Chatham, Sarnia and soon to apply to London and all surrounding communities in the Southwest Region are very similar.[31] Since June 2014, practice in the Southwest Region is governed by a new Consolidated Practice

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29 See the form of Requisition in the annexed Appendix II, Precedents.

30 See *Taylor v. Ontario*, 1983 CarswellOnt 735, 42 O.R. (2d) 740 (H.C.).

31 The author wishes to again thank the Honourable Mr. Justice Anthony E. Cusinato of the Superior Court of Justice at Windsor, Ontario, for taking the time out of his schedule to answer the author's letter, in detail, providing the procedures set out at this section. The extract that follows in the text is taken directly, and often verbatim, from Justice Cusinato's thorough and helpful remarks.

Direction.[32]

(2) Interim Procedure for Vacating during COVID-19 Pandemic

During the COVID-19 pandemic, the interim procedure for motions brought in writing to vacate liens by payment into court is as follows:

1. In motions brought in writing under s. 44 of the *Construction Act* for an Order vacating a lien upon the posting of security, all motion materials must include evidence supporting the relief sought as well as the following:

   a. A copy of the security to be posted. For lien bonds or letters of credit, this includes all schedules with visible signatures, identification of authorized signing officers, and any corporate seals. A high quality scan of the original security is preferred.

   b. A completed fiat in the usual form in Word format.

   c. A draft order taking into account currently necessary direction to the Accountant of the Superior Court of Justice (the "Accountant"), current pre-conditions to the vacating order taking effect, and service of the Accountant's receipt. The general form of draft order is available at https://www.ontariocourts.ca/scj/files/notices/vacating-order-form.pdf. All draft orders should be submitted in both PDF and Word formats.

   d. Copy of the updated Abstract of Title.

   e. Executed Consent if one is required (such as in cases where a party is seeking to post reduced security).

2. If there is already a Toronto court file (such as an action to enforce a lien), the motion must be brought in that action. If not, the court file should be left blank, and the court will assign a Toronto court file number.

3. Once the Construction Lien Master has reviewed the materials and approved the security, and the fiat will be signed, and in the

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[32] See <http://www.ontariocourts.ca/scj/practice/practice-directions/southwest/sw/>.

case of a lien bond or letter of credit, the security will be endorsed. Master's endorsement, signed fiat, signed order, and, if applicable, endorsed lien bond or letter of credit will be emailed to the moving party.

4. Orders must be issued remotely before attending the Accountant's office. A request for the order to be issued should be made to the Assistant Trial Coordinator or Judicial Assistant who has emailed the endorsement, fiat, order and approved security.

5. Orders granted in Toronto actions must be entered at the civil intake counter in person. Parties must make arrangements with the Trial Coordinator for delivery of the original signed Order to the civil intake unit, following which parties can attend in person to have the order entered.

6. For Orders granted in non-Toronto actions, where leave to have the motion heard in Toronto has been granted, the order must be entered at the courthouse where the action was commenced.

7. Pursuant to the current vacating practices, it is generally recommended to bring vacating motions in a jurisdiction where the action was commenced in order to avoid further delays pertaining to the entry of the order in another jurisdiction.

8. The issued and entered order, signed fiat, original security, and, if applicable, a copy of the endorsed lien bond or letter of credit are then taken or sent to the Accountant, who will post the original security (and, if applicable, the approved copy of the security) and will issue a receipt.

9. Once the security has been posted, the vacating order must be served on counsel for the lien claimant with the Accountant's receipt and may be registered on title where the lien attaches to the premises.

10. For greater certainty, vacating motions brought in-person to a construction lien *ex parte* court, following resumption of in-court hearings, may be brought in accordance with the court's prior non-interim procedure, including use of the prior standard form of draft order.

(3) Foreign currency and tax issues

Occasionally you will run across a claim in foreign currency (usually in U.S. dollars). If a claim for lien is expressed in foreign currency and must be vacated under **s. 44** of the *Act*, then the only permissible course, in view of s. 121 of the *Courts of Justice Act* and **s. 50(2)** of the *Construction Act*, is to vacate the claim for lien using security in the same currency as the claim for lien. Thus, a claim for lien in Euros, Mexican pesos, or U.S. dollars would be vacated by cash or letter of credit drawn on an appropriate Schedule 1 bank under the *Bank Act (Canada)*, by further reference to s. 121 of the *Courts of Justice Act*. If you are planning to vacate a lien expressed in a foreign currency with the letter of credit of a bank that is not a Schedule 1 bank under the *Bank Act (Canada)* then expect to "show cause" as to why the court should accept the security of that institution. This would be done by affidavit of a responsible bank officer and would require sufficient notice to the other side to consider the material filed in that regard. If a bond is used, the issue becomes slightly more complex, and the court would have to be satisfied, upon the posting of the bond, that the surety's obligation was expressed consistently with s. 121 of the *Courts of Justice Act*. Once again, such a motion, because of its added complexity, would have to be brought on sufficient notice to permit the other side to consider the proposed bond wording.

Another issue is with federal H.S.T. It is most common to see claims for lien state the amount claimed as owing, in Blank #7 of the statutory claim for lien form, as "$100,000 plus H.S.T.", for example. While this is correct, it runs a risk that an *ex parte* application to vacate under **s. 44** of the *Act* the court *might* approve the security without reference to the H.S.T. component. This would leave the lien claimant under-secured, and might expose the lien claimant's lawyer to claim in the event that the under-security turned out to be material in the final outcome. The better practice, indeed the "best practice", is to calculate the H.S.T. and express it in dollars in the claim for lien form. If the client has invoiced for a gross amount, inclusive of H.S.T., then there is no issue in this regard, as the H.S.T. will automatically be included in any calculation of security under **s. 44**.

If the claim for lien is silent on H.S.T., there is no need to inquire behind the face value of the amount stated in the claim for lien. You must include taxes in the amount stated in the claim for lien if you

want to claim taxes.[33]

(4) Consequences of payment into court

What are the consequences of payment into court under **s. 44**? What protection does a person have who pays in to vacate the lien of a claim and with whom they have no contract. What about an owner paying into court to vacate the lien of a subcontractor or supplier? Once again, it is possible to list some basic principles:

1. No one gains or loses by the posting of security.[34]

2. Priorities are unchanged by the mere posting of security to vacate a lien registration.[35]

3. There is no admission of liability by mere payment into court to vacate a lien registration.[36]

4. No one gets access to security for costs beyond the amount posted for that purpose.[37]

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33 If it were otherwise, the claim for lien would effectively be amended to a higher amount, which cannot be done under the *Act*: see *AFG Glass Inc. v. Glaxo Canada Inc.*, 1992 CarswellOnt 861, 49 C.L.R. 215 (Gen. Div.).

34 *Reliance Electric Ltd. v. G.N.S. Contractors Inc.*, 1989 CarswellOnt 705, 70 O.R. (2d) 364, 35 C.L.R. 310 (H.C.), *James Dick Construction Ltd. v. Durham Board of Education*, 2000 CarswellOnt 3086, 50 O.R. (3d) 308 (Div. Ct.).

35 *Gilvesy Construction v. 810941 Ontario Ltd.*, 1994 CarswellOnt 950, 17 C.L.R. (2d) 187 (Gen. Div.), *P. Michaud Roofing Ltd. v. National Trust Co.*, 1979 CarswellOnt 253, 103 D.L.R. (3d) 523 (Div. Ct.); affirmed 1980 CarswellOnt 1479, 30 O.R. (2d) 620 (C.A.).

36 *Tech-Ex Contractors & Associates Inc. v. Pre-Eng Contracting Ltd.*, 1990 CarswellOnt 664, 40 C.L.R. 313 (Gen. Div.).

37 The authority in this area is generally accepted to be *P & D Holdings Ltd. v. Alta Surety Co.*, 1996 CarswellOnt 2937, 30 O.R. (3d) 97, 29 C.L.R. (2d) 60, 138 D.L.R. (4th) 735, 92 O.A.C. 203 (C.A.), in which the Court of Appeal appeared to allow access by a claimant having a shortfall in security to the surplus in security for another lien claimant's lien. *However*, as observed by the Master in *M. Sullivan & Son Ltd. v. Roche Ltée*, 1998 CarswellOnt 2851, 39 C.L.R. (2d) 251 (Gen. Div.), the decision by the Court of Appeal on the costs point in *P. & D. Holdings Ltd.* appeared to proceed on the basis of particular terms agreed to by counsel and not argued, and therefore *P. & D. Holdings Ltd.* does not appear to decide the issue. The reader is referred to the discussion of this issue in *Cesan Mechanical Systems (1990) Ltd. v. York Humber Ltd.*, 1993 CarswellOnt 3124, [1993] O.J. No. 2075 (Gen. Div.); additional reasons 1994 CarswellOnt 944, 16

5. No one gets security for unlienable supplies or claims, such as interest just because of a payment into court.[38]

6. If an owner posts security the owner does not increase its liability to subtrades. The owner's liability to subtrades is still a matter of statutory holdback or whatever is owed to the contractor, whichever is greater.[39]

7. If you need to reduce or substitute security, you can.[40] It may be advantageous to take cash out of court and replace it with some other form of approved security. It would be "best practice", however, to discuss the issue with the lien claimant's lawyer and obtain the consent of that lawyer, failing which a motion on notice is required. If the motion is for a reduction in security, the requirement for notice is mandatory; if the motion is for a substitution of security, the requirement for notice is permissive.

8. If someone other than the owner has posted security to vacate all liens, the proper thing to do is to dismiss against the owner.[41]

C.L.R. (2d) 185 (Gen. Div.), *United Dominion Industries Ltd. v. Ellis-Don Ltd.*, 1993 CarswellOnt 855, 8 C.L.R. (2d) 184 (Div. Ct.) and as well to a plain reading of the *Construction Lien Act*, R.S.O. 1990, c. C.30, **s. 14** of the statute which argue, persuasively it is submitted, that costs do not form part of the claim for lien *per se*, and that pooling of security for costs is not contemplated by the statute. There would seem to be a practical reason to distinguish two cases: first, where a party in privity posts cash to vacate a lien, in which case there is no reason that the cash should not answer *all* aspects of every party's judgments against that party; and cases in which the security is in the form of a bond or letter of credit, or is posted by a non-privy in any form, in which case there would appear to be a reliance interest, worthy of protection, that the security will *not* be exposed to any claim for anything that is not lienable (i.e., interest and costs).

38 *P & D Holdings Ltd. v. Alta Surety Co.*, 1996 CarswellOnt 2937, 30 O.R. (3d) 97, 29 C.L.R. (2d) 60, 138 D.L.R. (4th) 735, 92 O.A.C. 203 (C.A.).

39 *J.B. Allen & Co. v. Kitchener Alliance Community Homes Inc.*, 1992 CarswellOnt 942, 6 C.L.R. (2d) 141 (Gen. Div.).

40 *Tom Jones Corp. v. OSBBC Ltd.*, 1997 CarswellOnt 1752, 34 C.L.R. (2d) 44 (Gen. Div.), *T.R.A.C.S. Construction Ltd. v. Whitby Hydro-Electric Commission*, 1993 CarswellOnt 817, 10 C.L.R. (2d) 214 (Gen. Div.).

41 *Benny Haulage Ltd. v. Carosi Construction Ltd.*, 1996 CarswellOnt 5238, *(*sub nom. *Benny Haulage Ltd. v. Hamilton-Wentworth Roman Catholic)* 33 C.L.R. (2d) 44 (Gen. Div.) at p. 45 [C.L.R.]: "The cases of *Bratti Mechanical Inc. v.*

(5) Vacating certificates of action

A problem arises as a result of the sheltering provisions of the *Act* (**ss. 36(2)**, **36(4)** and **Rules 1, 3,** and **4** thereunder) in combination with e-registration.[42] The sheltering problem can arise in two situations. One situation is where there is just one lien with its own certificate of action, and the lien claimant and owner/contractor settle. The lien and certificate of action can be removed from both Registry and Land Titles systems by using a simple release of lien under **s. 41**. The statutory form can be modified to add reference to the certificate of action and its registration number if there are no other registered liens on title that could, arguably, be sheltering under any such certificate.[43] Another way to handle this same situation is to obtain a consent order under **ss. 47(1)(a), (b)**, and **(d)** and to register such order.

A second situation is where there is a lien and certificate of action, but also a sheltering lien claim. An owner, contractor or mortgagee can obtain an order vacating these liens and certificates of action under s. 44(1) or (2) by posting security. If this order is made, s. 44(6) and s. 44(9), Rule 1, make it clear that a certificate of action need not be registered, or, if one has been registered, it can be vacated by court order. Such an order will not adversely affect any properly sheltered lien claim.

But what if there is at least one arguably sheltered lien claimant, and the perfected lien claimant and the owner want to settle and clear

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Orlando Corp. and *Delange Asphalt v. Gallagher* make it clear that once a general has posted security, an owner is no longer a required party at the suit of any lien claimant who's lien has been bonded off. If an owner is so named it should immediately seek an Order dismissing the claim against it so no further costs are incurred." [citations omitted]. There is an argument that the lien court has no jurisdiction over the issues in a lien proceeding unless an "owner" is at least a nominal party, in which case it would only be safe to dismiss at trial, but, in view of the modern view expressed in *Benny Haulage*, this may no longer be a concern: see *Nick Dellelce Ltd. v. Seven City Development Co.* (April 26, 1972), [1972] O.J. No. 392, Aylesworth J.A., Brooke J.A., MacKay J.A. (C.A.), *G. Newman Aluminum Sales Ltd. v. Snowking Enterprises Inc.*, 1980 CarswellOnt 551, 13 R.P.R. 275 (H.C.).

42 The following is either quoted directly from, or paraphrased closely from Master Sandler's remarks delivered at a conference regarding the electronic registration of liens in October 2003.

43 See *Registry Act/Land Titles Act* Bulletin #96002 — November 26, 1996.

title, including the certificate of action? This problem may be made more complex, and more realistic, by having, say, 10 preserved and perfected liens, and, say, five sheltering lien claims. It is the same problem only larger. One argument is that the rights of the sheltering lien claimant were perfected upon registration of the certificate of action behind which the claimant shelters, and are no less perfected if the perfecting action is dismissed as settled. The counterargument is that the certificate of action under which a preserved lien is sheltering under **s. 36(4), Rule 1**, must remain on title until trial whether that action is settled or not (unless, of course, vacated by court order under **s. 44(1)** or **(2)**).

Section **47(2)** is important to this discussion. It provides that where a certificate of action is vacated under **s. 47(1)** (general power of the court to discharge or vacate liens and dismiss actions), and where liens remain which may be enforced in the action to which that certificate relates, the *court shall give any directions that are necessary in the circumstances in respect of the continuation of that action*. Therefore, where a certificate of action is vacated under s. 47(1), any remaining liens which may be enforced in the action to which that certificate related must be given in respect of the continuation of the action that relates to that certificate for the purpose of allowing the sheltering lien(s) to be enforced. This section provides that the certificate of action can be vacated without affecting the sheltering lien(s) so long as directions are given by the court.

The usual directions are that the sheltering lien claimant(s) be notified that they must now proceed with an action, and must serve and file a statement of claim, and that the title of proceedings be amended to show these lien claimants as plaintiffs. The directions could also include a warning about **s. 37** (two-year expiration period).

The master at Toronto may also explicitly provide that the sheltering action is dismissed only as between the named plaintiff and the defendants but shall remain "alive" or "in force" for the purpose of enforcing the lien of the sheltering lien claimants. The master at Toronto will also enquire as to the necessity of removing the certificate of action. If it is not necessary to remove it, it will stay in place to avoid the argument later when sheltering claims have to be dealt with under **ss. 44, 45, 46, 47** or at trial.

The master at Toronto might also direct, based on **s. 36(4), Rule**

3,[44] that the only defendants in the ongoing action are those named in the original statement of claim, and the "nature of the relief" to be claimed is only that which is set forth in the original statement of claim. The master at Toronto has never directed that the sheltering lien claimant must start its own action, and it would be wrong to do so, in light of the above statutory references.

It is the responsibility of counsel, when moving under **ss. 47(1)(a)** and **(b)** and **(d)** to provide the court with a title search and any other relevant evidence that would disclose if there were any apparently sheltering liens, and to suggest to the court appropriate directions to be given under **s. 47(2)**. It then becomes the responsibility of the court to give the necessary directions so that the sheltering lien claimants will not be prejudiced by the settlement of the action and removal of the Certificate of Action.

If all of this has been done properly, the mandatory statements in e-registration, 705 or 706, by the registering lawyer should not be required. The court order should be obeyed and acted upon in e-registration without further enquiry or evidence on anyone's part.

(6) Process for removing construction liens from title

As of January 11, 2016, the Teraview form "Application to Delete Construction Lien" ought to be used when a party is removing from title a claim for lien and a certificate of action, if any, in any of the following instances:

a) **voluntary discharge**, i.e., release of lien (and certificate, if applicable)

b) **order discharging** the lien (and releasing certificate, if applicable)

c) **order vacating** the lien (and certificate, if applicable)

The statements set out below appear on the Teraview form: Application to Delete Construction Lien. In each scenario, the required

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44 "A sheltered claim for lien perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered." Note also **s. 36(4), Rule 4**, that entitles any defendant in the original action to give a notice to any sheltering lien claimant to provide it with further particulars of the claim for lien. This would often be done if a direction was not given, under **s. 47(2)**, to such lien claimant that it was to serve and file a statement of claim.

statements are checked; all other statements would be considered non-applicable in the given scenario. Within each of the scenarios below, there may be minor variations which would require an altering of statements to accurately reflect the scenario.

Voluntary discharge

Scenario: client preserved and perfected lien; matter settled; no other liens sheltering.

[✓] **701 The lien claimant releases the lien claimed in the claim for lien as in registration number INSTRUMENT NO., and in respect to an improvement to the premises owned by OWNER(S) and described in the PIN(s) identified.**

❑ 702 The application is based on a court order IMPORT ORDER, discharging/releasing/vacating the lien. The court order is still in full force and effect.

❑ 703 The lien has expired since no certificate of action has been registered within the prescribed time under the *Construction Act*.

[✓] **704 The lien claimant, who is a party to the certificate of action, hereby consents to the release of the certificate of action registered as number INSTRUMENT NO**.

❑ 705 There is sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO.

❑ **706 There is no sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO.**

[NOTE: Choose either 707 or 710]

[✓] 707 A certificate of action has been registered and no other claims for lien have been registered.

❑ 708 The application is based on a court order IMPORT ORDER, discharging/releasing/vacating the certificate of action. The court order is still in full force and effect.

❑ 709 The lien is released and no certificate of action has been registered.

[✓] **710 The deletion of Certificate(s) of Action number(s) INSTRUMENT NO.(S) is in accordance with the** *Construction Act*. [*Note: if this is chosen a lawyer must register the document*]

❑ 61 Schedule: TEXT

[Note: the release of lien option should only be used where there is no possibility of sheltering and in such cases Statement 710 should be selected. Note, if an action has been started to perfect the lien and

there are no other liens which may be sheltering, a Notice of Discontinuance will need to be delivered to dispose of the action.]

Order discharging

Scenario: client preserved and perfected lien; matter settled; order is obtained that discharges lien and releases certificate: *a lawyer must register this document*.

❑ 701 The lien claimant releases the lien claimed in the claim for lien as in registration number INSTRUMENT NO., and in respect to an improvement to the premises owned by OWNER(S) and described in the PIN(s) identified.

[✓] 702 The application is based on a court order *IMPORT ORDER***, discharging/releasing/vacating the lien. The court order is still in full force and effect.**

❑ 703 The lien has expired since no certificate of action has been registered within the prescribed time under the *Construction Act*.

❑ 704 The lien claimant, who is a party to the certificate of action, hereby consents to the release of the certificate of action registered as number INSTRUMENT NO.

❑ 705 There is sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO.

[NOTE: Choose either 706 or 710]

[✓] 706 There is no sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO. [*Note: use if there is no sheltering*]

❑ 707 A certificate of action has been registered and no other claims for lien have been registered.

[✓] 708 The application is based on a court order IMPORT ORDER, discharging/releasing/vacating the certificate of action. The court order is still in full force and effect.

❑ 709 The lien is released and no certificate of action has been registered.

[✓] 710 The deletion of Certificate(s) of Action number(s) INSTRUMENT NO.(S) is in accordance with the *Construction Act*. [*Note: use if there is sheltering*]

❑ **61 Schedule: TEXT** [*Note: optional*]

[Note: Where there are other liens that may be sheltered, the Court Order discharging the lien and certificate of action will need to provide directions in respect of the continuation of these liens in the ac-

tion in order to comply with Section 47(2) of the *Construction Act*. In these circumstances, Statement 710 should be selected.]

Order vacating

Scenario: client obtains order to post security to vacate registration of lien and certificate.

❑ 701 The lien claimant releases the lien claimed in the claim for lien as in registration number INSTRUMENT NO., and in respect to an improvement to the premises owned by OWNER(S) and described in the PIN(s) identified.

[✓] 702 The application is based on a court order IMPORT ORDER, discharging/releasing/vacating the lien. The court order is still in full force and effect.

❑ 703 The lien has expired since no certificate of action has been registered within the prescribed time under the *Construction Act*.

❑ 704 The lien claimant, who is a party to the certificate of action, hereby consents to the release of the certificate of action registered as number INSTRUMENT NO.

❑ 705 There is sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO.

❑ 706 There is no sheltering of another lien under Certificate of Action registered as number INSTRUMENT NO.

❑ 707 A certificate of action has been registered and no other claims for lien have been registered.

[✓] 708 The application is based on a court order IMPORT ORDER, discharging/releasing/vacating the certificate of action. The court order is still in full force and effect.

❑ 709 The lien is released and no certificate of action has been registered.

[NOTE: Choose either 710 or 61]

[✓] 710 The deletion of Certificate(s) of Action number(s) INSTRUMENT NO.(S) is in accordance with the *Construction Act*.

[✓] 61 Schedule: TEXT [*Note: If the order seeks to vacate a lien only: "The lien is vacated, no Certificate of Action has been registered, therefore there is no sheltering"*.]

[Note: Where there are other liens that may be sheltered, Statement 710 should be selected, since under s. 44(9), Rule 4 of the *Construction Act*, the sheltered liens may still proceed with an action as if the order vacating the lien had not been made.]

Note: the following statements are not generally used but included as form reference only.

❑ 62 I NAME solicitor make the following law statements INSERT DETAILS.

❑ 92 This document is supported by evidence which is indexed at the Land Registry Office as index number INDEX NO.

❑ 3640 Covenant to Indemnify the Land Titles Assurance fund IMPORT PDF COVENANT.

❑ 1606 The party executing this document is one and the same as NAME and the document evidencing the change of name was registered as number INSTRUMENT NUMBER AND DATE.

❑ 3755 In accordance with registration INSTRUMENT NO., the consent of NAME(S) has been obtained for the registration of this document.

❑ 3756 The registration of this document is not prohibited by registration INSTRUMENT NO.

❑ 3757 In accordance with registration INSTRUMENT NO., NAME(S) has consented to the registration of this document. IMPORT CONSENT.

LSUC's Requirement for Acknowledgment and Direction

The Acknowledgment and Direction is a form produced by the electronic registration system and ought to be prepared by the lawyer which summarizes the contents of the document to be registered and contains written instruction from the client to the lawyer to register the document. The Acknowledgment and Direction should always include the draft ("In Preparation") of the document that is to be registered.[45]

6.1.3 Motion under s. 45 to declare that a lien has expired for failure to preserve or perfect in time

The motion to discharge and vacate a lien on the basis of failure to preserve or perfect a lien on time is brought under **s. 45** of the *Act*.

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45 **Practice Guideline 3** of Practice Guidelines for Electronic Registration of Title Documents, The Law Society of Upper Canada may be found at: <https://lso.ca/lawyers/practice-supports-and-resources/practice-area/real-estate-law/electronic-registration-of-title-documents>.

The section provides that the court may rule upon the matter upon the motion of any person without notice to any other person.

The court will not make decisions of fact on a **s. 45** motion. It must be self-evident on the face of the lien itself, or on the lien claimant's own, unequivocal evidence that the lien is out of time.[46] If there is any doubt whatsoever, the court will not proceed *ex parte* and notice will be required notwithstanding the language of the section.

The motion is analogous to a motion for summary judgment under the *Rules*. The burden is on the moving party to establish that there is no genuine issue for trial.[47] The court will not determine issues of credibility and will dismiss the motion if it turns on credibility.[48] The moving party will find it difficult to persuade a judge or master that a party should be deprived of its right to lien unless the court is absolutely driven to that conclusion.

Motions under **s. 45** (out of time lien) and **s. 46** (expired lien, two-year period) are directly comparable. The language used in each section is mandatory ("shall" as opposed to "may"). **Section 45**, like **s. 46**, allows the motion to be made by "any person", which could include mortgagees, or vendors who have given undertakings on closing. Each section provides that the motion may be made without notice to "any person". Presumably this includes the person whose lien is attacked. If there is any doubt at all, notice will be required as a practical matter.

The **s. 45** motion requires "proof that the lien has not been pre-

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46 The simple test for counsel is this: if you feel the need to file supplementary material with the court to make your point, then an *ex parte* application is certainly inappropriate, and the whole idea of a motion under s. 45 is probably inappropriate.

47 *Demik Construction Ltd. v. Royal Crest Lifecare Group Inc.*, 1994 CarswellOnt 955, 18 C.L.R. (2d) 114 (Gen. Div.) at p.119 [C.L.R.]: "In my opinion, a motion under s. 45 of the *Construction Lien Act* is analogous to a motion for summary judgment. Section 45(1)(b) creates an onus or burden of proof on the moving party to demonstrate that the lien has not been preserved within the time allowed. No such proof was tendered in these motions. Even if a motion under s. 45 were held to be analogous to a motion under Rule 21.01 to determine an issue of law before trial, it is doubtful that such a motion could succeed where, as here, there are material facts in dispute."

48 *690452 Ontario Ltd. v. Cataract Plaza Ltd.*, 1989 CarswellOnt 709, 36 C.L.R. 231 (H.C.).

served or perfected within the time allowed". The requirements of **s. 45** are expressed conjunctively, requiring both proof that the lien has not been preserved or perfected within the time allowed *and* either a certificate of search under either the *Land Titles Act* or a registrar's abstract under the *Registry Act*, together with a certified copy of the claim for lien. With regard to the steps required to electronically register an order discharging the lien, see s. 2.15 of chapter 2 above. If the lien was perfected by notification rather than by registration, the issue of proper notification will be an issue of mixed fact and law, with the consequence that a motion under **s. 45** is unlikely to succeed in such circumstances.

The result of a successful **s. 45** motion is a declaration that the lien has expired and an order that the registration of the lien be vacated. Where the order is made, the court *shall* order the return of any amount paid in under **s. 44** to the person who paid it in, and cancellation of any security posted for that lien. The section provides that if security has been posted it will be returned "for cancellation". Simple return is often enough for a lien bond surety, but, to be certain, it is recommended that the language in the order require the Accountant or Registrar to deliver up the security to the principal named in the bond (the person who posted the bond in the first place) "for the express purpose of cancellation".[49]

6.1.4 Motion to discharge under s. 47

The lien court has adequate jurisdiction to clear title for any good reason.[50] This jurisdiction may be exercised to implement settle-

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49 The person posting the bond will have an arrangement with its bonding company that provides a "bond limit", being a dollar value of suretyship that should not or cannot be exceeded. As long as the surety company deems there to be exposure on the bond, it affects this "bond limit". Thus, to persuade the surety that the instrument is returned so as to extinguish outstanding suretyship, the words required by some sureties are that "the bond be delivered up for the express purpose of cancellation". On the importance of the issue of "delivery" as it relates to bonds generally, the reader is referred to the authority of K. W. Scott, R. B. Reynolds, *Scott & Reynolds on Surety Bonds*, looseleaf (Toronto: Carswell, 1993).

50 See *Beaver Materials Handling Co. v. Hejna*, 2005 CarswellOnt 2803, 45 C.L.R. (3d) 242 (S.C.J.), where the court summarizes the case law on point as follows: (1) the court has the authority to vacate the registration of the lien and

ments or to clear title without the need for post-reference reports in the event that the judgment debtor simply pays the judgment debt. This power may also be needed to deal with claims that are obviously expired or fatally flawed in some manner.

The jurisdiction found in **s. 47**, which permits the court upon motion to order the discharge of a lien, order the registration of court upon motion to order the discharge of a lien, order the registration of the lien or its certificate of action or both to be vacated, declare written notice of lien to no longer bind the person to whom it was given or to outright dismiss an action, all on the basis that the claim for lien is frivolous, vexatious or an abuse of process, or upon "any proper ground", and subject to any terms and conditions the court deems appropriate.[51] This jurisdiction is exercised fully in the master's office to do justice among the parties on terms that protect remaining liens.[52] In one of the first decisions interpreting the 2018 addition of the "frivolous, vexatious or abuse of process" language of s. 47, the court held that wilful exaggeration of the lien could be the basis for determining that a lien is an abuse of process, and that s. 35 is not a complete code when it comes to dealing with exaggerated liens.[53]

Make it a separate paragraph, please.

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the certificate of action, declare that the lien has expired, or that written notice of lien shall no longer bind the person to whom it was given and/or dismiss the action; (2) the motion under s. 47 is akin to a motion for summary judgment and therefore Rule 20 applies; (3) the moving party must establish that there is a genuine issue for trial; (4) if there are genuine issues of fact, the matters should be left for the trial judge; (5) if it is not patently demonstrable on an interlocutory motion that a party has no right to a lien, or unless the court is satisfied that the cause of action could not possibly succeed at trial, the matters should be left for the trial judge; and (6) assessing credibility, weighing of evidence and drawing inferences are functions of the trial judge, not the motions judge.

51 See, for example, *Franro Property Development Ltd. v. Heritage Glen North Ltd.*, 1993 CarswellOnt 2572, [1993] O.J. No. 2396 (Gen. Div.), where the court discharged a lien manifestly registered in bad faith. For an example of the creative use of terms, where an order for discharge had to be made, but the court required the posting of other security in the unique circumstances of the case, see *W. Robert Hutcheson Sand & Gravel Ltd. v. Taylor*, 1999 CarswellOnt 2609, 48 C.L.R. (2d) 292 (S.C.J.).

52 *Construction Act*, R.S.O. 1990, c. C.30, **s. 47(2).**

53 *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190, 2020 CarswellOnt 12410 (S.C.J.); additional reasons 2020 CarswellOnt 15469 (S.C.J.). In the re-

The burden on such a motion is on the moving party. It is a heavy burden.[54] There is some authority for a kind of secondary burden on the responding lien claimant to produce business records and other evidence to establish a *prima facie* case for a lien, timeliness and lienability, but the fundamental onus is that of the moving party.[55]

Motions under **s. 47** are treated as if they were summary judgment motions under **Rule 20**.[56] It is well settled that the test on a **s. 47** motion is the same as the test on a **Rule 20** motion: is there a genuine issue for trial?[57] As a result of the application of **s. 86,** and by analogy to **Rule 20**, the costs consequences of a failed **Rule 20** motion also apply to a **s. 47** motion. Recent decisions by the Ontario Divisional Court have made it clear that while s. 47 motions are akin to motions for summary judgment, they are procedurally different things.[58] However, it has since been held that the Divisional Court's

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sult, though, there was not sufficient evidence before the Master to discharge the lien on this basis.

54 *Park v. Metropolitan Separate School Board*, 1998 CarswellOnt 795, 36 C.L.R. (2d) 202 (Gen. Div.), and see *1246798 Ontario Inc. v. Sterling*, 1999 CarswellOnt 2961, [1999] O.J. No. 3513 (S.C.J.); reversed in the result, with reference to the high onus that must be met, at 2000 CarswellOnt 4023, 5 C.L.R. (3d) 146 (Div. Ct.), and see *690452 Ontario Ltd. v. Cataract Plaza Ltd.*, 1989 CarswellOnt 709, 36 C.L.R. 231 (H.C.), where discrepancies in discovery evidence were relied on. The court will not resolve credibility issues on such a motion, or such a record.

55 *Disal Contracting Ltd. v. J. Salamon Holdings Inc.*, 1997 CarswellOnt 4322, 35 C.L.R. (2d) 200 (Gen. Div.); additional reasons 1998 CarswellOnt 4275 (Gen. Div.); additional reasons 1998 CarswellOnt 4274 (Gen. Div.).

56 The summary judgment rule has changed effective January 1, 2010. It is likely that the standard of the new rule will apply to motions under **s. 47**.

57 See the decision of Justice Ferrier in *Dominion Bridge Inc. v. Noell Stahl-Und Maschinebau GMBH* (1999), Kirsh's C.L.C.F. 47.41 (Ont. S.C.J.), and *1246798 Ontario Inc. v. Sterling*, 2000 CarswellOnt 4023, 51 O.R. (3d) 220 (Div. Ct.) at p. 225 [O.R.] [Heeny J.]: "A motion under s. 47 is analogous to a motion for summary judgment under Rule 20 [. . .] As such, if there are genuine issues of fact the matter should be left to be determined by the trial judge."

58 *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111, 2020 CarswellOnt 7064 (Div. Ct.) and *Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308, 2020 CarswellOnt 9830 (Div. Ct.). See also *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190, 2020 CarswellOnt 12410 (S.C.J.); additional reasons 2020 CarswellOnt 15469 (S.C.J.).

clarification was not intended to overturn established case law holding that both parties must put their best evidentiary foot forward in s. 47 motions.[59]

A motion under this section must be brought on notice.[60] Master Sandler has this to say about such motions:

> If the action is a Toronto action, then you must know whether the action has been referred to a Toronto Master who has conducted a first pre-trial. If so, that Master is "seized" with the action and only he or she (. . .) can sign the settlement order.
>
> If the Toronto action has never been referred, (and it has been settled before the 2-year period in s. 37 has expired), then any Master can sign the order. If the action is outside Toronto, a Toronto Master can deal with the motion.
>
> A lien action is a type of "class action". All existing claims must be dealt with one way or the other. Therefore, an up-to-date search showing all deleted instruments (i.e., all vacated liens where security has been posted), must be provided. If the search shows no other liens, then just a consent of the lien claimant and all defending parties in the action to be settled, is required. If certain defendants were never served or have been noted in default, make this clear in the supporting affidavit.
>
> If there are other liens, things get complicated. If a Toronto action has not been referred and has not been set down for trial before a judge, then a settlement of one lien action, with its certificate of action to be vacated, can be ordered by any Master provided any other lien claimants have their own certificates of action. If not, the sheltering lien claimant(s) must consent or be given notice. (They would usually consent *if* they are sheltering under some other lien claimant's certificate of action.) (If security has been provided, see below).
>
> If the action is outside Toronto, then it is important to know if it has been set down for trial or not. If so, special directions may be required. And again, if there are any other lien claims without their own certificate of action, they must consent or be given notice. (If security has been posted, see below.)
>
> A common situation that creates problems is where there is one lien action, and the plaintiff and the defendant settle, and the defendant wants the lien discharged and the certificate of action vacated and the action dismissed, before the defendant will pay over the settlement money. An up-to-date search shows another lien. That lien claimant may be able to shelter under

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59 *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190, 2020 CarswellOnt 12410 (S.C.J.); additional reasons 2020 CarswellOnt 15469 (S.C.J.).

60 *Interhaven Development Corp. v. Slovak Village Non-Profit Housing Inc.*, 1997 CarswellOnt 4411, 36 O.R. (3d) 502, 36 C.L.R. (2d) 66 (Gen. Div.).

> the plaintiff's certificate of action in the situations described in s. 36(4) 1. Therefore, unless such lien is an old lien, put on years before the plaintiff's lien that is sought to be settled, where it is clear that such lien claimant cannot shelter under s. 36(4), the certificate of action should not, in my view, be vacated even though the plaintiff has settled with the defendant. The solution is to discharge the plaintiff's lien, dismiss the claim of the plaintiff in the action, but keep the action alive for the purpose of allowing the sheltering lien claimant to continue with the action to enforce its lien. That sheltering claimant is "perfected" by the certificate of action sought to be lifted and it should not be vacated . . .
>
> In my view, the cautious way of proceeding is not to vacate the certificate of action (although that seems to be contemplated by (s. 47(2)) but rather, to provide in the order that the action (and therefore, the certification of that action) is to continue, to allow that other lien claimant to enforce its lien in that action . . .
>
> I would then require this order to be served on the sheltering lien claimant . . .
>
> If the settlement takes place in a Toronto lien action, that has been referred to a Master, who has conducted a pre-trial, and is therefore seized of it, the next scheduled pre-trial date or fixed trial date must be disclosed in the material, so the Master (who is seized with it) can cancel the scheduled date and free up that date for other cases. If the settlement takes place after an order fixing a trial date has been made, but before its return date, again, you must notify the Construction Lien Secretary so she can cancel that first pre-trial appointment. If a trial date has been fixed, the construction Lien Secretary must be notified so the trial date or dates can be cancelled and freed up for other trials. If the settle case has been set down for trial before a judge, the person in charge of trial lists for Toronto, or outside of Toronto, must be notified so the case is taken off the trial lists.
>
> If there are, say, 5 liens, and all have been perfected with their own certificate of action, and all have been "bonded off" by security, and you want to settle your lien action, you must still get the consent of the other 4 lien claimants or given (sic) them notice, even though each has security for its lien: see *M. Sullivan v. Roche* (1998), 39 C.L.R. (2d) 251. The reason for this is explained in that case (by me)."[61] [Emphasis in the original]

Section 47 is the only appropriate section to be used when it is sought to extinguish *both* the claim for personal and the claim for

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61 Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference at pages 11–15 inclusive.

lien.[62]

It is possible to defend a **s. 47** motion. The **s. 47** motion should be defended like a **Rule 20** summary judgment motion. The material filed must put the lien claimant's "best foot forward" and disclose a genuine issue for trial. The respondent's affidavit should be from someone with direct, first-hand knowledge and not merely information and belief.[63]

In some cases the facts will support a defence of *estoppel*. In the 1982 decision of Master Peppiatt in *Valo v. 430327 Ontario Inc.*,[64] decided under the former *Mechanics' Lien Act*, the lawyer (who was the husband of the owner) had advised the lien claimant wrongly that a period extended the time for preservation of the lien. This evidence was uncontradicted. In dismissing the motion, the master described the *estoppel* as "estoppel by statement of law" and made it clear that the *estoppel* was only between the parties before him on the motion. The same issue arose two years later, at trial, in *Soo Mill & Lumber Co. v. 499812 Ontario Ltd.*[65] *Soo Mill* is a decision of Justice Stortini, also decided under the *Mechanics' Lien Act*. It was established by evidence at trial that a drywall subcontractor with an admittedly out of time lien had been summoned to a meeting with the owner directly before its lien rights had expired. At this meeting the subcontractor lien claimant was told by the owner's representatives that if they did not claim a lien and if they continued working they would be paid directly by the owner, by postdated cheques. The post-dated cheques were delivered, work progressed and the first post-dated cheque actually cleared. The next post-dated cheque was dishonoured. The court's first concern was the possibility of prejudice to other persons including the many other lien claimants. This concern was answered by the fact that all other lien claims had been bonded off title prior to

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62 *612354 Ontario Ltd. v. Tonecraft Corp.*, 1991 CarswellOnt 799, 5 O.R. (3d) 764, 47 C.L.R. 229 (Gen. Div.).

63 Attention must be paid to the new rules regarding adverse inferences in the amended **Rule 20**.

64 1982 CarswellOnt 178, 36 O.R. (2d) 439, 42 C.B.R. (N.S.) 267, 29 C.P.C. 1 (S.C.).

65 1984 CarswellOnt 709, 17 C.L.R. 306, [1984] O.J. No. 2418 (H.C.); additional reasons 1985 CarswellOnt 2223, 17 C.L.R. 306 at 322, [1985] O.J. No. 1821 (H.C.).

the trial. The trial judge found that the owner's representation as to its financial position had been relied upon by the subcontractor to its detriment and that this was sufficient to support an *estoppel*. The decisions in *Valo* and *Soo Mill* were subsequently distinguished in *J.D. Strachan Construction Limited v. Egan Holding Inc.*[66] on the basis that both those cases involved promises to pay that were accompanied by explicit representations that directly contemplated the subject liens and, therefore, did not support the lien claimants' position on estoppel based solely on the owners' promise to pay.

Make it a separate paragraph, please.

If other parties are involved and would be prejudiced by the *estoppel*, it will not be given effect as a defence. In *Irving Oil Ltd. v. M.D.G. Holdings (Bay) Ltd.*,[67] the issue concerned what was described as an "informal lien". Here the owner, a Township, had represented to the lien claimant that it could "informally" lien without taking the usual statutory steps necessary to preserve their lien. There were other, formal, lien claims before the trial judge. The trial judge held that the "formal" liens would be prejudiced by the inclusion of the "informal" lien. The plea of *estoppel* was disallowed. This may also be the case in Ontario under the *Construction Act*, however, a pleading of *estoppel* was allowed by the master in *1189215 Ontario Ltd. v. Market Design Group Inc.*[68]

6.1.5 Getting security out of court

All of the statutory provisions for discharging liens on motion include an express provision for the return of monies in court to the person who paid the money or into court, or for the cancellation of security.[69] This issue should be specifically addressed, in the material filed in support of the motion. If the security is to be paid out to anyone other than the person that paid it into court, then notice to all affected parties must be given, even if they are not actually parties to

66 2019 ONSC 522, 2019 CarswellOnt 658 (S.C.J.).

67 1985 CarswellOnt 956, 20 C.L.R. 26 (H.C.).

68 (April 23, 1998), Doc. No. 89882/98, [1998] O.J. No. 1968 (Master) [Sandler].

69 See *Construction Act*, R.S.O. 1990, c. C.30, **s. 45(3)**, where the liens have expired due to failure to preserve or perfect on time; **s. 46(4)** with respect to expiration due to passage of the **s. 37** two-year period; **s. 47(1)** being the courts general power to discharge a lien and make any order as to terms that is just.

the lien action. If a bond is being released from court, the accountant should be directed to release it "for the express purpose of cancellation".

6.1.6 Application for declaration of substantial performance

Section 32(1)7 contemplates an *application* under **Rule 38**, *not a motion* under **Rule 37**. A master has no jurisdiction to hear an "application".[70] These applications are very difficult. On such an application, the court is asked to substitute its discretion for that of the payment certifier hired by the parties and authorized to act in a quasi-judicial capacity by their contract. The standard of proof on such an application is quite high. The motives of the applicant can be called into question. In *Cityscape Richmond Corp. v. Vanbots Construction Corp.*,[71] Trafford J. held as follows:

> The jurisdiction of the Court to determine the substantial performance application is found in s. 32(1)7 of the *Construction Lien Act*. For convenience, I repeat it at this stage of the judgment:
>
> > Where there is a failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the Court, and the Court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.
>
> This section has three components — the failure or refusal to certify, the obligation to process the application for a certificate of substantial performance within a reasonable time and the conclusion by the Court that the contract has been substantially performed. "Substantial performance" is defined by s. 2(1) and (2) of the *Construction Lien Act*, *supra*. Let me consider those provisions in the circumstances of this case.
>
> Based on the record before the Court, I am not satisfied there was a substantial performance of the contract by (the contractor) on or about February 20, 2000. It is correct to observe that the building was then being used for its intended purpose. However, the financial component of the definition, that is, the cost of the completion, has not been proven. The evidence of the

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70 *SNC Services Inc. v. Peel Resource Recovery*, 1992 CarswellOnt 946, 6 C.L.R. (2d) 254 (Gen. Div.).

71 2001 CarswellOnt 517, 8 C.L.R. (3d) 196 (S.C.J.).

consultant is that approximately $460,000 worth of work remained to be completed when it rejected the applications for the certificates. This is far in excess of the financial component required by the section in the circumstances of this case. The consultant is a well-qualified architect. The qualifications of (the contractor's) staff in dealing with this aspect of the case are less impressive. There is no articulable basis for me to discount the opinion of the more qualified person and choose to rely on the opinion of the less qualified one. I decline to do so. Accordingly, I am not satisfied the contract was substantially performed on or about February 20, 2000.

Moreover, the consultant did not fail or refuse to certify substantial completion. They considered each application on its merit and rejected it for reasons given in writing shortly after the application was received. They completed the task within a reasonable time. In cases like this, absent a showing of fundamental error by the consultant, this Court should decline to grant any relief under s. 32 of the Act. This section is not intended to permit a hearing de novo at the instance of every person who feels aggrieved by a rejection of an application for a certificate of substantial performance. It would be an improper step for the Court on summary applications to merely substitute its view for that of an expert who was selected by the parties under the contract to perform this important task. A showing of significant error, legal or factual, is required to warrant the relief sought in this case. The most appropriate response for a person feeling aggrieved by any such rejection is to work diligently towards the preparation of a deficiency list and an orderly response to the deficiencies. This interpretation is compatible with the history and purpose of the section — ". . . to expedite payment of the holdback under the special circumstances contemplated . . . (and) to address the problem of delay, overcautiousness and uncertainty that characterized payment of holdbacks under the previous legislation . . ." See *Soo Mill and Lumber Co. v. JJ's Hospitality Ltd.* (1993), 12 O.R. (3d) 351 at 367 (Ont. Ct. (Gen. Div.)).

6.1.7 Summary judgment in lien and trust actions

The *Construction Act* contains no specific provision for summary judgment as such, but **s. 47** allowing the discharge of any lien and the dismissal of any lien action on any terms is in effect such a motion and is treated as such by the court.

The master in *St. Clair Roofing & Tinsmithing Inc. v. Davidson*,[72] remarked in *obiter* that he saw no reason why **Rule 20** could not be used in the context of a lien action, but did not have to decide the issue in that case. In *Michaels Engineering Consultants Canada Inc.*

72 1992 CarswellOnt 446, 8 O.R. (3d) 578 (Gen. Div.).

v. 961111 Ontario Ltd.,[73] the Divisional Court held that **s. 67 (now s. 50(3))** made it clear that the legislature intended that lien claims be resolved by way of a summary procedure and consequently, only interlocutory steps that would *delay* the summary resolution of lien proceedings would be inconsistent with the *Act* and thus prohibited. As summary judgment motions dispose of claims which do not raise a genuine issue for trial at an early stage, such motions were held to advance the intention of the legislation and were therefore ruled proper in actions under the *Construction Act*. The Divisional Court in *Michaels Engineering* specifically approved the *obiter* of the master in *St. Clair Roofing & Tinsmithing*. **Rule 20** is only to be used in "an appropriate case".

While a defendant in a lien action, or a party adverse in interest to a lien claimant in a consolidated lien action, can use **Rule 20**, which is available to both plaintiffs and defendants, counsel for defendants and parties adverse in interest to lien claimants should consider bringing their motion under **s. 47** of the *Construction Act*.

Section 47 allows anyone (a party in another lien action, for example) to move under the *Act* for an order discharging a lien, vacating title registrations, declaring a written notice of lien expired or no longer binding, and dismissing an action "upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances". This is wide jurisdiction indeed.

Therefore, to *enforce* a lien summarily, leave must be obtained for a **Rule 20** motion. To *dispose* of a lien summarily, you have the option of simply moving without leave under **s. 47**. In either case the substantive test is exactly the same: is there any genuine issue for trial?[74]

On the issue of leave for a summary judgment motion under **Rule 20,** the court will look at the proximity of the trial, and the utility of the motion in the context of all of the issues and evidence that are expected to be canvassed at trial. If the motion stands a chance of shortening things, leave will be granted.

Rule 20.04(4) provides that on a **Rule 20** motion, where the court

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73 1996 CarswellOnt 2239, 29 O.R. (3d) 273 (Div. Ct.).

74 See *G.M. Sernas & Associates Ltd. v. 846539 Ontario Ltd.*, 1999 CarswellOnt 3161, 48 C.L.R. (2d) 1 (S.C.J.).

is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to a judge. There is no similar jurisdictional impediment to a master under **s. 47**. Under **s. 47**, a master has jurisdiction to decide questions of law.

In *Combined Air Mechanical Services Inc. v. Flesch*,[75] the Ontario Court of Appeal provided guidance to the profession as to the interpretation of the revised Rule 20, including the nature of the test for determining whether or not summary judgment should be granted, the scope and purpose of the new powers that had been given to judges hearing motions for summary judgment and the types of cases that are amenable to summary judgment. The court held that the amended rule permits the motion judge to decide the action on a summary judgment basis where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution.

Three types of cases are amenable to summary judgment. The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment.[76] The second type of case encompasses those claims or defences that are shown to be without merit.[77] The third category includes cases where the trial process is not required in the "interest of justice".[78]

In deciding whether or not a trial is required in the "interest of justice" the motions judge must ask the following question: "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of trial?"

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75 2011 ONCA 764, 2011 CarswellOnt 13515; additional reasons 2013 CarswellOnt 5398 (C.A.); additional reasons 2013 CarswellOnt 5399 (C.A.); leave to appeal refused 2014 CarswellOnt 744, 2014 CarswellOnt 745 (S.C.C.); affirmed *Hryniak v. Mauldin*, 2014 CarswellOnt 640, 2014 CarswellOnt 641 (S.C.C.); affirmed *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 CarswellOnt 642, 2014 CarswellOnt 643 (S.C.C.).

76 *Ibid.*, at para. 41.

77 *Ibid.*, at para. 42.

78 *Ibid.*, at para. 44.

A motion for summary judgment should not automatically be dismissed on the basis that the moving party has outstanding undertakings.[79]

While in ordinary civil litigation, a master does not have the enhanced powers given to a judge on a motion for summary judgment, where the master acts as a referee to whom a construction lien action had been referred for trial, the master has all the powers of a construction lien referee and is not confined to the jurisdiction conferred on masters in ordinary civil litigation. The procedural powers of a construction lien referee include the full range of powers accorded to a judge under the *Rules of Civil Procedure*, and these, in turn, include the enhanced powers that may be used on a motion for summary judgment.[80]

Finally, counsel should consider another available avenue for summary judgment under **O. Reg. 302/18, s. 10**. This section allows judicial implementation of properly conducted settlement meeting agreements. In addition to dealing with consent matters under **O. Reg. 302/18, s. 10(8)**, the court may "make any order that is necessary for, or will expedite the conduct of, the trial". This aspect of the order under **O. Reg. 302/18, s. 10(8)**, apparently, does not have to be on consent. There is case law, decided on unique facts admittedly, in which the outcome of a settlement meeting was approved and enforced by order under an equivalent of **O. Reg. 302/18, s. 10(8)** even though it was opposed by two of the 16 claimants who participated in the settlement meeting.[81]

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79 *Urbacon Building Groups Corp. v. Guelph (City)*, 2012 CarswellOnt 462 (S.C.J.).

80 *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111, 2020 CarswellOnt 7064 (Div. Ct.).

81 See *Moffatt & Powell Ltd. v. 682901 Ontario Ltd.*, 1992 CarswellOnt 860, 49 C.L.R. 205 (Gen. Div.) [Misener J.]:

> The second way — and this is the one that I have persuaded myself is the right way — is to invoke (*Construction Lien Act*, R.S.O. 1990, c. C.30, **s. 61(5)(b) and (c)**). The argument goes this way. The statement of settlement required Mr. McLay to prepare a report with respect to the validity of the claims for lien. That direction was settled by the parties. Section (**61(5)(b)**) gives jurisdiction to the court to enter a judgment . . . upon consent on those issues which have been settled by the parties' at the settlement meeting. The order of Brown J. dated

6.1.8 Motion for security for costs

In *Global Design & Building Inc. v. 1289193 Ontario Inc.*,[82] the court held that security for costs was not "necessary" within the meaning of **s. 13 of O. Reg. 302/18** and, therefore, not possible in a lien action in Ontario. The court in *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*,[83] on the other hand, considered the long standing practice of granting security for costs in lien actions to be sufficient proof that they were contemplated by the *Act*. Although not specifically contemplated by the statute, motions for security for costs from the plaintiff have been successful in the past, with leave.[84]

October 4, 1991, is such a judgment. By its express terms it ordered Mr. McLay to "prepare a report to the said Court with respect to the quantum and validity of all of the outstanding liens." Mr. McLay has prepared that document pursuant to the judgment of Brown J. In it he has found the proper quantum of all of the 16 liens and he has declared 14 of them to be valid. Section (**61(5)(c)**) authorizes the court "to make an order that is necessary in order to give effect to any judgment . . . of the court under clause (a) or (b)". That is what Mr. Szemenyei is asking me to do. It may be said that this argument stretches the meaning of some of the words found in (**s. 61(5)(b)**). Maybe it does. But, in my view, it does not violate the meaning of or the sense of those words, and a little stretching is entirely justified by the subject and scope of the Act as a whole.

82 2000 CarswellOnt 1216, 2 C.L.R. (3d) 271 (S.C.J.).

83 1996 CarswellOnt 4798, 31 C.L.R. (2d) 111 (Gen. Div.).

84 *Budline Millwork Ltd. v. Torindo Ltd.*, 1988 CarswellOnt 757, 29 C.L.R. 319 (S.C.), and *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*, 1996 CarswellOnt 4798, 31 C.L.R. (2d) 111 (Gen. Div.), decided prior to *Global Design* had both ordered security for costs. Parties seeking security for costs tend to rely upon *671122 Ontario Ltd. v. Canadian Tire Corp.*, 1993 CarswellOnt 466, 15 O.R. (3d) 65 (C.A.) for general principles, *Magellan Entertainment Group (Ontario) Inc. v. Global Media Corp.*, 1999 CarswellOnt 795 (Gen. Div.) and *Design 19 Construction Ltd. v. Marks*, 2002 CarswellOnt 1414, [2002] O.J. No. 1091 (S.C.J.) [Nordheimer J.] on impecuniosity, *John Wink Ltd. v. Sico Inc.*, 1987 CarswellOnt 370, 57 O.R. (2d) 705 (H.C.) [Reid J.] ; leave to appeal allowed 1987 CarswellOnt 516 (H.C.) on onus and standard of proof on the motion, *423322 Ontario Ltd. v. Bank of Montreal*, 1988 CarswellOnt 543, 66 O.R. (2d) 123 (H.C.) [Granger J.] on onus and policy issues, *1384675 Ontario Inc. v. HSBC Bank Canada*, 2004 CarswellOnt 1681, [2004] O.J. No. 1759 (S.C.J.) [Master Beaudoin] on the personal undertaking

In *Biotechnik Inc. v. O'Shanter Development Co.*,[85] the master considered these apparently conflicting decisions and, not being bound by either, decided the matter from first principles:

> In deciding whether any particular interlocutory step is "necessary" within s. 67(2) — (it seems clear that the words "expedited the resolution of the issues in dispute" do not apply) — a court must look at the question not just from the perspective of the plaintiff nor just from that of defendant but from the perspective of a court trying to do procedural justice to *both* parties.
>
> The security for costs rule is part of the Rules of Civil Procedure. These rules are designed to achieve procedural fairness and justice to all parties to a lawsuit. The Rules Committee decided in 1985 that a defendant, being sued by a corporate plaintiff who, as in this case, has insufficient assets in Ontario to pay the defendant's costs if it were successful and were awarded such costs, could suffer an injustice and therefore provided that a security-for-costs order "may" be made "as is just". In my view, such a motion is "necessary" in the interests of doing procedural justice to *both parties*. I agree with McDermid J. that such a step is not "necessary", i.e., required or essential, if one looks at the question *only* from the plaintiff's perspective. But, looked at from the perspective that I have outlined above, it is my view that this step, of a defendant being allowed to *try* for an order for security for costs, is "necessary" to do procedural justice to *both* parties. I therefore choose to follow the ruling in *Hutchison*, supra, that consent (or leave) to bring a motion for security for costs under s. 67(2) *can* be granted, and here *should* be granted. (There could be cases where, because of peculiar facts, it would be appropriate for leave not to be granted.) [Emphasis in the original]

As to the principles that apply to the substantive motion, once leave is granted, *Biotechnik* contains an encyclopedic review of the law of award of security for costs, and possible defences to such a motion. The case should be considered in its full text. By way of summary,

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issue, and *Biotechnik Inc. v. O'Shanter Development Co.*, 2003 CarswellOnt 1895, 30 C.L.R. (3d) 52 (S.C.J.) to place these cases in their lien context.

85 2003 CarswellOnt 1895, 30 C.L.R. (3d) 52 (S.C.J.). See also *D.M.S. Concrete Forming Inc. v. Eastern Construction Co.*, 2004 CarswellOnt 3124, 36 C.L.R. (3d) 153 (S.C.J.). The court cited this case with approval in *John Bianchi Grading Ltd. v. Belrock Design Build Inc.*, 2005 CarswellOnt 3034, [2005] O.J. No. 2972 (S.C.J.), and more recently in *JV Mechanical Ltd. v. Steelcase Construction Inc.*, 2008 CarswellOnt 9062, [2008] O.J. No. 5777 (S.C.J.); additional reasons 2009 CarswellOnt 3560 (S.C.J.); reversed 2010 CarswellOnt 1522 (S.C.J.); additional reasons 2010 CarswellOnt 2359 (S.C.J.); varied 2010 CarswellOnt 1522 (S.C.J.); *Yuanda Canada Enterprises Ltd. v. Pier 27 Toronto Inc.*, 2017 ONSC 1892, 2017 CarswellOnt 3791 (S.C.J.).

however, the following points emerge:

1. Where an action is being pursued for the benefit of creditors, it is not the willingness of the creditors to post security for costs that is in issue, it is their ability to post security for costs. On a motion for security for costs, there must be some evidence as to their ability to post security, one way or another.

2. In a case in which the defendants have posted security for the plaintiff's lien under **s. 44** of the *Act*, there is an additional argument for the granting security for costs, in order to "level the playing field":

> Another important factor is that the defendant has posted with the court a letter of credit as security to cover the lien claim . . . (and) . . . for any costs order in favour of the plaintiff. The defendant is being sued by an insolvent corporate shell. This is not a level playing field and, in my view, without security for the defendant's costs, is not "just" to the defendant. This imbalance is, I think, unique to construction lien cases where a lien has been "bonded off" by posting security for the lien claim and costs. Even if a lien has not been "bonded off", a defendant's land stands as security for the lien and, at least from a practical if not a strictly legal point of view, for any costs as well . . .
>
> Numerous cases (collected in my judgment in *Peter Lombardi Construction v. Colonnade Investments* (2001), 51 O.R. (3d) 551) have pointed out that costs, and security for those costs, and offers to settle and their impact on costs, are relevant not only for the purpose of properly compensating successful litigants after trial, but also for the purpose of promoting settlements. In this case, while the defendant must worry about issues relating to costs if it is unsuccessful, the plaintiff will have no such worries. It can litigate with impunity. If it is unsuccessful, and a large costs award is made against it, it knows that such award will have no real impact on the company, nor any of its shareholders, officers or directors, and will be unenforceable.

3. There is precedent for an order giving a plaintiff the option of posting cash, a bond, or a letter of credit to satisfy an order for security for costs, or having the principals of the plaintiff corporation file with the court a written undertaking to personally pay any costs that might be ordered by the court to be paid by the unsuccessful corporate plaintiff to the successful defendant.[86] In

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86 See *Albino & Mike Contracting Ltd. v. James*, 1992 CarswellOnt 409, 17 C.P.C. (3d) 331 (Gen. Div.). But note that this case was criticized by Borins J. in

Biotechnik, a discount of 10% was given in exchange for two personal undertakings, or 5% for one. As Master Sandler observed in *D.M.S. Concrete Forming Inc. v. Eastern Construction Co.*,[87] it may be prudent for a moving party defendant to argue as a primary argument for there to be no discount for any personal undertaking, but to prepare to argue in the alternative for the best terms: i.e., low discount rate, and a favourable form of undertaking.

1056470 Ontario Inc. v. Goh, 1997 CarswellOnt 2434, 13 C.P.C. (4th) 120 (Gen. Div.). Justice Borins held that the *Albino & Mike* decision of the Master was incorrectly decided and not to be followed. In coming to his conclusion, Justice Borins disagreed with another Superior Court decision (*Itan Transportation Services Inc. v. Canadian Office Products Assn.*, 1996 CarswellOnt 3354, 6 C.P.C. (4th) 25 (Gen. Div.) [Greer, J.]), and distinguished three similar cases (*Clothescall A Fashion Investments Inc. v. Miller*, 1995 CarswellOnt 4441, [1995] O.J. No. 1728 (Gen. Div.) [Mandel J.] ; summary at 56 A.C.W.S. (3d) 23, *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CarswellBC 2615 (S.C. [In Chambers]); summary at 33 A.C.W.S. (3d) 684 and the decision of Ground J. in *Food Service Market Insight Inc. v. 114862 Ontario Inc.*, 1996 CarswellOnt 3629 (Gen. Div.); summarized at 65 A.C.W.S. (3d) 927) on the basis that in those cases the corporate officer was also a party to the action (this was the case in *Biotechnik*, as one of the officers was a defendant by counterclaim notwithstanding that this is not possible, even with leave, under the *Construction Lien Act* according to *Wharton Enterprises Ltd. v. Brompton Financial Corp.*, 1990 CarswellOnt 345, 37 C.L.R. 121 (H.C.) and *Bay City Carpentry Inc. v. Matushovsky*, 1999 CarswellOnt 482, [1999] O.J. No. 506 (C.A.)). *Food Services Market Inside Inc.*, decided by Justice Ground, approved exactly the same *alternative* form of order as ordered by the Master in *Albino & Mike* and, in the end, *Biotechnik*. As is pointed out in *Albino & Mike*, the result of an order for security for costs against a corporation without assets is almost certainly that some officer or stakeholder will come forward and loan the company the money (thereby exposing his or her personal assets for a corporate debt) to post the security and get on with the action. This outcome is entirely consistent with the decided cases (*Kurzela v. 526442 Ontario Ltd.*, 1988 CarswellOnt 524, 66 O.R. (2d) 446 (Div. Ct.), *Shadows v. Travelers Canada Corp.*, 1990 CarswellOnt 346, 40 C.P.C. (2d) 118 (H.C.), *Smith Bus Lines Ltd. v. Bank of Montreal*, 1987 CarswellOnt 457, 61 O.R. (2d) 688 at 690 (H.C.); leave to appeal refused 1987 CarswellOnt 566, 61 O.R. (2d) 688 (H.C.), *Mastercraft Group Inc. v. Confederation Trust Co.*, 1997 CarswellOnt 3678, 15 C.P.C. (4th) 48 (Gen. Div.), and *Continental Breweries Inc. v. 707517 Ontario Ltd.*, 1990 CarswellOnt 422, 46 C.P.C. (2d) 151 (Gen. Div.)).

87 2004 CarswellOnt 3124, 36 C.L.R. (3d) 153 (S.C.J.).

4. If a personal undertaking as to costs is given, no new proceeding has to be commenced to enforce the undertaking. It is enforceable in the proceeding in which the undertaking was given, i.e., in the lien proceeding.

5. The requirement for a personal undertaking can either be an option for the plaintiff, or an integral part of the security package ordered by the master.

6. It is open to the court to consider the issues pleaded in the case, and to sever issues or try them in a specific order so as to get primary issues of entitlement decided at relatively little cost before deciding other issues at significantly greater cost. The court can then tailor a combination of amount and type of security for costs (i.e., letter of credit, bond, cash, or personal undertaking to the court) to accommodate the issues and exposures involved at each stage. In *Biotechnik*, for example, the master ordered the following three issues tried separately and in the following order: first, entitlement to terminate the plaintiff's contract (if the defendant was correct, it was the end of the plaintiff's claim, and the defendant would be unlikely to proceed to recover an uncollectible judgment on its counterclaim); second, the defendant's counterclaim (in which it was a plaintiff, and therefore not entitled to security for costs); and, third, the quantum of the plaintiff's recovery, if any (subject to security for costs). This order had the effect of letting the action proceed through the first stage on modest security, with the option to use a personal undertaking and the benefit of certain costs orders to that date, to reduce (but not eliminate) the amount of cash, bond or letter of credit security required.

7. The court is aware of the economic realities of modern construction litigation. On this issue the master in *Biotechnik* held as follows:

> I recognize that there is a risk that the plaintiff will not be able to pay or post the security required, even if the first instalment amount is reduced . . . This will mean that the plaintiff's claim will be dismissed and its lien discharged. The limitation period to start an ordinary contract action is 6 years from September 14, 2000. Maybe within the remaining time, the plaintiff or its shareholders or creditors will be able to raise the money to finance such an action. Perhaps in such a non-lien action, the plaintiff may not be required to provide security for

costs. On the other hand, it may be so required.

It is a hard economic fact that litigation costs money. Financially compromised corporate plaintiffs not only have to be concerned about orders for security for the defendant's costs buy, in most commercial cases, plaintiffs' solicitors would want a retainer and payment of interim accounts to cover their fees and disbursements along the way. Sometimes, a lawsuit will have to be abandoned where there is not available money to fund it. The plaintiff here had to know there was the possibility of a motion for security for costs being brought, and of the plaintiff not being given the exemption discussed in *John Wink v. Sico* (1987), 57 O.R. (2d) 705 and *Smith Bus Lines v. Bank of Montreal* (1987), 61 O.R. (2d) 690; leave to appeal refused 61 O.R. (2d) 688, especially since this is a construction lien action where a "level playing field" (or, at least, one not tipping strongly against a defendant) is seen by at least some courts to be a desirable procedural goal.

6.2 Trial management: pre-trial conferences, hearings for directions

6.2.1 Guide

It must be emphasized that the role of the master in a lien action is one of active management. Under **s. 51**, it is mandatory that the master on a reference try the action "and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served". As the author has argued elsewhere,[88] the judge or master in a lien action is tasked with taking all accounts, making all inquiries, giving all directions, and generally doing "all things necessary to dispose finally of the action and all matters, questions and accounts arising therein *or at the trial* and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action".

This duty is supported by powers granted to the master as a referee under **R. 55**, Procedure on a Reference. Here, the master is mandated (subject to any directions in the order of reference) to "devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference" and to conduct an immediate hearing for

88 D.W. Glaholt & M. Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

directions for the conduct of the reference, including the time and place at which the reference is to proceed, special directions as to parties who are to attend, and "special directions concerning what evidence is to be received and how documents are to be proved".

As a result, the first attendance before the master after an order of reference has been issued and entered is not simply an attendance to set a time table. As will be discussed in greater detail below, you need to know your case, you need to know the issues, and you need to know at least the outline of the evidence that will be marshalled in support of your case.

There is a distinction between "lien pre-trials", and "pre-trial conferences" under **Rule 50**, and "case conferences" under **Rule 77.08**.

The *Act* is clear that the civil "pre-trial conference" rule, **Rule 50**, does not apply to actions under the *Act*.[89] This is interesting because the stated purpose of **Rule 50**, in part, is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing. The term "lien pre-trial" is actually a misnomer, as there is nothing "pre" about a lien pre-trial, as discussed in detail below. The "lien pre-trial" is simply the non-evidentiary portion of an ongoing lien trial that commenced upon the first return date of the *first* properly served notice of trial. Thus, in the masters' office in Toronto, the preferred term for such pre-trials is "trial management pre-trial conferences", and this is the terminology used throughout the balance of the chapter.

It should also be noted at the outset that there are potentially serious consequences of failing to attend either a lien pre-trial or a statutory settlement meeting.

What is the lawyer's role at the first and subsequent trial management pre-trial conferences? As always, the lawyer's role is to prepare, attend and effectively represent the client's interests.

Fundamentally, the lawyer's first job is to ensure that a Scott Schedule is available for the use of the lien master.

In addition the well-prepared lawyer will have available for counsel and the court a spreadsheet of lien claimants, owners and financiers, noting the registration particulars and amounts of all instruments affecting title in the appropriate box for the appropriate person, and the

89 **O. Reg. 302/18, s. 10(9)**.

name, telephone number, facsimile number and e-mail address of all lawyers who are on the record. It is best if the lawyer has already made **s. 39** demands and conducted any necessary cross-examinations under **s. 40**.

As to attendance at the first and subsequent trial management pre-trial conferences, the responsible lawyer does not send a substitute, no matter how well informed. Many important issues will be discussed, and the court is likely to make important orders, or give important directions as to the conduct of the lien action. The responsible lawyer should attend in person. Trial management pre-trial conferences are events for lawyers, not for clerks, students or agents, although there is no formal rule preventing the attendance of such persons.

It is good practice for the lawyer who has served the notice of trial, or the order for the settlement meeting, to do a survey of counsel in advance of the lien trial management pre-trial conference or settlement meeting, by telephone. The purpose of the survey is to get a sense of the positions of the parties, and determine who might be willing and suitable candidates to chair the settlement meeting, or, in the case of a lien pre-trial, assume carriage of each of the various classes of lien actions.

In complex cases, an agenda may be helpful, and if so it should be circulated to all counsel and approved in advance. In trial management pre-trial conferences, the court will determine the agenda for the first and all subsequent attendances. All tasks assigned at each trial management pre-trial conference are canvassed at each subsequent trial management pre-trial conference, until they are completed.

6.2.2 Arranging and conducting pre-trial conferences and hearings for directions

(1) In Toronto

While there is ample judicial authority of long standing, there is no specific statutory authority for lien pre-trials.[90] Specific statutory au-

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90 This is discussed in two principal cases: *Ontario Electrical Construction v. Stern*, 1997 CarswellOnt 703, 31 C.L.R. (2d) 150 (Gen. Div.) and *York Marble, Tile & Terrazzo Ltd. v. Exim Group of Canada Inc.*, 1998 CarswellOnt 3730, 41 C.L.R. (2d) 110 (Gen. Div.) (Beaulieu J., considering and approving *Ontario*

thority for the lien pre-trial, if such authority was needed, could be

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Electrical Construction v. Stern). In *Stern*, Master Sandler held as follows: "In Toronto, the procedure of pre-trials in construction lien cases has been going on for a very long time. In *Kennedy Glass Ltd. v. Jeskay Construction Ltd.*, [1973] 3 O.R. 493, the Divisional Court held that the 'pre-trial' procedure was not sanctioned by the *Mechanics Lien Act* and that there was no provision in the Act for judgment being granted for default of defence, and that a 'trial' had to be held even if the defendants defaulted in delivering a statement of defence, and even if the defendants had no desire to defend, or if it was unclear whether the defendants wanted to defend or not, . . . and that the lien claimants had to prove their claims with their witnesses being examined on oath before the Master . . . The *Construction Lien Act* is totally different . . . The so-called 'pre-trial' procedure that is still being used in Toronto, by the Construction Lien Masters, is really just part of the trial itself. Through sections 58 and 60 of the Act, once the judgment of reference has been obtained, the Master fixed a day, time and place for the trial of the action. Notice of trial must hen be served '. . . at leas 10 days before the date appointed of trial . . .' upon the persons referred to in section 60(2). Each session before the Master is part of the 'trial', and all steps taken and directions given must be noted in the Master's Procedure Book — Rule 55.03(11). The Master can adopt any manner of conducting the reference — Rule 55.01(1) — and can give directions and make rulings — Rule 55.01(1) and Rule 55.01(3). Rules 54 and 55 apply to the reference of 'trial' but subject to the provision of the governing statute — sec. Rule 54.01 and section 67(3) of the Act. In my view, while the word 'pre-trial' is not used in the current *Construction Lien Act*, the current practice in Toronto of having various sessions of the trial take place before actually hearing any testimony, (i.e., '*pre-trials*'), where various appropriate pre-trial matters are considered and directions and rulings are made (such as consolidation, separate trials, adding parties, amending pleadings, documentary and oral discover, delivery of Scott Schedules, etc.) is fully in accordance with the provisions of the *Construction Lien Act* and the reference Rules, Rule 54 and 55." In *York Marble*, Justice Beaulieu held as follows: "Turning to the legal validity of pre-trials, the defendant correctly notes that the *Construction Lien Act* makes no reference to such a term. In practice, however, there is long standing tradition in Toronto and other regions of pre-trials in matters referred to the Master (citing and quoting *B.A. Robinson Plumbing & Heating Ltd. v. Dunwoodco Ltd. (Trustee of)*, [1968] 2 O.R. 826 at p. 829) . . . The benefits of pre-trials are similarly recognized by the Divisional Court in *Kennedy Glass Ltd. v. Jeskay Construction Ltd.*, [1973] 3 O.R. 493 (Ont. Div. Ct.). Relying on a portion of the above quote from *B.A. Robinson Plumbing & Heating* the court refused to prohibit the use of pre-trials (quoting from p. 497 of *B.A. Robinson*). For a recent view that 'pre-trials' should not be conceived of as a separate procedure but rather 'really just part of the trial itself' see *Ontario Electrical Construction v. Stern* (1997), 31 C.L.R. (2d) 150 (Ont. Master)".

found in the "hearing for directions" contemplated by **Rules 55.02(1), (2), (3) and (4)**. The Toronto lien masters office has advised that they have changed the terminology from "pre-trial" to "hearing for directions", since the term "pre-trial" makes many lawyers and parties expect settlement discussions similar to a civil pre-trial or mediation.

The long-standing practice before the master at Toronto after a judgment of reference has been made is to assemble all counsel and parties (but *not* all witnesses and evidence) on the first return date of the notice of trial, to discuss the practical management of all of the substantive disputes and all of the procedural matters required prior to an evidentiary hearing on the merits. This first return date of the notice of trial is therefore the "first lien pre-trial" (as distinguished from the second, third, fourth and subsequent lien pre-trials that may be needed prior to the evidentiary hearing itself). The "first lien pre-trial" is also the first day of the trial of that lien action. This important point is often ignored or forgotten by lawyers using standard wording for **Rule 49** offers to settle.

The person who has taken out the judgment of reference (**s. 58(1)**) serves a notice of trial on everyone who, under **s. 9(2) of O. Reg. 302/18**, would be *entitled* to notice of a settlement meeting. That means service on any person who was, on the 12th day before the day appointed for the settlement meeting:

1. The owner and every person named as a defendant in *every* statement of claim who is not in default (this underscores the class actions aspect of a lien action).
2. Everyone with a registered interest in the premises, where the lien attaches to the premises.
3. Execution creditors of the owner, where the lien attaches to the premises.
4. Anyone having a preserved or perfected lien against the premises.
5. Any person named as a third party under **s. 4 of O. Reg. 302/18**.

A successful first hearing for directions happens in the following order:

1. Judgment of reference.

2. Clear a series of dates with all counsel who will be required to attend.

3. "Without notice attendance before the master with available dates you have cleared with all counsel to fix a date for trial (the master will use this "without notice" attendance to make it clear to counsel who is to be served with the notice of trial and order for trial).[91]

4. Insertion of that date in a notice of trial.

5. Service of that notice of trial on everyone who would otherwise get notice of a settlement meeting under the Act.[92]

6. Attendance upon the return of that notice of trial.

7. Conduct the first hearing for directions.

The form of order presented to the court on the "without notice" attendance following the judgment of reference should say this:

> It is ordered that the trial of this action, by way of first pre-trial, is fixed for day, the ....., day of ....., 2006, at ..... a.m./p.m. (emphasis often in the original).[93]

The form of order required by the Toronto construction lien masters also includes a provision that the party who takes out the order shall serve a notice of trial *and a copy of the order* on all persons required to be served by **s. 9(2) of O. Reg. 302/18**.

It is a good practice to diarize and follow up with all counsel and attendees by telephone or email at least a week or so prior to the return date to confirm attendance.

In the past, the Master's Office in Toronto did not require service of the notice of trial on a mortgagee or execution creditor who was not otherwise a defendant at the pre-trial stage, or where it was unlikely that the property would have to be sold, notwithstanding the

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91 Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference at pp. 9-10, and, for an example of how much confusion can be caused when it is not done in this order, see *Williams & Prior Ltd. v. Taskon Construction Ltd.*, 2003 CarswellOnt 474, 22 C.L.R. (3d) 1 (S.C.J.).

92 Once again, upon service of the notice of trial, the person serving the notice of trial and all persons served with notice of trial are parties to the action in which the notice of trial was served (**O. Reg. 302/18, s. 6(1)**).

93 Master Sandler, *supra* note 10 at 9.

provisions of the *Act* to the contrary. The Master's Office has now indicated that those persons ought to be served. To that effect, the Masters in Toronto will want to have execution and bankruptcy searched before them at the first pre-trial.[94]

Lien claims registered or served *after* the initial **s. 9(2) of O. Reg. 302/18** searches are done, or after due and proper service of the notice of trial and order for trial, should be identified and served with notice of trial. Counsel should perform a quick sub-search before attending on the return date to identify any such lien claimants and serve them. The court will address and rectify all issues with service at the first lien pre-trial. No one will be prejudiced. The progress of the lien action to trial will not be held up.

What if liens go on title *after* the first lien pre-trial? The easy solution to this relatively rare problem is to be found in **s. 62(6)** which provides that the court may allow any person with a perfected lien who was not served with notice of trial, or whose action was stayed by reason of an order under the *Arbitrations Act*, to be let in to prove the claim at any time before the amount realized in the action for the satisfaction of the lien has been distributed, and where the claim is allowed, the judgment or report shall be amended to include the claim. The onus in such a case is on the subsequent lien claimant to locate the lien action in which it should have proved its claim for lien, by its own investigations of the title and court records, and then move to be let in. There is no onus on the original claimants who properly served notice of trial, and proceeded regularly thereafter. The master in Toronto will require a verbal update from the lawyer having carriage at each sequential lien pre-trial as to the state of title and as to the registration of any new liens.

As can be seen from what has been set out above, the notice of trial is a crucial document in a lien action. A form of notice of trial is found in the regulations to the *Act*, **Form 33, O. Reg. 303/18**. Note that there are *alternative* provisions in the form: "A" for referred actions in Toronto, and "B" for non-referred actions (i.e., lien trials before a judge), anywhere in the province. It often happens that a notice of trial is served in accordance with wording "B" of **Form 33**,

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94 Master Carol Albert, *An Evening with the Construction Lien Masters* (Toronto: OBA, November 23, 2010).

even when the matter is before the master at Toronto, and, as a result, the following statement finds its way into the hands of all persons served with notice of trial: "(a)ll parties are required to be prepared to proceed with the trial, and to bring with them on the trial day all evidence and witnesses necessary to prove their respective claims or defences".

Some parties turn up at the first lien pre-trial before the master with all their witnesses in tow. This is unnecessary, whether the lien action is in Toronto, before the master, or not. In order to prevent this, the master in Toronto will specifically provide that the order containing directions made by the master at the first "without notice" attendance after the judgment of reference to obtain a trial date to insert in the notice of trial be served with the notice of trial itself. This accompanying order for directions makes it abundantly clear, among other things, that no witnesses are required to attend the first lien pre-trial.

At the first hearing for directions, the lawyer for the party that served the notice of trial must have and file with the court:

1. An up-to-date search of the title showing all deleted instruments (this is an important note in the case of electronic title searches as counsel must specifically select the electronic search that shows all deleted instruments; a vacated lien is still a "subsisting" lien, and a lien claimant with a vacated lien is still entitled to notice of trial);

2. A copy of the judgment of reference (the original of which should remain in the lawyer's file, and a true copy of which will already be in the court file before the master);

3. A copy of the order fixing a date for trial; the master's clerk will have obtained the court file from the 10th floor, in Toronto, on the Thursday before the regularly scheduled Friday pre-trials (see **Rule 55.02(14)**);

4. Proper proof of service of the notice of trial and "without notice" order for trial on all appropriate parties;

5. Accurate, up-to-date information as to the status of any security in court with respect to "bonded-off" lien claims. The best practice here is to have a true copy of any and all **s. 44** orders available to show to the master (if they are properly done, they will recite the type and particulars of the security posted in their preamble(s)), along with a verbal up-date as to the value of the

security, if cash;

6. An up-to-date, tabbed pleadings brief, single sided;

7. A chart, showing accurately, on one piece of paper, all known lien claimants and their contractual relationships, accurate registration numbers and amounts of all liens and certificates of action, court file numbers and accurate names and co-ordinates of all counsel (including telephone, facsimile and e-mail references).

The Masters' Office in Toronto will use the first hearing for directions to engage in a meaningful discussion of the merits of the case and the positions taken by the parties on issues such as lienability and timeliness. In Toronto the first hearing for directions goes well beyond scheduling matters. For example, where reflexive "boiler plate" pleadings of lack of timeliness or lienability have been made, the master will expect counsel to substantiate such allegations on at least a *prima facie* basis, with reference to anticipated documentary evidence or testimony. It is expected that pleadings without *prima facie* substantiation will be formally discarded at the first hearing for directions.

It will come as no surprise to learn that lawyers should not delegate attendance at the first hearing for directions to uninstructed persons. If time is wasted, adverse cost orders may be expected.

(2) Outside of Toronto

Procedures outside of Toronto vary. In some jurisdictions, the court will proceed more or less as outlined above but, perhaps, will refer to the proceeding as "first pre-trial conference". In others, the court will treat a lien trial like any other trial and expect the return date of the notice of trial to be the commencement of the trial. It is best to call the trial coordinator in jurisdictions outside of Toronto in advance if you are in any doubt as to the appropriate procedure.

When the first lien pre-trial is under way in Toronto and the above filings are made, the master will conduct a roll call to determine who has attended and who has not. In a complex lien action it may take hours to sort out who is who and what is what. As Master Sandler has said:

> The first "pre-trial" is just to get organized and determine who is involved, and what the issues are, and what needs to be done procedurally. This is *not* a "pretrial" conference "under Rule 50". There will be no explicit talk about

> settlement possibilities and offers and counteroffers. (I have sometimes asked another Master or a judge to conduct a Rule 50 pre-trial conference but this is done at a later stage, usually just before a trial date is fixed.)
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> . . .
>
> Sometimes there are 4, 5 or even 6 organizational "pre-trials" that are required. Settlement discussions, in a general way, are always explored and encouraged. Detailed discussions cannot be had since the presiding Master is the trial judge. Alternatives to trial are explored such as mediation, arbitration, conferring of opposing experts, an on-site determination of deficiencies by an architect or contractor or other consultant, or other alternative dispute resolution mechanisms, are reviewed.[95] (Emphasis in original)

Parties to a complex lien action will often seek one or more of the following items of relief at the first lien pre-trial:

1. Consolidation of the lien actions, as may be appropriate, and an award of conduct and carriage.

2. Authorization for the eventual assessment and payment of salvage costs to the lawyer having carriage.

3. Joining any persons as parties under **s. 57(2)** such as the CRA against whom a priority will be claimed.[96]

4. Establishment of a "vetting committee" to enquire into issues on behalf of the court and report back on a fixed date.

5. Any consent amendments to tidy up pleadings. If narrow points of pleading are being relied upon by someone to take a hard or unreasonably technical position, counsel may find that the master may deal with this on his or her own motion.[97]

6. Scheduling of motions regarding pleadings, particulars.

7. Leave for the production of documents and examinations for discovery, including limiting terms as to time and issues, as discussed in detail above.

8. In cases of self-representation or corporate representation by a non-lawyer any attendant issues are raised and sorted.

9. Dismissal of lien proceedings against the owner or mortgagee,

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95 Master Sandler, *supra* note 10 at 28–30.

96 *I.B.E.W. Trust Fund, Local 353 v. 779857 Ontario Inc.*, 2004 CarswellOnt 2528, 36 C.L.R. (3d) 48 (S.C.J.).

97 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 55.02(10)**.

on consent, if all of the liens have been "bonded off" by the general contractor.

10. Scheduling of further lien pre-trial conferences, and the setting of agendas for those conferences.

At the last two or three trial management pre-trial conferences at this point, a date for the evidentiary portion of the on-going trial is set and trial management orders are made. The date for the commencement of the evidentiary portion of an on-going lien trial is always peremptory to all parties. All fixed dates in Toronto are reached as scheduled. Adjournments are granted only rarely. The test for adjournment of a peremptory date is one of absolute necessity, not one of relative convenience. As Master Sandler has observed, "(e)arly, fixed, firm, trial dates promote settlements, which are desirable, so I keep my system of trial dates very tight. Also, fixed firm trial dates facilitate the scheduling of witnesses and expert witnesses."[98]

Lien pre-trial procedure is set by the court.[99] The court has ample jurisdiction to create a procedure that fits the particular circumstances of each case. Having said this, the conduct of lien pre-trials tends to be an informal affair, even though conducted in open court. It tends to be more of an inquiry by the court and dialogue with the court, than a matter of formal submissions and agreement. Counsel are expected to take complete notes at a lien pre-trial, as myriad details will be dealt with. The master's practice in Toronto is to read his or her endorsement aloud, as it develops, so that counsel can follow in their own notes and stop the master and discuss any changes or amendments that are required to make the endorsement accurate. If asked, the master will provide a photocopy of his or her notes, but they may be difficult to read. Some masters are able to give counsel a printed endorsement to review and approve before leaving the lien pre-trial.

In Toronto, the results of the lien pre-trial find their way into the master's procedure book, whether hand-written or computer generated. Notes in a master's procedure book are the equivalent of formal orders without any formal order being taken out, unless one is specif-

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98 Master David Sandler, Ontario Superior Court of Justice, "Lien Actions: Practice Tips From the Bench", March 20–22, 2003, O.B.A. Annual Institute Conference at 30.

99 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 55.02** generally.

ically required for registration or some other administrative purpose.[100] Although it is surprising that authority is needed for such a proposition, it is well established now that repeated or chronic failure to comply with orders made on pre-trial conferences can result in the dismissal of a party's case.[101]

As there are multiple, sequential trial management pre-trial conferences it is best to refer to them as "First Lien Pre-Trial", "Second Lien Pre-Trial" and to use this nomenclature in all written materials and submissions. In complex lien proceedings it would not be uncommon to reach your "Tenth Lien Pre-trial", for example, just prior to trial or reference.

The practice as to lien pre-trials elsewhere in the province varies. In the Southwest Region, Essex County, Chatham, Sarnia and soon London and surrounding communities, lien pre-trials are not generally carried out without the consent of counsel. If a matter has not had any input from a judge, and it appears on the court docket for trial, the trial judge may conduct an in-trial discussion before the trial even commences. This is generally carried out on consent with the judge making it clear he or she shall not lose jurisdiction. Some trial judges are uncomfortable with this procedure and ask that another judge deal with a possible settlement discussion before the calling of evidence, perhaps better described as an "in-trial conference", to discuss obvious difficulties. The court recognizes that lien trials are document intensive, and that it can be an imposition, or impractical to try and bring in another judicial officer for the purpose of a pre-trial or "in-trial conference".

In Ottawa, there are no standard mandatory pre-trial procedures for use in lien actions. The parties must, however, schedule and attend a formal settlement meeting pursuant to the *Act*. Typically, in Ottawa, a judicial pre-trial is held some time between the assignment court and the actual date of the commencement of the trial (i.e., *not* by the judge hearing the lien trial, and pursuant to **Rule 50**). This appears to be the case in Thunder Bay and Kenora as well.

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100 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 55.02(11)**.

101 *Schindler Elevator Corp. v. 1147335 Ontario Inc.*, 2007 CarswellOnt 6253, 65 C.L.R. (3d) 110 (S.C.J.); affirmed 2008 CarswellOnt 5796 (Div. Ct.).

6.2.3 Consequences of failing to attend a trial management pre-trial conference

The failure to attend a trial management pre-trial conference can have surprisingly serious consequences, whether the failure is advertent or inadvertent.

As discussed above, the lien pre-trial is actually the commencement of the lien trial itself. It is not, in any technical sense, a "pre" trial at all. Because it is a trial, and because **Rule 52.01** is not inconsistent with the *Act* in this regard (**s. 50(2)**), **Rule 52.01** applies in the case of failure to attend at trial.

Rule 51.02 provides that where an action is called for trial and a party fails to attend, the trial judge may proceed with the trial in the absence of the party, dismiss a counterclaim if necessary and allow the plaintiff to proceed to prove its claim, or dismiss the action and allow the defendant who attends in the absence of the plaintiff to proceed to prove its counterclaim, or make any other order as is just.

In Toronto, if anyone, including a client representative, agent, student, or a person bearing a letter addressed to the court attends a scheduled lien pre-trial to speak to a matter, the court will not make any final order at that time. Instead, if the default is early in the lien proceedings, the court is likely to deal with the matter by giving specific direction to counsel for the party having carriage to write to the non-attending party and its lawyer, specifying the date of the next lien pre-trial, stating that the absent party must attend at the next lien pre-trial fully prepared to speak to the claim or defence and circumstances of default, and stating that failure to attend will result in the discharge of the relevant lien, or judgment in default of defence.

The court may also direct that this written notice be personally served, or served by registered mail and ordinary mail, for example. The court may also require the absent party, or its counsel, to attend the next lien pre-trial to "show cause" why the consequences of **Rule 52.01** should not follow.

If the absence occurs late in the proceedings, or on an important day, when, for example, consensus of the parties as to an interim distribution is required, or some other substantive matter is to be dealt with, it is more likely that these proceedings will take place without regard to the absent party's rights.

Thus, if you represent a lien claimant and fail to attend a first or subsequent lien pre-trial, there is a very real risk that your client's

lien will be discharged, or that other equally serious consequences will ensue. It is for this reason that the first order of business at the first lien pre-trial is always for the court to canvass the issue of due and proper service of the notice of trial. It is further imperative that the party serving the notice of trial attend upon the return date with all affidavits of service attached to the notice of trial, as served, together with a title search current to the day before evidencing strict compliance with **s. 9(2) of O. Reg. 302/18**.

If the defaulting party at a first lien pre-trial is an "owner", the court can usually proceed in the owner's absence to establish a vetting committee and see to it that the action is properly constituted. The court could also ensure that everyone entitled to notice has notice so that the title could be cleared of all liens related to the improvement if and when necessary. If an owner fails to attend a first lien pre-trial, however, the most serious consequence for the owner is likely to be an adverse costs order. If an owner fails to attend a subsequent lien pre-trial, however, the owner must expect **Rule 52.01** to be applied against it.

6.3 Discovery in lien actions

Discovery in a lien action occurs only with leave. Leave is almost always granted, but it almost never granted at large. More often the lien master will discuss the case closely with counsel at the first or a subsequent trial management pre-trial conference, with close examination of the Scott Schedule, to determine just how much discovery, of whom, and when is necessary (not "desirable") to advance the case.

6.3.1 Documentary discovery

As discussed above, the existence of litigation, or reasonably anticipated litigation, creates an obligation on a party to preserve potentially relevant documents; to disclose all relevant documents in an affidavit of documents; and to produce copies of relevant documents that are not privileged. The implications of the first obligation were discussed earlier. This chapter will address the second and third obligations. It will also discuss issues surrounding the conduct of examinations for discovery.

Discovery in a lien action is an interlocutory procedure not other-

wise contemplated by the *Construction Act*. Discovery in a lien action is not a right, but a privilege. Leave must first be sought under O. Reg. 302/18, **s. 13**. While the 2018 Expert Review recommended that the requirement to seek leave of the court to conduct oral examinations for discovery and examination of documents under former s. 67(2) should be removed from the *Act*, that recommendation was not adopted by the legislature, and former s. 67(2) was re-enacted as s. 13 of O. Reg. 302/18.

For a number of years, it was thought that orders in lien actions for production and discovery could be obtained for the asking. This thinking changed in the early 1990's. Instead of simply asking for and getting an order for production and discovery, the court began to ask: "Why do you need discovery in this case?", "What do you hope to accomplish?" And, "How long do you need?" When leave is granted, lien discoveries proceed under careful judicial supervision.[102]

It has been observed by experienced lien masters that a well-planned day of discovery can save as much as three days of trial time. Properly controlled and supervised pre-trial procedures lead to shorter trials and earlier settlements. Interestingly, the master is not bound by the consent of the parties and can, and often does, rule against the parties' plan if it is impractical.

On January 1, 2010, significant changes were made to the Ontario *Rules of Civil Procedure*. The rules pertaining to discovery were one of the focal points of the revisions. The new rules redefined the scope of discovery by replacing the old "semblance of relevance" test with a simple "relevance" test. Rather than having to disclose all documents "relating to any matter in issue", parties will have to disclose all documents "relevant to any matter in issue".[103] There are new time limits on the length of examinations for discovery.[104] There is a new requirement for a written discovery plan to be agreed on by the

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102 *Eurocor Ltd. v. Vernich*, 1995 CarswellOnt 4534, [1995] O.J. No. 2315 (Gen. Div.), *AMCA International Ltd. v. Ellis-Don Ltd.*, 1990 CarswellOnt 676, 42 C.L.R. 227 (Gen. Div.), *Clarke's Electrical Service Ltd. v. Gottardo Construction Ltd.*, 2001 CarswellOnt 1389, 9 C.L.R. (3d) 14 (S.C.J.).

103 Rules 30 and 31.

104 Rule 31.05.1.

parties.[105] The Sedona Canada Principles are officially endorsed.[106]

Finally, the principle of proportionality is introduced into discovery.[107]

All documents relevant to the matter in issue that is or has been in the possession, control or power of the party must be disclosed.[108] A complete set of those original documents becomes a "library set" of documents. Usually, this set will be scanned. One subset of this library set, for example, will be a list of privileged documents.

Unique identifiers are affixed to each physical sheet of each source document. These can be clear, indelible black ink stamp or computer generated labels. The numbering system adopted for these unique identifiers should be designed to provide as much information as possible. A sequential document number, and a page number for each page of each document should be a minimum. The unique identifier numbers are stamped or affixed to the lower right corner of each *original* document. Thus, no matter how many times the original documents are disassembled and re-assembled, they can be reconstituted. Every stray piece of paper can be traced back to its source. By placing the unique identifier in the lower right corner of each original document, the document, when copied, has space left in the upper right corner for pagination in briefs or affidavits. Specific instructions regarding the document's briefs at trial commences (the trial management pre-trial).[109] If the documents are scanned, this step of unique

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105 Rule 29.1.

106 Rule 29.1.03.

107 Rule 29.2.

108 Rule 30.02(1).

109 A sample order drawn from a case currently before the Master at Toronto is as follows: "Each party shall prepare four sets of Document Books to contain all documents that each of the plaintiff and defendant intend to rely on at trial, in support of their respective positions on the claim and the counterclaim, bring one copy for the Court, one copy containing original documents, except if no longer available in which case a copy may be substituted, for use by the witnesses in giving their testimony, and one copy for each counsel for each of plaintiff and defendant, and these document books are to be duly indexed, and tabbed, and pages numbers, and no document that is not contained in any of the said document books shall be permitted to be tendered in evidence at the trial, except with leave of this court, and only if the party seeking leave can establish a persuasive

identification can be accomplished digitally.

The library set of documents is then culled for privileged documents. These privileged documents are physically removed from their original file and kept in a secure "privileged" file or are digitally refilled. If you are working with paper, they can be replaced with a coloured sheet of paper bearing the words "Document No. ..... pages removed: Solicitor and Client Privilege Claimed" (or, "Solicitor's Work Product Privilege", or "No Relevance", as the case may be). Privileged documents should be separately maintained and listed. The client's filing system should be preserved wherever possible, however rudimentary it may be. If the original client documents are not kept in the client's original order, the client will not thank you and you will not thank yourself when you discover that your client's witnesses no longer know where their documents are located. You will hear something like: "The report you are looking for is in the supplier's account receivable file", but if the file in that form no longer exists because the lawyer has altered the client's filing system, hours will be lost trying to find the documents. Even if the client's filing system is not efficient, it will be intuitive and familiar to them.

Once the unique identifiers are in place and privileged original documents have been culled, the whole library set of uniquely identified original documents can be copied. These copies, each sheet bearing a unique identifier, can *then* be chronologically ordered, or reorganized by issue as the lawyer's needs require.

Clients sometimes object to the significant up-front expense involved in this kind of document location, preparation and management. This process of preparing a library set of documents often in-

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reason why any document has been omitted, and such document books are to be exchanged by no later than ..... and further that the authenticity of each document in the Document Books so delivered shall be admitted pursuant to **Rules 51.01**, **51.02**, and **51.03**, and shall be deemed admissible in evidence, unless the party objecting to such authenticity or admissibility serves a written Letter of Objections, specifically denying the authenticity or admissibility of any such document within 10 days following the date of service of any such Document book on the opposite party, and otherwise, the documents in the said books shall be admissible in evidence by each party as part of their case, without further formal proofs, and any objection to authenticity or admissibility of any such document as specified in such written Letter of Objection shall be ruled upon by this Court during the course of the trial."

volves days out of the office spent combing through bales of battered paper and accounting records, but it is an essential, even mandatory requirement of good lien practice. It would not be unreasonable to budget 10–20% or so of the overall cost of the litigation for this initial, lawyer-driven process. If the client will not pay for such a process, this may be an indication of trouble to come. Money spent at the front end on document management is a fraction of what it costs to catch up later in the litigation, both in terms of money and in terms of tactical advantage lost. If a client will not participate in this process, the lawyer should obtain a letter confirming their advice and the client's instructions.

Many clients point out that as cases frequently settle at mediation well in advance of any formal production or discovery, this is as good a reason not to incur the initial expense of preparing a library set of client documents. They may be right. In the writer's view, however, it is not always true that the "interests" of the participants are not always true prior to documentary production or discovery. If the interests of the parties are well-known, then it makes sense to defer the expense of a documentary production until the outcome of the mediation. Even if the entire case does not settle, it is always possible that some issues may, thereby reducing the number of documents that would otherwise be assembled, marked and produced.

Except in the largest cases and at the most specialized firms, the document management system seems to be somewhat lower than the standard described above. In most lien proceedings, many lawyers accept at face value whatever documents their client chooses to give them, then take this client-prepared group of documents, apply a sequential number on the first page only of each apparently whole document beginning with "1", and sends it out the door. This is no substitute for a properly prepared library set of documents, as described above. It will eventually prove inadequate. Inadequate up-front document management simply pushed the inevitable cost of document preparation toward discovery and trial.

The whole exercise of reviewing the client's file should be documented by memorandum of instruction to the lawyers or clerks involved, and then reported to the client in writing as soon as possible after the lawyer's attendance.

6.3.2 Electronic documents

Rule 30.01 of the Ontario *Rules of Civil Procedur*e makes clear that the Rules regarding discovery extend to electronic documents:

> "Document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form . . .

Electronic documents should be treated just like their traditional paper counterparts. This should be kept in mind especially when sending and forwarding e-mails. All that happens to an erased e-mail is that its "address" in the hard drive is removed, making it inaccessible to most operating systems. Computer specialists, however, can locate and reassemble erased documents on a hard drive, unless they have actually been over-written. Even the apparent physical destruction of a computer hard drive does not always erase the electronic record of e-mails and other electronically stored documents (such as drafts of letters, internal memoranda and the like).

Electronic documents that might be relevant to litigation should be maintained, organized and accessible. Lawyers should implement a policy to that effect.[110] A party seeking production of electronic documents should send a preservation of evidence letter and make use of **Rule 30.04** regarding requests to inspect documents in the affidavit of documents and should inquire about the opposing party's policy with regard to electronic documents.[111]

In 2003, the Sedona Conference, a non-profit law and policy think tank based in Sedona, Arizona, published the first U.S. public comment draft of the "Sedona Principles". This public comment draft addressed the disclosure and discovery of electronically stored information. Working Group 7, "Sedona Canada", recognized that the discovery of electronically stored information can no longer be seen as a peculiarity of litigation in the United States or limited to complex commercial lawsuits in Ontario and British Columbia. It is quickly

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110 For an excellent guide on the issues discussed in this chapter, see Oleh Hrycko and Chuck Rothman, *Electronic Discovery in Canada: Best Practices and Guidelines*, 2nd ed. (Toronto: CCH, 2009).

111 *Ibid.* See also D. I. Prywes, "Discovery of Electronic Records: Prepare for the Inevitable", *The Brief Magazine*, Summer 2002; J.E. Feldman, R. I. Kohn, "Collecting Computer-Based evidence", *New York Law Journal*, January 26, 1998.

becoming a factor in all Canadian civil litigation large and small. The final Sedona Canada Principles were released in January 2008.[112]

In summary, the Group established the following principles:

1. Electronically stored information is discoverable.

2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information, (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically sorted information.

4. Counsel and parties should meet and confer as soon as practical, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and

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112 See the Sedona Conference Working Group Series, *The Sedona Canada Principles: Addressing Electronic Discovery*, see online at <https://www.canlii.org/en/commentary.html>.

organization of information to be exchanged in any required list of documents as part of the discovery process.

9. During the discovery process parties should agree to, or if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forms.

11. Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligations to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

In 2004, a sub-committee of the Discovery Task Force, chaired by the Hon. Mr. Justice Colin Campbell, was formed to consider issues relating to electronic information and electronic discovery. Guidelines for the Discovery of Electronic Documents in Ontario were published by the Task Force in November 2005. While the Guidelines are not, at this point, legally binding, it is to be expected that they will become the accepted standard for managing the e-discovery process.[113] The Guidelines have established the following 13 Principles governing e-discovery:

1. Electronic documents containing relevant data and information are discoverable pursuant to Rule 30.

2. The obligations of the parties with respect to e-discovery are subject to balancing, and may vary with (i) the cost, burden and delay that may be imposed on parties; (ii) the nature and scope of the litigation, the importance of the issues, and the amounts at

113 Takach, "E-evidence: Part 3", *Lexpert Magazine*, June 2006.

stake; and (iii) the relevance of the available electronic documents, and their importance to the court's adjudication in a given case.

3. In most cases, the primary course of electronic documents should be the parties' active data, and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.

4. A responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or a court order based on demonstrated need and relevance.

5. As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant.

6. Parties should place each other on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.

7. Parties should discuss the need to preserve or produce meta-data as early as possible. If a party considers meta-data relevant, it should notify the other party immediately.

8. Counsel should meet and confer, as soon as practicable and on an ongoing basis, regarding the location, preservation, review and production of electronic documents, and should seek to agree on the scope of each party's rights and obligations with respect to e-discovery, and a process for dealing with them.

9. The scope of e-discovery should be defined by parties and their counsel before commencing oral examinations for discovery. This can best be achieved if parties' request for preservation of electronic documents, and pre-discovery meetings between counsels, are as specific as possible in identifying what is requested, what is being produced, and what is not being produced, and the reasons for any refusals.

10. A party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and

processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.

11. Parties should agree early in the litigation process on the format in which electronic documents will be produced. Such documents may be produced in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the documents in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.

12. Where appropriate during the discovery process, parties should agree to measures to protect privileges and other objections to production of electronic documents.

13. In general, consistent with the rules regarding production of paper documents, pending any final disposition of the proceeding, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will, similarly, be required to incur the cost of making a copy, for its own use, of the resulting productions. However, in special circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by agreement or court order.

In December 2005, the Canadian General Standards Board releases Standard CAN/CGSB 72.34-2005, "Electronic Records as Documentary Evidence", explaining the policies and procedures required to prove the reliability and integrity of a computer system for the purposes of the law of evidence.[114]

The 2006 EIC best practices with respect to electronic discovery discussed above should be referred to.[115]

Among the most significant new development is the introduction of the proportionality principle. EIC Model Documents #10 provides as

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114 Takach, "E-evidence: Part 2", *Lexpert Magazine*, May 2006. The standard can be purchased online at <http://www.techstreet.com/cgi-bin/detail?product_id=1252845>.

115 <http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx>.

follows:

> The Ontario Rules of Civil Procedure emphasize the importance of proportionality in connection with all documentary production issues. In applying the Rules, the court is required to make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding (Rule 1.04(1.1)). Parties are required to agree, prior to engaging in discovery, upon a discovery plan that is proportionate to the circumstances of the case, having regard to the factors listed in Rule 29.1.03(3) and The Sedona Canada Principles Addressing Electronic Discovery (the "Sedona Canada Principles"). The court, in determining whether to order a party or other person to produce a document, must consider the list of proportionality factors set out in Rule 29.2.03(1) and (2).

In cases where the parties cannot agree on the scope of documentary production, the party seeking production will be required to satisfy the court that the order sought is proportionate.

6.3.3 Examination for discovery

Examinations for discovery in lien actions are conducted under **Rule 31**. One of the major amendments in the 2010 Rules with respect to such examinations was the introduction of a time limit on oral examination. The new **Rule 31.05.1** provides that in conducting examinations for discovery, no party shall exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, unless the parties consent or the court grants leave. Even though the limit of seven hours has been held to mean seven actual hours of discovery, i.e., seven hours not including breaks, adjournments or unreasonable interferences,[116] seven hours will prove to be very restrictive in many complex lien cases. A party seeking an extension of time must bring a motion for leave to exceed the time limit. In one of the first such motions under the new rules, the court in *J. & P. Leveque Bros. Haulage Ltd. v. Ontario* considered the following factors:

1. Five named parties in the litigation;
2. Damages in excess of two million dollars;
3. Parties had exchanged digital database of 8,950 documents (17,710 pages) in Summation;

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116 *J. & P. Leveque Bros. Haulage Ltd. v. Ontario*, 2010 CarswellOnt 2330, [2010] O.J. No. 1585 (S.C.J.).

4. Multiple jurisdictions involved;

5. Mediation unsuccessful with respect to the parties currently before the court;

6. Counterclaim of $250,000;

7. Time frame of evidence spanned three years; and

8. Parties represented by experienced counsel.

Based on those considerations, the court allowed an extension of time and ruled as follows:

> The overarching concern in the *Summary of Findings and Recommendations* referred to above which is reflected in the amendment to the Rules is the need for effective *and* cost-efficient access to justice. For a number of years, these two concepts have unfortunately in theory and/or in practice been viewed or treated as virtually mutually exclusive.
>
> For most, access to justice also means "legal representation" representation in the litigation process which in and of itself has financial consequences for the litigant. That said, it is not uncommon to observe that the lack of legal representation may also have costs consequences that would not otherwise be incurred were the litigant represented.
>
> The foundations of "effective litigation" are "relevance" and "preparation". Ironically, these are also the very same foundations for "cost-effectiveness" in the litigation process particularly at the discovery and trial stages. Lack of preparation and pursuit of irrelevant evidence contribute to spiralling costs.
>
> The interests of justice do not require that the concept of effective representation trump the concept of cost-efficient and/or expeditious justice or vice versa; but they do require that these factors be balanced both jointly and severally by all participants in the process. It is the inherent melding of these concepts that the new amendments of the Rules seek to enhance within an environment of fairness and objectivity. Thus, in Rule 29.1.03 there is reference to "any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner *that is proportionate to* the importance and complexity of the action." (my emphasis)
>
> This overarching concern for balanced access to justice is also reflected in Rule 31.05.1(2)(g) which grounds the Court's option to consider evidence pertaining to "any other reason that should be considered in *the interests of justice"* (my emphasis) when considering a leave application for an extension of time as is the case here.
>
> Taking into account effective representation, cost efficiency and expediency as defined in the factors set out in the Rule, do the interests of justice require that leave should be granted in this case? The answer must be in the affirmative.

> Further, against the backdrop of Justice Osborne's comments and the amendments to the Rules, I interpret the limit of seven hours to mean seven hours of *actual* discovery on the record and that the limit does not envisage inclusion of breaks, adjournments or, in addition to the conduct described in Rule 31.05.1(e) and (g), unreasonable interference in the questioning process by opposing counsel the effect of which interference is to unduly shorten the time available to the examining party.
>
> I am also of the view that in circumstances in which the time limit agreed upon in the Discovery Plan has expired and counsel is at a crucial point in his/her examination on an issue central or germane to the case, flexibility ought to be brought to bear and that further time to a maximum of one hour to continue and conclude the examination would not be unreasonable in the circumstances.
>
> In cases involving multiple parties, I would expect the excess of one hour to be deducted from the time available for that same party to examine another party to the litigation. In other words, to ensure that effective and cost-efficient justice is realized, counsel must adhere to their agreement with respect to the *total* length of the examinations but where there is more than one party, a leeway of one hour past the allotted time for the examination of one of the parties would not be unreasonable provided it is recovered from the examination of another party. This flexibility allows counsel to be effective and to prioritize but at the same time cost-efficient in the overall process.

6.3.4 Preparing and conducting a lien discovery

There are many excellent sources of information on how to conduct an examination for discovery.[117]

One way to plan a discovery in a complex lien action (one with many factual issues, or one with many parties, or both) is to use an Excel spreadsheet to prepare a matrix of issues and evidence. This matrix aligns statements of the factual propositions that must be proven along the vertical axis (rows), and sources of that evidence across the horizontal axis (columns).

Use this matrix to sort out your own and your adversaries' witnesses.

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117 See Lubet, *Modern Trial Advocacy: Analysis and Practice*, *Canadian Edition*, Block & Tape, editors (National Institute for Trial Advocacy, Inc. 1995); Cudmore, *Choate on Discovery*, 2nd ed. (Toronto: Carswell, 1993, looseleaf); Ross, *Conducting an Examination for Discovery* (Calgary: Carswell, 1995); White, *The Art of Discovery* (Aurora: Canada Law Book, 1990); Peppiatt & Linton. *Practice on Motions and References* (Toronto: Butterworths, 1988).

Where there is an intersection between a row (a necessary factual element) and a column (a possible witness), you can insert references to documents to which that witness can testify, and evidence that witness is expected to give on the issue.

When this matrix is complete, empty cells at intersections indicate a want of evidence. Full cells indicate evidence to be tested on discovery. This matrix of issues and evidence is *not* a Scott Schedule (the Scott Schedule, technically, is merely an elaborate form of particulars ordered by a court in a construction action or reference), nor is this matrix of issues and evidence a necessary document in the lien action. Your Excel evidentiary matrix is simply a useful tool in organizing the issues and evidence *before* the motion for leave for discovery, so that a discovery process can be planned and discussed with the lien court. It is possible in commercial document management programs, such as Summation, to do a pass through the documents and copy documents into folders on an issue-by-issue basis, where they can be sorted by date or author for example, and flagged with notes.

In a construction lien case, there are often generic issues and documents where generic, pre-prepared discovery questions may be useful. There are "dilapidation" cases (poor construction), "scope" cases (extras and changes), "schedule" cases ("delay, abandonment, termination") and simple "debt" cases (non-payment of progress bills). Each of these cases has enough in common that discovery can be standardized and does not have to be prepared from scratch in every case.

In terms of generic documentation, one usually sees the following documents:

- tender documents (requests for expressions of interest (RFEI's));
- requests for qualification (RFQ's), information for tenderers, bid sets of drawings, addenda, tenders etc.;
- contract documents (often standard forms such as the Canadian Construction Document Committee "CCDC" documents, purchase orders);
- performance documents (payment certificates, bills of quantities, delivery slips, issued for construction plans and specifications, inspectors' reports, quality control documents, technical audits);

- scope documents (requests for quotation (RFQs), site instructions, requests for change orders (RFCs), change orders (COs));
- administrative documents (meeting minutes, diaries, correspondence);
- schedule documents (schedules, critical path charts, notices of delay events), and
- commercial documents (invoices, statements, cheques), which lend some predictability to the production of documents request.

Discovery has a strategic purpose, as well as an information gathering purpose. Committing witnesses under oath for possible impeachment purposes at trial is a legitimate goal of discovery.[118]

Subject to any specific terms imposed by the leave order, the *Rules of Civil Procedure* govern the discovery process. Production from non-parties may be ordered.[119] The deemed undertaking rule applies.[120] The rules of procedure that govern the conduct of the examination itself also apply.[121] The rules for the inspection of property can be enlisted in aid of a complete discovery.[122] Counsel seeking leave to inspect property have to address the rights of third parties in their submissions and material. **Rule 32.01(4)** provides that no order for inspection shall be made without notice to the person in possession of the property unless service of notice might entail serious consequences to the moving party, or the court dispenses with service. In practice, the lien court will enquire as to the interests of non-parties and will require notice to them, or their consent, before permitting an inspection of property where their interests may be affected.

The lien court may impose artificial time limitations appropriate to the amounts in issue. For example, it would be unreasonable to permit $20,000 of discoveries in an action involving $20,000. In such a case, if discoveries were allowed at all, the court would likely allow

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118 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 31.11**.

119 **Rule 30.10**.

120 **Rule 30.1**.

121 **Rule 31, Rule 34**.

122 **Rule 32**. Note that the Master would expect counsel to discuss and agree to inspection of property without a formal order.

two days of discovery, one for each of the principal parties, and would provide that these days be scheduled and completed, along with any refusals or undertakings, in a finite period of time mentioned in the order, say 90–120 days from the date of the order permitting the discovery.

The matrix of issues and evidence discussed above can be refined following the production of documents and used as a template for the examinations for discovery themselves.

Many excellent resources are available to instruct counsel in the conduct of discoveries,[123] but counsel generally take one of two approaches: either simply turn up and start talking, or do some real preparation. A lawyer that is well prepared for discovery in a lien action will have used **s. 39** demands and followed up with a motion, if necessary, and will already have cross-examined as of right under **s. 40** of the *Act*. They will have spent sufficient time with their own and their opponent's documents to develop a good matrix of issues and evidence, focusing on areas that require discovery. They will have visited the site. They will have interviewed and taken statements from key witnesses. They will have prepared subsets of documents from their library set, and the other parties' productions, from which to examine. Even in a complex case, a discovery prepared in this way takes days, not weeks.

If the case is well prepared and being conducted in paper, at least two sets of three-ring, tabbed binders will be in the discovery room, one for examining counsel, and one for the witness being examined, containing all of the documents culled from the library set and the opponent's productions. If the other side has not used unique identifiers, it will be necessary to mark each document from their productions in some way that identifies the source of the document and its number from their system of document identification. During the examination all documents are both described and associated with a document number on the record: "I am showing you Mr. Smith's letter to Ms. Jones of August 11; your production 143".

Witnesses are entitled to have original documents put to them. If these briefs are served prior to the examinations, you can ask the other side if they will require any of the original documents to be

123 Once again see *supra* note 116.

present at the examination.

Large-scale examinations are now frequently conducted using electronic documents only. It is imperative that an agreed system of unique identification be employed so that transcript references are uniform and accurate, otherwise the transcript is largely useless at trial.

In any case where the examination stretches over weeks or months, with breaks between attendances, try and arrange to have the same reporter present for all examinations. Provide your reporter with a glossary of technical terms, the names of and biographies of the key participants (both individuals and corporations), common numbers or references that will be expected to crop up during the examination, and anything else that makes the reporter's job easier. This makes for a more satisfactory transcript in the end.

In terms of facilities required for a lien discovery, one of the distinguishing features of lien litigation is the use of large rolls of plans. You usually need a larger room so that rolls of plans can be spread out on the table and referred to by witnesses during the examinations.

The order permitting discovery will often indicate who is to go first, who is to follow, and who may attend to observe. In this way many areas of possible conflict are resolved in advance. If specific areas of questioning are anticipated to draw objection (meetings attended by counsel, calculation of bid prices, audio recordings, prior litigation, etc.), they can be raised in advance at the lien pre-trial, or motion at which leave for discovery is given.

Some prior direction from the court is often helpful.

There is a style in asking questions in transcribed examinations that reads well in print or when read aloud at trial, but may sound artificial in the examination room. Questions are simple, not compound. They address one concept or one factual element at a time. They build to form more complex ideas. All references to documents are accurate, clear and uniform. There can be long pauses while counsel read another question or series of questions, or reformulate a question. These long pauses do not appear in the transcript, which reads like an unbroken dialogue between examiner and examinee. Take the time to get your questions right. Listen to the answers.

6.3.5 Lawyer's conduct at discovery

A lawyer's conduct during an examination for discovery is gov-

erned by the *Rules of Professional Conduct*. In *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*,[124] a dispute arose after a lawyer, during a break at the discovery, had discussed evidence with his client. While the decision should be read in its entirety, the court distilled the *Rules* and the relevant case law down to the following principles:

> 1. Counsel representing a party who is being examined is entitled to interrupt the examining party for the purpose of objecting to an improper question, placing the objection on the record and either directing the witness to answer under protest or not to answer.[125]
>
> 2. Counsel may also interrupt the examiner if necessary to ensure the witness and counsel both understand the question.[126]
>
> 3. As a practical matter counsel may sometimes wish to answer a question or to correct an answer but if the examining counsel objects then neither of these are permitted. See Rules 31.08, 31.09.[127]
>
> 4. Counsel may choose to re-examine his own client in order to correct an answer or to clarify or explain an apparent admission or inconsistency. Alternatively, he or she may provide the correction or clarification subsequently in writing. In either case, the examining party is entitled to the evidence of the witness and not that of counsel. It is the duty of the witness and not counsel to correct the evidence.[128]
>
> 5. Counsel must respect the fact that discovery evidence will include an element of cross-examination and should not discuss evidence with the witness during a break.[129]
>
> 6. In a lengthy discovery or series of discoveries, counsel may consider it necessary to discuss evidence with the witness. Generally the intention to do so should be disclosed to opposing counsel and if there is an objection it may be necessary to seek leave

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124 2006 CarswellOnt 6532, 83 O.R. (3d) 438 (S.C.J.).

125 See Rule 34.12 and *Kay v. Posluns*, 1989 CarswellOnt 917, 71 O.R. (2d) 238 (H.C.) at p. 246 [O.R.] ; additional reasons 1991 CarswellOnt 1635 (H.C.).

126 See *ibid.*, at p. 246.

127 *Ibid.*, at pp. 246-47.

128 See Rules 31.09 and 34.11; *Ibid.*, at p. 247.

129 See Rule 4.04, *Rules of Professional Conduct*; Chapter IX, *CBA Code*.

of the court.[130]

7. If there is a break between rounds of discovery, counsel is free to meet with the client to prepare for the upcoming discovery. It may also be necessary to discuss evidence already given to obtain instructions in regard to discovery motions, to advise the client of the duty to correct answers and to answer undertakings. It is prudent to disclose this intention to opposing counsel.

8. Counsel ought not unnecessarily oppose reasonable discussions between counsel and client provided they are disclosed. It is legitimate on the resumption of discovery to ask the witness under oath if he or she was coached in any way as to what answers to give.

9. Accusations of professional misconduct ought to be reserved for the clearest of cases based on cogent and persuasive evidence and when such a finding is a necessary and inescapable conclusion.

10. Motions for direction should only be necessary when counsel for the party being examined has refused all requests to conduct him or herself in accordance with the rules and interference has become so extreme as to render the discovery futile.

11. Generally speaking, the court will eschew findings that a counsel has breached the *Rules of Professional Conduct* as such but will take notice of those *Rules* in determining what standard is expected of counsel before the courts. The court may have to make findings of fact that could constitute evidence of professional misconduct. In such cases, counsel should be afforded reasonable procedural protections.

6.3.6 Refusals and undertakings

Answers and undertakings are enforced in lien actions by motion in accordance with the regular motions procedure in force in the jurisdiction in which the motion is brought. Even though leave for conducting discoveries implicitly includes leave to bring such ancillary motions, it is prudent to seek leave in the notice of motion under **s. 13**

130 See Commentary, Rule 4.04, *Rules of Professional Conduct*.

of O. Reg. 302/19.[131] Counsel would do well to read **s. 86**, regarding costs before refusing questions or delaying answers to undertakings.

Ontario Regulation 260/05 amended the *Rules of Civil Procedure* by introducing severe consequences for failing to answer questions on discovery.

Rule 31.07 now provides that if a party (a) refuses to answer a question, whether on the grounds of privilege or otherwise; or (b) takes a question under advisement, but no answer is provided within 60 days after the response; or (c) undertakes to answer the question, but no answer is provided within 60 days after the response; the party may not introduce at the trial the information that was not provided, except with leave of the trial judge.

If the lien case has been referred to a master and there has been a first lien pre-trial, then the master who heard the first lien pre-trial is seized of all aspects of the matter, including all motions that may arise out of discoveries. **Rule 54.05** provides that the referee shall hear and dispose of any motion made in connection with the reference.[132] If the case is a Toronto case that has not been referred, then the motion is made to the general lien master sitting on Mondays, and not to a case management master. Outside of Toronto the normal motions practice applies and the motion has to be brought where the opposing lawyer practices law.

Only in lien actions is the master who hears these interlocutory motions regarding refusals and undertakings the same master that will eventually hear the evidentiary portion of the trial. By the time refusals and undertakings come before the master in such a case, the issues will be so well-known, and so well developed, that there is little room for argument. Frivolous or tactical objections are quickly seen for what they are.

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131 Although there are cases in which motions have been dismissed on this ground alone, they are rare, and in the case of motions brought before the Master at Toronto, it may be expected that if leave has not been sought, and a reasonable explanation of this inadvertence is made, and no party is prejudiced, the Master will treat the motion as having requested leave, and deal with the issues on their merits.

132 *Jondy Retail Interiors Inc. v. 832807 Ontario Inc.*, 1992 CarswellOnt 870, 50 C.L.R. 123 (Gen. Div.).

6.3.7 Scott Schedules

Perhaps one of the most important tasks that counsel have in presenting a lien action is the preparation of a comprehensive, accurate schedule of particulars to what in lien actions are often "bare bones" pleadings. The form that these particulars take is called a "Scott Schedule". A well prepared Scott Schedule forms a reliable road map throughout the entire course of a lien action, from first lien pre-trial to evidentiary hearing.

(1) Guide

In *Urbacon Building Groups Corp. v. Guelph (City)*,[133] the court explained Scott Schedules as follows:

> The construction law bar has developed a standard tool for organizing construction lien cases, known as "Scott Schedules". In Scott Schedules, the parties list each of the disputed factual issues concerning claims, counterclaims, and defences, and then summarize their positions on each of those issues. Although neither the *CLA* nor the *Rules of Civil Procedure* provide for Scott Schedules, experienced construction law counsel know that the court will expect them to prepare and exchange these documents in any lien proceeding involving multiple parties and numerous issues.
>
> In a large construction project such as this, Scott Schedules are generally organized in the following fashion. First, the parties set out their positions on what the contracts say (identifying the parties in privity, the contract price(s), and their respective positions on the extent to which the contract has been performed) and the contract accounting. Second, the parties set out their positions on "extras" to the contract, that is, work that was performed outside the scope of the contract, and the amounts claimed and/or paid in respect to such work. Third, the parties set out their positions in respect to alleged "deficiencies" in the work performed (these are defects in work actually performed, rather than work that has not yet been performed), including the alleged costs to remedy these deficiencies. Fourth, the parties set out their positions respecting the cost to complete the contract work. Fifth, the parties set out their positions respecting ancillary claims (such as damages for delay, alleged set-off claims arising from matters other than the construction of the project at issue, and anything else that is alleged to affect the quantum claimed). Finally, a comprehensive Scott Schedule may also

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133 2009 CarswellOnt 8127, [2009] O.J. No. 5531 (S.C.J.). See also *Scott Morris Architects Inc. v. Blu Skye Medical Inc.*, 2010 CarswellOnt 865, [2010] O.J. No. 625 (S.C.J.), *Wo-Built Inc. v. Sangster*, 2011 CarswellOnt 4885, [2011] O.J. No. 2781 (S.C.J.); additional reasons 2011 CarswellOnt 5213 (S.C.J.).

> include a chart of the parties' positions respecting technical issues such as the formal validity and timeliness of liens. The Scott Schedules should be a detailed map to the claims asserted and defences raised, on an issue-by-issue basis, among all the parties. This map then becomes the outline for the evidence at trial and for the court's judgment itself.
>
> Each of the parties is required to set out in the Scott Schedules its position on each issue affecting its interests.

Although the Scott Schedule should contain a statement of positions, it usually will not include full arguments of these positions. Toronto masters want Scott Schedules of no more than 3–5 pages with positions, not full arguments. Outside of Toronto more detailed reiterations of arguments are permitted, even encouraged. Scott Schedules should be served and filed both in hard copy and in soft copy (Word or Excel). Each page of a Scott Schedule should contain the headers throughout the document.

The Scott Schedule was recognized, named and adopted by the Official Referee's Office in England.[134] The English Supreme Court Practice, paragraph 18/12/40, describes it as follows:[135]

> Where there are several items in issue between the parties, as to liability or

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134 Fay, *Official Referees' Business*, 2nd ed. (London: Sweet & Maxwell, 1988), chapter 10 "The Scott Schedule": "George Alexander Scott, barrister-at-law, was an official referee from 1920 to 1933. Confronted, as all official referees have been, with the necessity of rendering manageable disputes involving a long series of complex and controversial facts, he devised the method of arrangement and pleading to which his name has since become attached. The device is sometimes termed an 'official referees' schedule' but the more common usage 'Scott Schedule' has the merit of deservedly commemorating its inventor."

135 Compare the following quote from Fay, *ibid* at chapter 10 "The Scott Schedule": "where the parties are contesting a long catalogue of separate facts the ascertainment of their respective cases by the conventional method of particulars and further and better particulars attached to their respective pleadings becomes irksome to a degree proportional to their length. It was to obviate the searching to and fro through voluminous bundles of pleadings, and to have the issues clearly set out in one document, that G. A. Scott invented his schedule. Basically the scheme is to set out each item seriatim and to append in columns across the sheet the comments of each party. It involves the initial preparation of the schedule by one of the parties and its transmission to the other party or parties for them to make the necessary entries setting out their case or cases. The nature of the schedule will vary according to the nature of the contest. Crucial to the proper construction of the document is the settling of the column headings."

> amount or both, e.g., as in a typical building contractor's claim . . . it is of great convenience to the parties and to the Court for the respective contentions of the parties to be stated against each item. In cases before the Official Referee, it is the practice for this to be done in a document called a "Scott Schedule", so named after a former Official Referee. The Scott Schedule is divided into columns, providing in separate columns for the consecutive numbering of the items, the full description of each, the contention of each party against each item as to liability or amount or both, and finally a column for the use of the Court. In effect, the parties are required in the Scott Schedule to give full particulars to their respective cases in respect of each item in issue. Thus, the party who challenges the reasonableness of the amount charged for any item must himself state what sum he contends is a reasonable and proper charge . . .[136]

(2) The Scott Schedule as particulars of pleadings

In the lien master's office in Toronto, the Scott Schedule is thought of as particulars of pleadings.[137] For example, instead of allowing a pleading for balance due under a construction contract for a high rise office tower, or luxury home, to be met with the general pleading that "the contractor's work was deficient and incomplete", the court require particulars in the form of a Scott Schedule. The Scott Schedule is added to as the case proceeds and remains a work in progress until the commencement of the evidentiary portion of the lien trial.

The Scott Schedule has evolved from a simple bill of particulars into a helpful organizational tool. It enumerates issues for the use of the court at the trial of the action. It performs the same organizational function at mediations or arbitrations and is often required there as well. In its most detailed form, the Scott Schedule may contain an issue-by-issue brief of argument. In this form it can be used to outline evidentiary submissions during the evidentiary portion of the lien trial. The master or judge also uses the Scott Schedule as a working

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136 See *Parker v. Weet* (December 1, 1999), CCRTI 1999/0491/B1, [1999] E.W.J. No. 6588 (C.A.).

137 Master Sandler contrasts the Federal rules in the United States, which require the pleadings to say very little to properly plead a cause of action, but allow *very* broad discoveries (i.e., of all witnesses), and the U.K. approach, which has very strict and refined rules for pleadings and particulars and very extensive obligations for production of documents, but no right to oral examinations for discovery. Our philosophy is somewhere in between, and that is the reason for the importance of the Scott Schedule in our system.

document to organize their thoughts and decisions.[138]

It is important that each entry in a Scott Schedule be assigned a unique number, such as "4-1" to reference issue 4, sub-issue 1. Masters will often use this numbering to mark their notes of evidence for use in writing reasons and the inclusion of a specific Scott Schedule reference makes this easier.

The order that permits (or requires) the Scott Schedule will name the counsel or party that is to produce the first draft, and provide an outside date by which that first draft is to be circulated among the parties, who, in turn, will be given an outside date to return their comments to the original lawyer, who will then produce the final Scott Schedule and update it as ordered by the court.

(3) The form of the Scott Schedule

There is no required or established form for a Scott Schedule. The key consideration in drafting a Scott Schedule is that it be useful both to the parties and the court. It is really a case of "form follows function". While precedents may be helpful, they should not be adhered to slavishly. The Scott Schedule is flexible. There is no guidance in the case law on the required degree of particularity. Based on that inherent flexibility, in *1917196 Ontario Ltd. v. Kazmi*,[139] the Master dismissed a motion to strike a defence based on a deficient Scott Schedule, holding that the deficiencies did not rise to the level of

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138 Fay, *supra* note 132: "Apart from its mechanical advantages at the hearing, the Scott Schedule serves a useful purpose in concentrating both parties' attention on the points of agreement and of difference. This facilitates discussion with a view to settlement, or partial settlement. It allows the plaintiff to apprehend what the defendant's case is in detail; and when the differences between the prices respectively advanced by the parties are examined it enables them in many cases to reach a sensible agreement on amounts where the divergence is not great and to concentrate the contest on the instances of larger divergence. At the trial the document will be before the judge and both parties, and the surveyors' evidence on each item is thereby shortened and note-taking facilitated. Anyone who has endeavoured to link evidence with pleadings in the conventional bundle of further and better particulars will have occasion to bless the name of G. A. Scott. Indeed judges find that if for some reason a case of this kind comes to trial without a Scott Schedule, they often have to construct one for themselves in order to marshal the evidence and apprehend its effect."

139 2020 ONSC 6166, 2020 CarswellOnt 14544 (S.C.J.).

non-compliance that would allow him to strike a pleading. While not perfect, the original lawyer, who was not a construction lawyer, had attempted to follow the form requested by the Master. The Master did, however, criticize original counsel for not involving experienced construction counsel in light of her unfamiliarity with such schedules. Counsel with active carriage of the file should not delegate the preparation of the Scott Schedule, but should create the Scott Schedule themselves and with care. A Scott Schedule is almost always on legal sized paper, in landscape format.[140] It can be on 11x17 paper, but this makes it more cumbersome to use. The following are some basic observations about Scott Schedules:

1. Components of complex consolidated lien actions can have their own Scott Schedules.[141] There may be an overall Scott Schedule for the consolidated proceeding. If multiple Scott Schedules are used, they are bound into a single booklet and handed up to the trial judge or master as part of the plaintiff's opening submissions;

2. Each component issue of each lien action is usually addressed in the same, logical order. These component issues are assigned an ordinal number (down the left side of the Scott Schedule).

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140 From "Court Forms & Precedents", Butterworths, 2nd edition, Vol. 8: "In regard to cases referred to him, an official referee will often order the preparation of what is known as a Scott or Official Referee's Schedule, either as part of the pleadings, or as an additional document. This schedule is usually prepared on brief size paper in columnar form as directed by the Official Referee, and is designed to enable the parties contentions and the court's decisions, and the monetary value of those contentions and decisions, to be entered at the side of numbered short summary descriptions of the various items in dispute."

141 Fay, *supra* note 132: "In some official referee cases it may be desirable to employ two Scott Schedules. This state of affairs arises for example in the class of building case, common in the official referees' lists, where a builder is claiming against his customer for his charges and the customer is counterclaiming in respect of allegedly defective work. If the building work was contracted to be charged on a day work basis or otherwise at reasonable rates, a Scott Schedule will be called for setting out the items of work done and the charges claimed. This Scott Schedule will be prepared by the builder and answered by the customer. The second Scott Schedule will be devised by the customer and answered by the builder and will set out items of work said to be defective together with the costs of remedying the same."

This numbering is kept throughout the whole case and often finds its way into the reasons for decision. It would not be at all unusual to enumerate a dozen or more issues in a complex lien case. One logical grouping for these individual issues is as to timeliness, lienability and quantum. The order must serve the needs of the case, not the other way around. The usual column headings (across the top of the Scott Schedule) are: Issues, plaintiff's position, value, defendant's position, value, judge's (referee's) comments. This last column is left blank, to be used as a work sheet by the court;

3. Each party's position on the issues should be briefly stated.[142] This is not full written argument. It is merely a shorthand statement of position such as, for example: "installation deficient: see Deficiency Inspection Report, A445; evidence of A. B." The counterpart of this entry from the defendant's side might be: "work performed by others; see evidence of Smith, Jones; Meeting Minutes 12, 15, 16, 17 and 21". There may be two days of evidence and two dozen exhibits around this issue at the evidentiary portion of the trial. The Scott Schedule merely flags the issue, but does not argue it;

4. It can be useful if appropriate and if agreed to in advance by all counsel, to state the current "bid" and "asked" numbers on each issue: i.e., the "delta" expressed in dollars between the settlement positions of the parties. This brackets the range of numbers within which a settlement can be found. If this is contem-

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142 Fay, *supra* note 132: "In the not infrequent cases where a plaintiff sues a number of defendants in respect of the same transaction, a Scott Schedule may be called for with extra columns devoted to the cases of the different defendants. Thus a building owner may be suing three defendants — his architect, his builder, and his builder's subcontractor. The Scott Schedule will in such a case have a column or pair of columns for each of the defendants and the plaintiff will be required to state against which defendant each item of claim is directed; it is a convenient device to have this indicated in a separate column specifying first and/or second and/or third defendant as the case may be. Similarly if in a Scott Schedule case a defendant brings in one or more third parties he may be ordered by the third party Order for Direction to serve on the third party a copy of the schedule with added columns indicating which of the items are being passed on to the third party and not that third party's answer to the relevant allegations."

plated at trial, it should be discussed and agreed at an early lien pre-trial conference. A refinement of this approach is the so-called "baseball arbitration" approach, where the Scott Schedule is used in an arbitration setting. The arbitrator is given the "bid" and "asked" numbers from the Scott Schedule and is required to hear the evidence and rule in favor of one or the other, but not in between. Ask for too little, and the defendant might snap it up; ask for too much, and the arbitrator might have to choose the defendant's number. Whatever use is made of the numbers, it is often thought helpful to include a Bid/Asked column or two in the Scott Schedule.

6.4 Trial of the action

6.4.1 Guide

This chapter focuses on the evidentiary portion of the trial that actually commenced at the return date mentioned in the notice of trial (i.e., the first trial management pre-trial conference). This chapter is addressed to the new lien litigator, not the experienced litigator. If you have done one or two civil trials before, you will find yourself well prepared to conduct a simple lien trial.

The lawyer's task in presenting either a lien claim or defence at an evidentiary hearing is to clarify, simplify and focus. If a piece of evidence, or cross-examination, or argument aids in clarifying, simplifying or focusing, keep it. If it does not, lose it.

Preparing for the evidentiary hearing in a lien action is similar to preparing for the trial of any other civil proceeding, but with a few nuances. Counsel with trial experience should stick with what works for them, even if it differs from what is set out below.

The following comments are divided into two sections, the "complex lien trial" and the "simple lien trial", even though lien actions rarely divide up so neatly. Fortunately, you do not need to prepare a $10,000 lien trial the same way you prepare a $10,000,000 lien trial, although both have to be "prepared". The governing principle is proportionality. The statutory requirement of **s. 86(2)** is "least expense". The following is a rough and ready guide to trial practice in this area.

6.4.2 Inquisitorial jurisdiction

There is some uncertainty as to the scope of the lien court's juris-

diction in the absence of proper pleadings. There is authority that holds that a master's report will not be confirmed on motion if it appears that the basis for the ruling was *quantum meruit*, and *quantum meruit* was not pleaded, although this seems contrary to the wide grant of jurisdiction to a master on a reference to take all proper accounts.[143]

Section 51 requires the lien court to try the action "and all questions that arise therein" or that are necessary to be tried in order to dispose completely of the action, and to adjust the rights and liabilities of the "persons appearing before it" (which would seem to include non-parties) and persons served with notice of the trial.[144] The court is required to "take all accounts, make all inquiries and give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial". The author has argued elsewhere that this creates and is intended to create an inquisitorial jurisdiction that has survived constitutional challenge,[145] allowing the lien court to enquire into and take charge of the issues raised as well as the action as pleaded, and to resolve all "issues" on whatever basis appears fair, including *quantum meruit*, whether pleaded or not.[146] Courts are reluctant to endorse a more inquisitorial role for the lien master.[147]

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143 *Komorowski v. Van Weel*, 1993 CarswellOnt 856, 12 O.R. (3d) 444 (Gen. Div.).

144 See O. Reg. 302/18, s. 6(1). For one of the rare considerations of these issues in a reported cast, see *Atlas Construction Inc. v. Brownstones Ltd.*, 1996 CarswellOnt 611, 26 C.L.R. (2d) 97 (Gen. Div.). The right of a bank served with Notice of trial in a consolidated series of lien actions actually trying to examine on issues is considered in some detail. Remember that in a lien action, a person served with a Notice of trial thereupon becomes an actual party to the lien action.

145 *Ontario (Attorney General) v. Victoria Medical Building Ltd.*, 1959 CarswellOnt 87, [1960] S.C.R. 32.

146 See D. W. Glaholt & M. Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

147 In *International Wall Systems Ltd. v. English Lane Residential Developments Ltd.*, 2011 ONSC 6920, 2011 CarswellOnt 14415 (S.C.J.); additional reasons 2012 CarswellOnt 2889 (S.C.J.), the court held that "Duncan W. Glaholt suggests, at page 379 of his text, *Conduct of a Lien Action*, 2011 (Canada: Thomson Reuters, 2010), that the *Construction Lien Act* provides the master on a reference with sufficient jurisdiction to conduct a more inquisitorial hearing. This includes

Civil code practitioners and persons dealing with international arbitration will be familiar with the concept of *amiable compositeur*, whereby the trier of fact is given the latitude and jurisdiction to enquire into *all* of the circumstances of the claims and impose a result that does justice among the parties. This seems closer to the original policy of our lien legislation than the fine and somewhat academic distinctions that are drawn in our jurisdiction between contractual and restitutionary unjust enrichment. Subject to terms relieving prejudice, there would seem to be no reason for a court not to adjudicate on an unpleaded claim or defence for that matter, including a claim for an implied contract for either *quantum meruit* or *quantum valebat*, but this is not the law of Ontario. Notwithstanding the generous jurisdictional grant of s. **51**, the law at the present time is that the court will not hear unpleaded claims. However, a less technical approach may be taken in Small Claims Court, which may grant unpleaded relief so long as supporting evidence is not needed beyond what was adduced at trial.[148]

6.4.3 Self-represented parties

It is common in lien actions for one or more parties to be self-represented. In fact, one of the original purposes of the *Lien Act* was to provide a summary remedy available to the worker or material provider without the necessity of retaining counsel. In cases where there is a self-represented party, there is a greater burden on counsel to comply strictly with all procedural rules and notification requirements. On a reference to the master, you can safely assume that the

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participating in analyzing the issues and requiring the necessary evidence, even structuring the arguments if necessary so that the court can decide the issues before it. The author suggests that the 'inquisitorial' model for dispute resolution lends itself well to the resolution of complex construction disputes. I have been unable to find any decided cases dealing with the specific issue of the scope of a master's jurisdiction to conduct a construction lien trial in a more inquisitorial fashion than in an ordinary civil trial. It is fair to say that the line between acceptable intervention, such that a master properly fulfills his mandate, and unacceptable intervention, to the extent of creating the appearance of a reasonable apprehension of bias, is a fine one."

148 See *Brighton Heating & Air Conditioning Ltd. v. Savoia*, 2006 CarswellOnt 340, 79 O.R. (3d) 386 (Div. Ct.).

master will not allow anyone to take advantage of a self-represented litigant. In cases where there are one or more self-represented parties and other parties represented by counsel of record, it would not be unusual for the master to require counsel to prepare a first draft of a Scott Schedule rather than leave this to the self-represented party. Difficult issues can arise where, for example, a husband turns up at trial as a joint owner, claiming to represent his wife or where a person turns up at trial claiming to represent a corporation as a shareholder or director. In the case of a company with a sole shareholder, this is not a particularly difficult issue but where there are multiple shareholders and board members, the masters' office is likely to ask for a resolution confirming the authority of the representative attending.

If you are a self-represented party, you should expect the master to encourage you to obtain competent counsel except in the very simplest of cases. The masters' office maintains a list of qualified construction lien lawyers who have volunteered on an informal "duty counsel" basis to be available to self-represented litigants on a reduced fee basis. You should also expect that at the first trial management pre-trial conference, the master will question you as to your background in business and legal matters in an effort to determine whether it is reasonable to permit you to conduct the case in person.

There are, however, limits to the court's accommodation of self-represented parties, and where such parties behave in a manner that goes well beyond anything attributable to lack of familiarity with court process, cost consequences may follow.[149]

6.4.4 Preparing for trial

(1) A simple lien trial

Here we are speaking of the traditional material supplier or subcontractor claim with a value of usually less than $250,000 few documents and few complicated factual issues.

Referring to this kind of case as a "conventional small lien trial", Master Sandler discussed the steps needed to get such a case ready for trial in *Bestdoor Co. v. Toronto Economic Development Corp*.[150]

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149 See, for example, *1269016 Ontario Ltd. v. Ellis*, 2013 CarswellOnt 4146 (S.C.J.).

150 2004 CarswellOnt 2426, 35 C.L.R. (3d) 70 (S.C.J.).

This case should be consulted directly, but for immediate purposes, these steps are paraphrased below:

1. Documentary evidence is prepared with unique identifiers, copied and exchanged at an early stage. If there is co-operation between counsel, this document preparation is done right at the close of pleadings. If there is no co-operation on this point, this document preparation will be ordered at the first lien pre-trial;

2. The evidence of the witnesses can be prepared and tendered in the form of affidavits with leave of the court. The idea is that these affidavits will be from persons with direct knowledge and not merely hearsay information;

3. This can be done as an initial exchange, followed by an exchange of reply affidavits in relatively short time periods;

4. In a proper case, it may not be necessary to call many, or any witnesses at trial "in chief" if this exchange of witness affidavits is handled well;

5. Cross-examinations are handled *viva voce* using a procedure similar to that under the *Simplified Rules*, **Rule 76**, but without the time limits. Any counsel wishing to cross-examine must notify opposing counsel in advance of the trial so that opposing counsel can ensure that the relevant witness is in attendance;

6. Counsel can expect that court imposed deadlines will be respected and enforced and that late evidence will be excluded;

7. Legal issues may be briefed and served in advance of trial, so as to focus evidence and argument at trial.

(2) A complex lien trial

These are cases generally involving large sums of money, many stakeholders, and many factually and legally intense issues. Each is unique and the steps outlined below are only a rough guide.

1. Tame the paper tiger: Lien actions tend to involve a lot of paper. You will have binders of day to day site documentation, rolls of plans, books of specifications, books of photographs, rolls of computer aided design (CAD) drawings, critical path schedules on 11x17 paper, and progress schedules on 11x14 paper. Technology has helped to organize this mountain of paper, but it has not yet been replaced or done away with.

In addition to this mass of paper, you may wish to utilize models, and maybe physical samples such as roof, wall, window or floor sections. The physical size and volume of such evidence can become overwhelming on the opening day of trial if it has not been anticipated and managed well in advance.

In most jurisdictions all of this organization will have been dealt with in the last two or three lien pre-trials, and there will be no surprises at the opening day of the evidentiary hearing itself.[151]

The standard order of the lien master at Toronto, usually made at the second or third last lien pre-trial or trial management pre-trial, if counsel have not raised and agreed on some other acceptable arrangement, is as follows:

> Each party shall prepare four sets of Document Books, to contain all documents that each of the Plaintiff and Defendant intend to rely on at trial, in support of their respective positions on the claim and the counterclaim, being one copy for the Court, one copy containing original documents, except if no longer available, in which case a copy may be substituted, for use by the witnesses[152] in giving their testimony, and one copy for each counsel or each of Plaintiff and Defendant, and these Document books are to be duly indexed, and tabbed, and page numbered, and no document that is not contained in any of the said document books shall be permitted to be tendered in evidence at the trial, except with leave of this Court, and only if the party seeking leave can establish a persuasive reason why any document has been omitted, and such Document books are to be exchanged by no later than *(usually a date 4 weeks minimum before the actual evidentiary portion of the hearing)* and further that the authenticity of each document in the document books so delivered shall be admitted, pursuant to **Rule 51.01, 51.02**, and **51.03**, and shall be deemed admissible in evidence, unless

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151 The last two or three lien pre-trials, in any large or complex case, are commonly referred to as "check-in pre-trials" or "trial management pre-trials". As counsel ready for trial, they will work with the court (the Master) to raise, debate if necessary, and decide on the exact details of how the case will be proved, and as to what physical facilities and other accommodations may have to be provided. This includes the use of video tapes, digital projectors, demonstrative evidence, models and the like. When the trial opens, all of these matters are dealt with and no time is wasted before getting into the evidence.

152 It is a matter of common observation, that original documents allow a witness to differentiate between colors of ink, types of handwriting, and other characteristics of original documentation that are lost in the photocopying process.

> the party objecting to such authenticity or admissibility serves a written Letter of Objections, specifically denying the authenticity or admissibility of any such document, within 10 days following the date of service of any such Document Book on the opposite party, and otherwise, the documents in the said books shall be admissible in evidence by each party as part of their case, without further formal proof, and any objection to authenticity or admissibility of any such document as specified in such written Letter of Objection shall be ruled upon by this court during the course of the trial.

Court administration in the United Kingdom has recognized the document intensity of construction cases by creating a Technology and Construction Court especially designed and equipped to handle huge volumes of documents, bulky exhibits and the technological demands that construction litigation places on the court system.[153] In Toronto, we have a single electronic courtroom, which is available, if requested, for construction cases. Special arrangements have to be made for the storage of large exhibits.

2. Prepare and use evidentiary aids: You will need to make use of evidentiary aids such as charts, lists, casts of characters, enlarged photographs, mounted documents and plans. PowerPoint and other electronic presentations are also used, particularly in delay, disruption and extension cases. If the case has been properly handled, all of these matters will have been fully canvassed, consented to or ruled upon and in place well in advance of the evidentiary portion of the trial. If you are in any doubt whether or not to produce your evidentiary aids to your opponent in advance of trial, resolve this doubt in favour of production. Your theme should be "no surprises". In Toronto, and in most jurisdictions in Ontario, counsel have sufficient advance notice of and access to the lien court, that these issues are all worked out well in advance.

3. Use document management consultants where necessary: The use of commercial database and document management consultants, technology and software continues to grow. There are a number of proprietary systems and well established consultants both here and in the United States. Choose and start with such a

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153 Bowsher, "A Specialist Court — The Technology and Construction Court — The High Court, England and Wales" (1999), 46 C.L.R. (2d) 153.

system early on. Prepare the affidavit of documents with such a system. Conduct the discoveries with such a system. Use the same system at trial. There is no doubt that it is an advantage to be able to carry an entire lien case around on one or two CDs or USB devices as opposed to a dozen or more cardboard boxes.

There are at least two cautions to be raised here: first, make sure that *all* members of the trial team have more or less equal facility with the database management system that you choose, so that you do not get stuck at trial without a key associate, due to illness, accident, or some other circumstance, and be unable to start the trial yourself; second, know your court.

The system should be compatible with the equipment and skill level available to the court. Make sure that you have a system that is usable by the court in some fashion, should that become necessary or desirable.

It would not be out of the question for the court to appoint a document management expert at the joint expense of the parties for use by the court under **s. 14 of O. Reg. 302/18**.[154] This is something that would be discussed and agreed to, or argued and decided, well in advance of the opening of trial, at "trial management" pre-trial.

It is not enough just to pay someone to image the documents. Counsel must still read all relevant documents during the course of discovery and trial preparation.

4. Ensure the attendance of witnesses: The construction industry is highly mobile. People go where there is work. Your key witness on a mechanical installation in North Bay today may be working on an offshore oil platform in Norway tomorrow, and at a mine in South America a year from now. You cannot assume that a witness will be here today, tomorrow, or at trial. Make no assumptions about the availability of witnesses.

Unless witnesses are duly summoned, you cannot count on their

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154 **O. Reg. 302/18, s. 14** provides that the court may obtain the assistance of any other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.

attendance, or deal in any meaningful way with their non-attendance. Clients should be prepared to pay to fly in, compensate and accommodate witnesses from foreign jurisdictions.

As soon as a trial date is fixed in a lien action, it is prudent to notify and summon all witnesses, including client representatives. This is a routine enquiry and endorsement at Toronto lien pre-trials. This gives all potential witnesses between 4 and 12 months advance notice of their attendance. All dates for evidentiary hearings assigned by the master in Toronto are peremptory on all parties and they rarely, if ever, change.

5. If working with paper, work with high quality copies: The physical quality of much of the paper evidence in a construction lien case will have suffered from its past life in a jobsite trailer or construction office. Important documents are likely to have survived many site meetings. They will have been thumbed through, flung open, taken apart and put back together many times. They may be coffee stained and maybe even tear stained in some cases. Such documents do not always copy easily or well. In some cases it is necessary to photographically or digitally enhance these documents to render them legible, before they are copied into briefs for trial. This is best done with plenty of advance notice to the other side, and to the court, and on consent. The original documents should be on hand, in court, in any event.

This physical quality of exhibits can be a real problem in the case of plans. Some counsel address this problem by mounting high quality colour photocopies of all key plans on presentation boards for display in court on an easel.

Another challenge is the proper use of photographs. It is not uncommon to see several binders of important photographs, organized issue by issue and chronologically within each issue. Try to have all the photographs oriented so that once the book of photographs is open in front of a witness or the court, it need not be turned or reoriented. The judge, master or witness should be able to simply flip through the photographs as they are referred to.

Numbering photographs seems to create problems. Some counsel appear to think that simply numbering a page containing two or more photographs and referring to them as the "top" or "bottom" or "left" or "right" photograph is sufficient. It is not. You have to

remember that you are creating a record that may be needed on appeal. Each individual photograph must be marked distinctly with a separate sequential number, from photograph #1, to the very last photograph relevant to the case.

If the case is reserved, as many larger cases are, this makes it possible for the court to make sense of the evidence in the absence of counsel. In a large enough case, with important photographs, the key photographs should be professionally enlarged and mounted on presentation boards.

(3) The final trial management pre-trial

The distinction between the lien pre-trial, the case management conference and settlement conference provided for by the rules has been discussed elsewhere in this book. By the time of the evidentiary portion of the lien trial (the trial itself began on the return date of the notice of trial), there is a need for a different, more focused type of trial management pre-trial conference for under **Rule 77.15**.

By analogy to **Rule 77.15**, the purpose of this final trial management pre-trial conference is to canvass with the parties the names of the witnesses intended to be called and the substance of their testimony; explore whether admissions can be made that will facilitate proof of non-contentious matters (although much of this will already have been accomplished by this time by regular lien pre-trials); explore alternative methods of presentation of evidence, such as the filing of affidavits or reports; explore with counsel expeditious means for the presentation of evidence (see, for example, the discussion below on demonstrative evidence and evidentiary aids in lien cases); and seek and obtain directions that will facilitate the orderly and expeditious conduct of the trial.

Unlike case management in a civil case managed action, the master who conducts the "trial management pre-trial" in a lien action also hears the evidence and argument in case itself.

The management of long, complex construction lien trials is dealt with in similar ways elsewhere in the province. In the Southwest Region, for example, including Essex County, Chatham, Sarnia, and soon London and surrounding areas, complex lien trials do not have a specific set procedure. One of the local judges may be appointed to deal with all of the possible motions, directions, or time schedules that may be required in a complex case. A request for the appoint-

ment of a judge for this purpose is made through the trial coordinator's office. Such a judge may direct that the bonding company be present at any scheduled meeting, or that the bonding company pay smaller confirmed claims so that only the main players to the action remain. Much will depend on whether the project is ongoing or abandoned by the general contractor. With the major players remaining, the judge may set up discussions as to what can be agreed and what remains at issue.

A judge appointed with the consent of counsel may set time limits for the delivery of relevant documents and evidence. If time limits are required to move the action along, the judge will impose them. Scott Schedules are not generally used, but that is not to say that they would not be ordered in an appropriate case.

In Ottawa there are no standard, mandatory procedures in effect with respect to large or complex lien trials. With the consent of the parties, a construction lien action can be transferred into case management, thereby providing the parties with all of the procedural benefits of case management including: mandatory mediation, case conferences to impose time schedules, and settlement conferences under the rules as opposed to the *Act*. It is also possible in the Ottawa area to have a judge appointed by motion to handle all of the interlocutory steps required in a particularly difficult or large lien case. Scott Schedules are not relied upon, or required as a matter of course in Ottawa.

No particular procedures are in force in Kenora or in Thunder Bay. It is likely that the procedure would be similar to that in Ottawa or the Southwest Region.

(4) Document management issues

By the time you reach trial, there should be no document management issues. With case management and trial management conferences, this is now almost always the case. If you have a method for document management that works, use it. Do not change it because of anything you read here. The acid test for all document management advice is simple: if it works, use it.

In anticipation of an unconventional or complex lien trial, most counsel will manage documents electronically. If counsel are working with paper, they might consider assembling a series of binders containing the subset of each party's documents that will be needed

at trial. An example set of binders (or folders in an electronic database system):

1. Pleadings, particulars, undertakings & answers;
2. Tenders, contracts and related correspondence;
3. Site instructions, requests for change, requests for quotation, change orders and related correspondence;
4. Schedules and related correspondence;
5. General correspondence;
6. Certificates of payment and quantity reports;
7. Inspector's reports;
8. Diaries and notebooks;
9. Liens and lien correspondence;
10. Damages;
11. Photographs, plans, drawings;
12. Exhibits marked only at the evidentiary hearing;
13. Lettered exhibits (identification only) at the evidentiary hearing.

Once these binders are assembled and agreed to by all counsel involved, they can be sequentially paginated in the upper right corner, with large, black numbers, commencing at "1" and ending at "2238" or whatever number corresponds to the last page of the agreed documents. Tabs are inserted between individual documents. You might have, say, 2000 actual pages of documents with 300–400 individual tabs. In an electronic system these documents will already be uniquely identified.

The 11th volume in our example would contain outsize documents. They are reproduced full sized, folded, and inserted into sleeves for that purpose.

The 12th volume in our example, "Exhibits at Trial", is filled with empty Tabs. The purpose of this volume is to receive whatever exhibits are marked at the evidentiary hearing itself. Counsel will come to court with sufficient copies of loose exhibits for the witness, the court, all counsel, and will have punched these with three holes so that if they are admitted as Exhibits, they can be inserted in the appropriate binder and Tab.

The 13th volume in our example contains Exhibits for identifica-

tion only, which are usually marked as lettered exhibits "A", "B", "C" etc. Depending on the practice of the court, this volume would usually contain the Reports filed by experts, evidentiary aids and similar documents.

This complete set of documents becomes the benchmark reference during the trial. The parties share the initial expense of producing one set for each counsel, one set for the court, and one set for the witnesses, to be placed on a table or bench adjacent to the witness box. If splitting the cost is unreasonable, it can be apportioned by size of claim, or number of documents in the brief. The court's copy is marked, with the consent of all counsel, as the first exhibit at trial.

Again, if the trial is being conducted with paper documents, it is always useful to have a set of binders at court, and another back in the office to use in evening preparation for the next day's evidence, but this is not always affordable.

> Counsel would introduce the set of binders to the trier of fact in this way
>
> Your Honour (or Master), we have before the court 13 binders (or, a hard drive containing 13 folders) of documents that the parties agree are "authentic" and "relevant" and admissible therefore into evidence as such, with leave of this court. Each document in these binders is marked with both a unique identifier in the lower right corner that will allow the court to identify the source of the document (explain) and a page number in the upper right corner, sequentially from page 1 through page 2238 for ease of reference during the evidence in this case. Volume twelve is reserved for exhibits this Court may be pleased to admit during the course of the trial, and volume thirteen is reserved for exhibits marked for identification purposes only. Your Honour (or Master), we tender the Court's set of thirteen binders or this hard drive as Exhibit ..... at this trial.

When you are preparing to commence your examination of a witness in chief, or to cross-examine an opponent's witness, you need only advise the Deputy to put before the court only the volumes that relate to that witness's testimony.

This method of presenting documents makes for a clear record for argument and helps sort out the evidence, should the trial decision be appealed.

(5) The trial brief

Once again, this section of the book is not for experienced trial lawyers. They know all of this already. This section of the book will help a lawyer through a first lien trial or reference.

The lien lawyer's trial brief should be started at the time of the initial retainer, and should be retired, carefully, to closed file storage when the case is over. The lawyer's trial brief is and remains the lawyer's single best resource in the conduct of the entire action.

What is a trial brief? Every experienced trial lawyer uses one, and there are almost as many styles as there are trial lawyers. Most styles are adaptations from the style used by the lawyer's articling principal or mentor during their first years of practice. Some litigation departments at larger firms have perfected the art of the trial brief and have a "firm style". You can recognize lawyers from these firms by glancing at the document they are working from. One firm uses a three-colour system. You can see lawyers trained at this firm, even if they have moved on to other firms over the course of their careers, still wielding their blue, green and red pens during the course of a trial. The point is: it is a system. It works. There are other systems. They work. The best trial brief is the one that works for you and helps you organize and win cases.

Most trial briefs are kept in an 8 1/2x11 three ring binder, with strong steel hinges and industrial quality ring mechanism. These binders get banged around a lot and they need to be durable. Our American neighbours have commercially available trial briefs, with pre-printed colour tabs. They are useful and easily adaptable to Canadian practice.[155] These commercial products offer a ready-made, tried and tested system for the practitioner that chooses not to develop her own.

The contents of a useful trial brief, whether for plaintiff or defendant, might be organized and maintained along the following lines:

1. Parties: This first tab contains a current, accurate directory of all the names, addresses, home, office and cell phone numbers, facsimile numbers, and e-mail addresses of absolutely everyone you are likely to have contact with in the course of the action.

   Suppliers, photocopy houses, hotels, cabs, limousines, investigators and the like get their own page or pages. Your own office staff get their own page or pages (it is surprising how often, in a large case, you need to reach your support staff at odd hours).

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155 See, for example, *Bucklin, Building Trial Notebooks* (Costa Mesa: James Publishing, 2004).

You will probably also want a list of couriers and a few "way bills" pre-completed if you are involved in an out-of-town trial. You will want a page for necessary court numbers, including the number of the trial co-coordinator.

These pages should be constantly updated, so that when you stand up to open your case, you have every reference you may ever need, come what may. In a long trial or reference, say of two or more weeks' duration, you will be surprised at how often you have reference to this section of your trial brief.

2. Perpetual calendar: Unless you are adept with your PDA or Blackberry, you will want to laminate one of those readily available perpetual calendars, and keep it at its own tab at the front of your brief. This allows you to convert any date, in any year, to a day of the week. It is surprising how useful this can be in evaluating response times to key letters and the like. Construction cases can span many years, and the perpetual calendar is a "must". There are utilities for personal digital assistants that will do this job automatically, but the laminated perpetual calendar is still a useful addition to the brief.

3. Issues: This tab will contain the formal trial record, in exactly the form that has been filed with the judge or master and the Scott Schedule. You may want to brief certain specific issues of fact and law, if they are sure to come up at the trial. If there is a key case in the area, you may choose to keep a copy at this tab.

4. Motions: This tab will contain a brief for all of the motions that you can anticipate at the trial, such as to exclude witnesses (although this is almost always done on consent), exclude or admit certain evidence, take a view, disqualify an expert in whole or in part, and the like. There are some evidentiary points that come up in most trials, and you may have a fully developed argument on such points (application of "Rule in *Browne v. Dunn*", for example, or on the admission of business records). If the trial is large, and the motions are many, it helps to brief them separately and include only a note in the Trial Brief itself.

5. Opening Statement: This is dealt with in detail in subs. 6.4.5(1) of chapter 6 and applies primarily to large or complex lien actions. The usual "garden variety" lien action will have been so thoroughly explored and developed by the master and all

counsel during a series of in-depth lien and trial management pretrials that no opening statement will be necessary. In fact, the master in Toronto will usually dispense with opening statements entirely, unless some purpose is served by requiring one. If an opening statement is contemplated, you will want to have it prepared and available in writing in case you are asked for same by the trial judge or master.

Until the opening is actually delivered, it remains a work in progress. It is the narrative or story of the case. In writing, the opening will resemble a long series of sequentially numbered factual propositions, which taken together prove all the facts necessary to make out the plaintiff's (or defendant's) case at law and refer to the evidence by which those facts will be proved. In oral presentation, the opening statement comes across as a narrative ("This is a case about . . .") containing a series of promises by counsel to the court that must be kept ("the court will hear evidence from the project superintendent, Ms. Jones, that . . ."; or, "the plaintiff will refer to the contract and the site meeting minutes to prove that . . ."; or, "the plaintiff will establish through the evidence of the project superintendent Smith that . . ."; or, "the plaintiff will establish through the evidence of the architect Jones that . . .", etc.). Like so much of trial practice, the opening statement is a matter of personal style, preference and experience. If it assists the court in understanding the point of the evidence you are about to lead, it is good; if it adds nothing to the conduct of the hearing, it is bad. Think of your opening as being a kind of "contract" with the court that you have to fulfil using admissible evidence.

6. Your Witnesses: In this section every possible witness for your case is given his or her own tab in the binder. It is emphasized that the trial brief is to contain the name of every possible witness, no matter how remote the witness may turn out to be as the case goes in.

It would not be at all unusual to have 10, 20 or more witnesses listed behind this tab in a trial brief, and then call only four or five at trial. Behind each witness's named tab goes a written record of every contact with statement of, or note about the witness and the evidence they can be expected to give. The best way to

collect this evidence is in the form of ongoing memoranda of counsel to file, following some standard format. The lawyer should err on the side of collecting too much, rather than too little information about the witnesses that will be called.

Proof of service of the summons to witness will be kept at this tab. For example, if, during discovery, a witness being examines notes that another person attended a meeting, a tab for that person should be created and the fact of their attendance should be carefully noted in the sheets behind the potential witness's name at that tab in your trial brief. If, on reviewing the documentary record in preparation for discovery or trial, an interesting phrase or comment is attributed to a person, this should be carefully noted in the sheets behind that witness's name in your trial brief, with the source of the phrase or comment. What emerges from this process, during the months leading up to trial, is often quite remarkable. Witnesses that seemed insignificant on day one of a case can seem pivotal on day 10.

By the time you reach trial, the materials collected under these tabs since the beginning of the case should allow you to prepare a competent examination in chief. You will have chosen the witnesses whose evidence you require, and you will have served the other side with notice as to the names of the witnesses, the areas in which they will testify, and, perhaps, the proposed order in which they will be called.

7. Their Witnesses: Similarly, a tab is prepared for each and every known or possible witness for each of your opponents. As the case progresses, every possible note about each such witness is recorded in the sheets behind that tab: things said about the potential witness by others, whether provable or not; notes of documents authored by or copied to the potential witness; notes of points for cross-examination; and anything else of use.

If the case is large enough, and can bear the expense involved, it is helpful to have a skilled clerk go through *all* of the productions, from all parties, and make individual briefs for the four or five key witnesses on each side containing, chronologically, *all* documents shown as sent to, received by, participated in, or copied to a witness. When the documents are assembled in this way, a complete picture can be gained, from *all* sources, as to the wit-

ness's possible evidence. This can help with cross-examination.

Your notes for cross-examination will be collected at these tabs for use in the event that any of these witnesses is called.

8. Argument: Once again, everything that could possibly be used in argument is collected in the sheets behind this tab, as the case moves on. Nothing should be omitted until all of the evidence is at trial, and the facts are fully established. In a busy trial, this section can begin to look like a scrapbook after two or three weeks of evidence.

The key is to collect every fragment of an idea for argument, without caring too much about the ultimate significance of the argument. Your student or clerk who attended with you at the lien pre-trials will have insights that should be collected under this heading. This "Argument" tab should be one of the most active tabs in the trial brief.

Most evenings of the trial will be spent briefing the evidence of the day and slotting this evidence into the appropriate portion of the evolving argument tab.

Ideally, your argument will closely track your opening statement, which, in turn, should track your Scott Schedule. If your argument, opening and Scott Schedule are not virtually identical, your case was not well prepared. Your argument is a record of promises kept. The argument generally follows that format: "In opening it was stated that the evidence on point one would be . . . the Court has heard the evidence of witness Smith in chief on this point that . . .; the Court heard witness Smith cross-examined, but not on this point. . . .; the Court has seen and been referred to the admitted job site minutes and diaries, Exhibits 1 and 2, pages 245 and 246 that corroborate the evidence of witness Smith; . . . the Court is asked to find as a fact that . . . (etc.)". Still, argument is more art than science. The best trial lawyers tend to be the ones who do it most often.

9. Law: As the case progresses, various memoranda of law will be prepared on a wide range of topics. These should all be kept at this tab, but without the underlying case law which should be kept in separate binders, to be used and referred to only if needed. If there is a key case or cases, such as on the issue of the lienability of delay claims, they can be included. The index of

any brief of case law filed with the court should be included here, along with a note as to the subject of the brief and the date it was filed.

6.4.5 Conducting the trial

Advocacy begins with the first document that leaves your hands. In court or before the master, you must know what really matters to your case and what does not and why. Masters report that some trial counsel appear to be learning their case on their feet, as it goes in. You cannot count on the court to intervene to set you straight. You must know your case, marshal your evidence and present and argue your case. To do this you need to be:

- Demonstrably well prepared and organized
- Focused on core issues, not peripheral issues
- Respectful to opposing counsel, the court and its staff
- Succinct (not necessarily brief, but definitely succinct) in all submissions.

(1) Opening statements

As is stated above, opening statements are usually *not* required in simple or straightforward lien actions. If there are many parties or issues, or if there is a high monetary value, opening statements may be offered to, or required by the court. The law surrounding opening statements developed primarily as a function of the sensitivity of juries to remarks in opening statements,[156] a sensitivity that does not exist in a trial by a judge or master or in an arbitration. Thus, if an

156 As lien trials are never jury trials, no survey of this case law is necessary or appropriate. A reader with an interest in the area might start with *Marrelli v. Deathe*, 2003 CarswellOnt 5434 (S.C.J.), trial proceedings before Jennings J. There seven objections were taken to the opening statement in a personal injury jury trial: there were three areas of inflammatory comment; five areas of comment about irrelevant matters (i.e., what the opening counsel had learned in law school); nine areas of argument, as opposed to statements of law; 10 occasions on which counsel gave his opinion; three times when counsel gave a reason for the use of the trial tactics; seven times when counsel gave his personal view; and 10 occasions where facts were misstated. This can be taken as a fairly compendious list of *all* the possible ways there are to go badly wrong in an opening state-

opening is allowed, or required, the following remarks may be taken as a guideline.

It is ultimately necessary that *all* of the evidence necessary to support the many interconnecting and interdependent claims be placed before the court in argument. An opening statement introduces the theory of a case to the court and promises how it will be proved. An opening statement is not an exhaustive recitation of all factual points.

The ordinary rules and practices with regard to opening statements in civil actions are well remarked upon and reviewed in the leading authorities on trial practice,[157] from which the following basic precepts are drawn:

> 1. The opening statement is no place for argument. While this is easy to say, it is a hard line to draw in practice. Basically you outline the facts you intend to prove, and how you intend to prove them, but not the argument in favour of those facts. If the statement would be admissible out of the mouth of a witness, it is generally permissible in an opening statement.
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> It would be permissible, for example, to open with the statement with, "The plaintiff performed extra work and expected payment", but not with the statement, "No one would perform that much extra work without reasonably believing that someone was going to pay for it."
>
> The difference is subtle and often ignored (perhaps properly), but in the second example the statement draws an inference and is therefore argument, not opening. The second statement would not be permitted in evidence from a fact witness at the trial of the action.
>
> 2. Similarly, the opening statement is no place to argue law. This is another fine distinction. The opening statement, "The plaintiff will argue the line of cases beginning with *Winnipeg Condominium*, Tabs 1 through 10 of the Plaintiff's Authorities in support of the following proposition of law" is permissible; while the open-

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ment. It should be noted that the trial judge did *not* declare a mistrial, even though he deplored the liberties taken in the opening statement in question.

157 An excellent reference for the occasional trial lawyer is Lubet, *Modern Trial Advocacy: Analysis and Practice*, *Canadian Edition*, Block & Tape, editors (National Institute for Trial Advocacy, Inc. 1995).

ing statement, "*Winnipeg Condominium* is distinguished by three cases in the Defendant's Authorities, but none of those cases is relevant for the following reasons, as the evidence will show . . ." is likely impermissible.

3. Despite points 1 and 2, above, there is nothing wrong with using the opening statement to demonstrate to the trier of fact that your case is sound in fact and law and consistent with the policy underlying the *Construction Act*. Indeed it is an opportunity not to be missed. You will open your case in a way that strings all of the necessary premises together to support a conclusion in your favour. If an authoritative case strongly favours your position, adopt its reasoning to build your opening statement.

4. Consistent with point 3, above, the opening statement is the first and best opportunity to introduce the underlying "equity" or "morality" of your client's case to the court. For example, for an owner, one might choose the device of repetition,? "The evidence will show that there were three major periods of delay: the first delay was by weather, which the owner paid for; the second delay was by strike, which the owner paid for; and the third delay was by fire in the transformer room, which the owner again paid for. The evidence in this case will show that the owner recognized and paid for all legitimate delays".

5. Finally, if like all cases your case has both strong and weak points, "lead through strength into weakness". Defuse the impact of weaknesses in your opening, as they are sure to come out during trial.

Some items to consider in opening a lien case, in addition to the usual items addressed above, are these:

1. Counsel having carriage should open first, for the lien claimants as a group, and should open his or her own client's case later.

2. The Scott Schedule should be used as the outline for the opening of counsel having carriage.

3. Update filings as part of your opening statement with a *very brief* history of the proceeding.

There was once some debate about whether a defence opening should be done at the time of the plaintiff's opening, or whether it should be done at all. There should be no debate about the latter is-

sue. If there has been a plaintiff's opening, a defence opening should be considered mandatory. As to whether the defence opening should occur immediately after the plaintiff's opening, or be reserved and delivered only at the opening of the defendant's case, or both times, this decision is up to the trier of fact. The most usual resolution of this issue is to have the plaintiff open in detail, have the defendant respond with the theory of the defence case only, and reserve to the defendant the right to open properly at the commencement of its case.

(2) Evidence at trial

How do you prove your case?[158] How and when do the other lien claimants prove their cases? How do you use business records, delivery slips, job site meeting minutes, and time slips? How do you introduce and use diaries and journals? Can you use photographs, videotapes, audiotapes? Is there more liberty with leading hearsay in a lien action? How do you deal with expert's reports and expert evidence? What about admissions, do they have any real value? How do you handle cross-examinations? Does every party adverse in interest get to cross-examine? How do you conduct a lien cross-examination? There is much excellent literature on the law of evidence, and the relative admissibility and quality of each of these types of proof, but of what use is all this evidence, if you do not know how to put it together into a compelling case?[159] All of these issues are addressed to some extent in this section.

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158 There are many definitions of "evidence", each one undoubtedly of value. Perhaps the best non-legal definition is that by Jonathan Baron in his important book *Thinking and Deciding*, 3rd ed. (Cambridge: Cambridge University Press, 2000). Baron says that "evidence consists of any belief or potential belief that helps you determine the extent to which a possibility achieves some goal". From this it is clear that a "purposive" definition of "evidence" may now be the most functional, but least intellectually satisfying definition and that the answer to the question "what is evidence" is unfortunately situational.

159 Sopinka, Houston & Sopinka, *The Trial of an Action*, 2nd ed. (Toronto: Butterworths, 1998); Williston & Rolls, *The Conduct of an Action* (Toronto: Butterworths, 1982); Lubet, *Modern Trial Advocacy*, adapted for Canada by Block & Tape (Notre Dame: National Institute for Trial Advocacy, 2000); Stockwood, *Civil Litigation*, 4th ed. (Toronto: Carswell, 1997); Huberman & Foti, *Civil Actions* (Toronto: Carswell, 1995); Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999).

Does everyone get to cross-examine the owner's witnesses on the issue of the value of the holdback, or only counsel having carriage? All lien claimants are "adverse in interest", in the sense that they have a legitimate stake in the outcome. Do all counsel have to be present throughout, or can some be excused so as to keep expenses down? Who proves their case first, the general contractor, or the lowest tier lien claimant (i.e., furthest away from the owner)?

The answer to each of these questions is: it depends. It depends on the type of case, the issues, and the experience of counsel and the court with lien cases. With the assistance of a good Scott Schedule, all of these questions should be asked and answered well in advance of the opening of the case.

Some areas in which counsel can assist the court by properly preparing for a trial are the following:

1. Marshalling parties, issues and evidence: If you are the lawyer having carriage of a consolidated lien action and expect salvage costs, you will want to marshal the parties, issues and evidence for the lien court at the evidentiary hearing. Most of what follows is directed to the counsel in this position. For counsel who does not have carriage and who is going to trial with one client, for example, your preparation need be no different than it would be if the action was merely an action in debt, and little or none of what follows is important.

   The issues will be clear cut by the time of the final lien pre-trial or trial management pre-trial. A plan for the hearing of the evidence necessary to determine of the remaining legal issues will be laid out by the lawyer having carriage, and perhaps circulated among all counsel in advance of the attendance for comment. It usually makes sense to prove a complex lien case "from the bottom up" starting with the claims of the furthest degree of privity with the owner, and building to the trial or reference of the issues as between the owner and contractor, but this is certainly not always the case.

   Cross-examination on issues of quantum in a large, complex, multiparty case should be led by counsel for the payer of the claimant. Cross-examination on lienability and timeliness should be conducted either by that counsel, or the owner's counsel, or counsel having carriage, if there is no conflict of interest in them

doing so. On a reference in Toronto, the masters will expect parties to have availed themselves of the right to cross-examine and parties should be cautioned that if they do not avail themselves of this right and later seek leave for examination for discovery, the granting of leave may not be a foregone conclusion. Individual briefs from the library set of documents, discussed above, would have been prepared for each claimant, possibly by the lawyer having carriage. The lawyer having carriage should log all efforts to marshal the parties, issues and evidence. The lawyer having carriage should build consensus as to the order of trial and the order of examinations.

2. Document Books: For most cases in a masters' office, it is preferable that the exhibits be prepared and filed in hard copy. The masters will expect each party to have one set of printed exhibits for filing (which will never be marked or written on) and another set for the use of the master during the trial, which will be annotated and marked as the evidence goes in. These are in addition to the copies of the document books that the parties may require. The masters will not require parties to strictly prove the authenticity of all documents and will do so only if they are alerted in advance to some genuine issue of authenticity. The key here is to use the trial management pre-trial conference process to identify these issues well in advance of the hearing. Readers are cautioned, however, that if they are conducting lien trials before trial judges, who are not used to hearing lien actions, they may be required to formally prove all documents and comply with all notice provisions in that regard in the *Rules* and the *Evidence Act*. On a reference to the master at Toronto, the master will expect trial counsel to have personally inspected all documents in advance of the hearing; in fact, several masters will expect that counsel will have personally inspected all relevant documents prior to pleading.

3. Photographs: For most cases in the masters' office, high quality colour photocopies will be adequate for all purposes other than filing as the original exhibit. The real difficulty with photographs is that they are often presented in evidence unnumbered, and undated, which renders them nearly useless. When referring a witness to a photograph, it is important to identify the photo-

graph by number and date, so that the masters' notes make sense weeks later when the report is drafted.

4. Plans: In many construction lien trials, it will be necessary to work with large roles of plans. If only two or three sheets of plans are relevant, they should be mounted on fibreboard and put on an easel at the trial. In addition, the master and counsel will be provided with 11x17 high resolution colour photocopies. The bottom line here for counsel is this: if the evidence is important to your case, make sure that it is legible and usable!

5. Filings: If any lien remains on title, the lien action is title litigation. As a result, searches and filings can be necessary. These allow the court to be satisfied that all proper and necessary parties are before the court.

In Toronto, these filings will have been made at the first lien pretrial (technically, the opening of the trial of a referred lien action in Toronto). Outside of Toronto, or in a Toronto lien action tried by a judge, these filings are probably best made at the opening of the evidentiary hearing. In Toronto only a title search and proof of due and proper service of the notice of trial are required by way of filings. No execution search or bankruptcy search is required.

An execution becomes relevant only if the land must be sold pursuant to a lien judgment. The master will rely on counsel to do bankruptcy searches and notify the court only if there is something of interest. In all jurisdictions, regardless of when the original filings are made, the court will want an update of the title search before commencing the evidentiary hearing, so as to be sure that all lien claimants are before the court when the evidentiary hearing commences. The lawyer having carriage will be expected to address all such issues at the opening of the trial.

6. Lay litigants and language issues: In lien litigation, you run the risk of having lay litigants and interpreters involved. Translation slows things down and can make for difficult days in court. Arrange for a translator well in advance. Comply with **Rule**

53.01(5).[160] Be prepared to address this issue at the last trial management conference.

7. Intervention by the court: The writer has argued elsewhere that the *Construction Act* provides the master on a reference with sufficient jurisdiction to conduct a true inquisitorial hearing, by which it is meant that instead of depending on the parties to put their best cases forward, and then choosing between them, the master actually participates in analyzing the issues and requiring the necessary evidence, even structuring the arguments if necessary so that the court can decide the issues before it.[161]

While the jurisdiction to conduct such an inquisitorial process appears to exist, it is not exercised. It is a policy of the lien court in Toronto *not* to identify issues for counsel, nor to require evidence, either in chief or in cross-examination.

The court will not intervene to repair defects in a case, even if these defects become obvious before counsel's case is concluded.

On the other hand, the master can be expected to intervene to the extent of ensuring that all issues properly placed before him/her by counsel are adjusted and finally disposed of in accordance with **ss. 51(a)** and **(b)**. For example, if no issue as to timeliness was raised in the pleadings, but the evidence at trial clearly indicates that a material supplier's lien is out of time, the court would allow an amendment to raise this issue, on terms perhaps, but the court would not raise this issue with counsel, unless they raised it first.

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160 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 53.01(5)** provides that where a witness does not understand the language or languages in which the examinations at trial are to be conducted, or is deaf or mute, a competent and independent interpreter, under oath to interpret accurately the oath that is to be administered to the witness, the questions to be put to the witness, and the answers given by the witness. If the interpretation is simply between English and French, the Ministry of the Attorney General may provide an interpreter (**R. 53.01(6)**).

161 This "inquisitorial" model for dispute resolution, as opposed to its counterpart, the "adversarial" model, is well used in other jurisdictions and lends itself well to the resolution of complex construction disputes. See Glaholt & Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

This is a fine line. If an issue is fairly raised on the pleadings, for example, but is being badly handled by counsel, then some intervention may be necessary.

The line is even finer when dealing with a self-represented or lay litigant. There the master can be expected to clarify and elucidate enough to eliminate confusion, but not to actually step in and conduct the case for the self-represented or lay litigant. In such a case counsel can expect the court to intervene in order to make the record intelligible. Counsel should welcome such intervention.

8. Hearsay**:** The lien court will be reasonably tolerant with hearsay evidence, particularly where the matter to which the evidence is directed is not controversial.

Even in a lien case, however, hearsay is to be avoided in critical areas of the testimony. Counsel can expect an objection from their opponent, or the court if they start putting words in the witness's mouth on a critical issue. The court will adopt the prevailing test in *R. v. Khan*[162] and look at necessity (Is direct evidence

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162 1990 CarswellOnt 108, 1990 CarswellOnt 1001, [1990] 2 S.C.R. 531, per McLachlin J.: "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions . . . The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as 'reasonably necessary'. The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual

available?) and reliability (Is there anything inherently reliable about such evidence?). Counsel should try to anticipate such objections and deal with them in advance of actually calling the evidence if possible. This would be a proper matter for a trial management pre-trial, for example.

The best evidence in construction cases is usually contemporary objective commercial records such as invoices, delivery slips, time records, cancelled cheques and the like.[163] These commer-

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encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge. In determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused. In most cases a right of cross-examination, such as that alluded to in *Ares v. Venner*, would not be available. If the child's direct evidence in chief is not admissible, it follows that his or her cross-examination would not be admissible either. Where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination. While there may be cases where, as a condition of admission, the trial judge thinks it possible and fair in all the circumstances to permit cross-examination of the child as the condition of the reception of a hearsay statement, in most cases the concerns of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of any corroborating evidence. I add that I do not understand *Ares v. Venner* to hold that the hearsay evidence there at issue was admissible where necessity and reliability are established only where cross-examination is available. First, the Court adopted the views of the dissenting judges in *Myers v. Director of Public* Prosecutions, which do not make admissibility dependent on the right to cross-examine. Second, the cross-examination referred to in *Ares v. Venner* was of limited value. The nurses were present in court at the trial, but in the absence of some way of connecting particular nurses with particular entries, meaningful cross-examination on the accuracy of specific observations would have been difficult indeed. I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. This does not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence."

163 See, for example, the power of such documents in *Bestdoor Co. v. Toronto Economic Development Corp.*, 2004 CarswellOnt 2426, 35 C.L.R. (3d) 70

cial records originally served no other purpose that to accurately record for commercial purposes and not for a trial, an empirical fact. Wherever oral testimony contradicts or is inconsistent with this kind of record (e.g., testimony of last delivery uncorroborated by a corresponding waybill), it is usually unreliable. The contemporary commercial record is a benchmark against which all evidence must be tested. Looked at another way, there is no point in trying to fight against a fact that is clearly contrary to the contemporary commercial record, or you are going to have to attack the veracity of the contemporary commercial record head on and explain the inconsistency.

Second best evidence in a lien case is usually contemporary subjective memorials, such as site diaries and work records, and documents prepared unilaterally, like many schedules on a large project. As records of non-empirical facts, like relative productivity of a work force, or the occurrence or subject of site meetings, these documents tend to be reliable in direct proportion to the degree of their circulation without objection, and in inverse proportion to the status of the person that kept the record. Thus, job site minutes, kept and circulated in the ordinary course are preferable to a document recorded in an uncirculated diary. The uncirculated diary of a foreman is preferable to the diary of his/her superintendent and the diary of the superintendent is preferable to the diary of the Vice President at head office. Once these records begin to fulfill corporate as opposed to site specific objectives, they become unreliable.

Third best evidence is usually found in contemporary photographs and videotapes. It is not so much an issue of the accuracy of what they show; it is more an issue of selectivity and interpretation. To the extent that the photograph or videotape was made for another purpose, such as unedited security camera footage, it tends to be reliable. To the extent that it was made to serve the purpose of a lawsuit, it tends to be argumentative. Often a construction photograph is meaningless to a layman (and a court) until it is interpreted by a witness. It is not uncommon to hear two

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(S.C.J.), where the course of commercial paper was sufficient to prove intention to contract.

experts of impeccable qualifications differ in sworn testimony over the value of photographic evidence.

Fourth best evidence in construction cases, usually, is the direct evidence of witnesses. Lien actions are fact intensive and document rich. It can take years for the issues to arise and years more to get to trial. Memories fade. Blank spots get filled in with inferences and impressions and suggestions from counsel. Events are often remembered as we want them to be, not as they were (e.g., "I clearly remember telling everyone at that meeting that we were doing the work under protest and that a claim was on its way. The minutes should say so and I do not know why they do not"). Given the sheer size of the factual record in any large lien case, witnesses can be in the stand for days and there are issues of fatigue.

Last in usefulness in a construction case are admissions. Construction lien cases tend to be so factually complex that what appears to be an admission is so dependent on other facts in issue that it is not an admission at all. For example, an admission that certain work was "extra" to the contract does not prove that it affected either the contract price or contract time, both of which are usually hotly contested.

Pre-trial admissions are usually (and properly 50) ineffective against unrepresented parties. Even in the face of an admission, the lien court is not prevented from pursuing a line of questioning wherever it may lead and "adjusting the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served".[164]

Admissions in pleadings can be withdrawn, subject to terms.[165] The use of requests to admit[166] under the rules is encouraged, but

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164 *Construction Act*, R.S.O. 1990, c. C.30, **s. 51**.

165 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **Rule 51.05**; *Szelazek Investments Ltd. v. Orzech*, 1996 CarswellOnt 274, 44 C.P.C. (3d) 102 (C.A.), *Antipas v. Coroneos*, 1988 CarswellOnt 358, 26 C.P.C. (2d) 63 (H.C.).

166 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **Rule 51.02**. As useless as requests to admit appear to be in practice as regards the resolution of substantive issues, they do have a big advantage in the event of costs. A party that has asked for admissions and been denied them, or ignored, and then has attended trial and

the effect of a failure to respond is insignificant in most construction cases, except, perhaps, on the issue of costs. Still, given the enormous cost of construction litigation, and the burden on any organization of a long trial, anything that *might* reduce the length of the trial should be attempted.

An interesting aspect of the subject of admissions in lien cases can be seen in home renovation cases, where a builder has liened for the unpaid price of its work and the owner has defended on the basis of deficiencies. In such cases, the master at Toronto will often require the two opposing experts to attend together, with the deficiency lists, without the parties if possible, to agree on a list of admissions for the purpose of shortening the evidentiary portion of the trial. If the parties are reluctant to cooperate, the master will remind them of his jurisdiction under **s. 14 of O. Reg. 302/18** to appoint a person to "obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties". This usually promotes party agreement.

Finally, there is the issue of audiotapes. People do make them. Audiotapes, however, have little or no place in lien proceedings. They are often dubiously obtained, and are taken completely out of context and therefore of little real use as evidence at trial.

(3) Conduct at trial

After their first trial, most lien lawyers will know how to conduct themselves at trial.[167] Most lawyers reading this book will have a few trials under their belts and will need no instruction from this

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proven the facts that he/she sought to admit on consent, will have a good argument for costs on a substantial indemnity basis under **s. 86(b)(ii)** on the theory that the failure to admit prejudiced or delayed the conduct of the action.

167 A great deal of the instruction here is punitive rather than prescriptive. Conduct of counsel at trial attracts attention after-the-fact, when in hindsight it might seem out of line. The exercise seems to be more one of telling lawyers after-the-fact where they went wrong, rather than laying down rules as to how they might go right (see: *R. v. Felderhof*, 2003 CarswellOnt 4943, 68 O.R. (3d) 481 (C.A.)).

book. For lawyers who do not have this experience, however, the following section should provide some outline level assistance. What follows is nothing more than common sense. If you already have your own style, and it works, keep it that way regardless of anything you might read here.

The basics are easy. You are gowned before a judge in a lien trial, but not before a master on a lien reference. Say "good morning" to the court staff and to your judge or master each day as proceedings commence. Refer to counsel as Mr. or Ms. and not by their first names. Refer to the court officials by their office, such as Mr. Deputy, or Madam Registrar, or Mr. Reporter, for example, when reference is required during formal court proceedings, and not by their names. Remember that what you say is on the record. The court reporter is not superhuman. He or she is trying to make an accurate transcript of the proceedings. Here are some rules to help you get along in court in a lien trial, if you have not done one before:

1. Control the speed and quality of your own delivery. Speak slowly and distinctly. For those of us that habitually speak too quickly, correct this habit at once. The "three count" technique can be useful. Speak, then count silently "one one-thousand", "two one-thousand", "three one-thousand", and then speak again. If it takes two or three or four phrases to get your point across, so be it. With a little practice, this lends a nice, easy rhythm to your delivery.

2. Control the speed of your witnesses' delivery. Some witnesses are keen to tell their story and get off the stand. Some are so nervous it is all they can do to sit still. Some know their evidence so well that they will blaze through it on the slightest provocation, if not carefully controlled by counsel. Witnesses should be rehearsed in their delivery wherever possible and be encouraged to go carefully and slowly through their evidence. The best witnesses tend to be those in the teaching profession. They are used to pacing the delivery of their words. Stop your own witness in mid-flight, if you have to, and slow them down: "Excuse me, Mr. Smith, may I stop you there for a moment. We are all following your evidence carefully. Can we try it again, please, point by point, and more slowly?" This is equally true on cross-examination. If it is worth doing, it is worth doing so that it is understood.

3. Clarify references to exhibits. It is unhelpful to the court and to counsel to let a witness ramble through charts and photographs and documents without clarifying specific references for the record. Imagine a witness dealing with a large plan mounted on an easel. As you ask your questions of the witness, everyone in the court (except the court reporter) can see the easel and knows what your witness is talking about. The court reporter has his or her back to the exhibit, and all the reporter hears and transcribes is: "Yeah, and over here there was a pipe, an 8" pipe, like I was telling you, and it went over down to there, where we put the new header, the one that is shown in that other picture over there. This makes a useless transcript. When this begins to happen, interject: "Stop there Mr. Smith, are you indicating the pipe at the intersection of grid line A — 14 on Exhibit 12?", "Yes", "Very well then, carry on", and so forth each time this happens. Unless the reference is clear, you will have no way of appealing the outcome if the court was to misunderstand the nature or quality of the evidence.

4. Make and file with the Reporter and the Court a common list of names and technical terms. Deal with this in your opening. There are variant spellings of even of the most well-known names ("Brian" and "Bryan") as well as names that sound and are spelled differently and much confusion can be saved by providing a list of spellings to the reporter and possibly the court on the first day of trial. Counsel would normally consider filing a "Cast of Characters" in a large or complex case in any event. Few counsel, however, remember to prepare and include a glossary of technical terms that are likely to come up in evidence. By the time you get on your feet at trial, you will know things you never knew before. You may know about "northings and eastings"; you may know about "victaulics"; you may know about "spools" and "TIG welding". This is all technical information. No lay person, including your court and court staff at the beginning of the trial at least, could be expected to know the accurate, technical meaning of these terms. They might ask, and they might not, in which case they will be operating on assumptions as to the meanings. It is good advocacy to provide a glossary. This glossary should be agreed to by opposing counsel and all expert witnesses. It should be comprehensive. Have a student unfamiliar

with the file read all of the experts, reports with a colored hi-liter in hand, marking all "technical" words, then circulate this list with proposed definitions. This would normally be an agenda item for a final, trial management pre-trial in a lien action.

5. If key photographs will be discussed extensively in evidence, make a copy for the court reporter and the court registrar. This is purely a matter of courtesy. There is no rule or accepted practice that demands it, however it is the only way the court officers can keep track of what is happening in the trial. The more they know about what is going on, and what to expect, the smoother the proceedings will go, and the better the transcript will be.

6. Obtain an order excluding witnesses from the courtroom until called to give evidence. This order is routinely obtained in opening submissions, at the "request" of any party, under **Rule 52.06**. The order does not apply in respect to a party to the action (if there is a personal defendant) or to a witness whose presence is essential to instruct counsel for the party calling the witness, subject to the court's discretion to dictate the order of witnesses so as to avoid the risk of communication between or among them.[168] Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, without leave of the court.[169] This applies until the witness has given their evidence. For example, even if the order was not made, you would probably want to exclude your witnesses voluntarily, so that the impact of their testimony would be better, and so that opposing counsel could not cross-examine by pointing out similarities in the evidence indicating collusion of witnesses.

None of this prevents a court from excluding a witness that is interfering with the proper conduct of the trial.

You have to be particularly careful with expert witnesses. If they are not voluntarily excluded and no motion is made to exclude them along with other witnesses that have not yet testified, there is a chance that their evidence will be tainted, or that the expert

168 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 52.06(2)**.

169 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 52.06(3)**.

may be disqualified in an extreme case.

Once the trial has started, counsel should exclude from the courtroom, voluntarily and without exception any witness that has not yet testified, including experts until all of their evidence is in, both in chief and in cross-examination.

For an example of the rule allowing a court to exclude any witness at any time, the author recalls a case in which the court directed a witness who had given his evidence, but who was a personal party to the action and thus entitled as a right to be in the courtroom, to sit behind a pillar in the courtroom, obscuring the witnesses' view of this person, so that his mugging and face-pulling at evidence could not be seen and could not influence subsequent testimony.

7. Be sparing with humour. If you have a witness who is given to coarse language, colourful metaphor, humour, irony or sarcasm, try to boil it out of them before you put them in the stand. Your persuasiveness depends on your mastery of the case and your mastery of the case is demonstrated, in part at least, by your control of your own witnesses' evidence. The earthiness of the day-to-day language of the jobsite may seem a little much in the courtroom. On the other hand, if this colourful language is what was said or written at the time of the events in issue, it is evidence and must go in as it is. Equally, however, everyone who has done a construction trial has had a witness slip into "project-speak" in the stand and use coarse language, or semi-obscene metaphor, which damages their credibility. There are no hard and fast rules. It is something done by feel. Humour is best avoided by both counsel and witnesses because it is so difficult to manage. When an attempt at humour goes wrong, which it often does, it can be damaging. On the other hand, in a long and tedious construction case, a little well-placed humour might be a mercy.

8. Deal with witnesses and opposing counsel through the court. If you want a witness to leave the witness box to handle an exhibit or point something out, ask permission of the court. Do not simply invite the witness out of the stand yourself. Everything that happens in the courtroom happens through the court, and with the permission of the court, not at the whim of counsel. If you want a witness to leave the witness box to give their evidence, you must

ask the court's permission: "Your Honour, with your permission, it would be clearer if the witness could indicate the location of the drain on the enlarged photograph of Station 5 + 135, Exhibit 7". When the witness has done what he or she has to do, invite the witness back into the box: "Thank you Ms. Smith, you may return to the witness box." If they have to leave again, ask again. If there is a long run of questions that address an exhibit on an easel, or a model in court, you can ask the court to allow the witness to remain out of the box for a series of questions. If a witness is being obstructionist, sarcastic or evasive in cross-examination, deal with it through the court: "Your Honour, I would ask that you direct witness Smith to answer the question that I have just put to her". If you argue with a witness you will lose the respect of the court. You might even lose the argument with the witness, which is bad in its own way.

9. Prepare articulate objections in advance. If you are well prepared, you will be able to anticipate some of your opponent's objections to your evidence and have the objections fully articulated and briefed in advance. After a few trials, you will have common objections (such as an objection based on the rule in *Browne v. Dunn*; or an objection to business records; or opinion evidence from lay witnesses) pre-prepared to take to any trial. Have the law briefed and have copies available so you can hand it out at the appropriate time.

10. Use the *voir dire* to get a ruling on substantial evidentiary objections. If the witness is in the stand, and an objection that you are about to make anticipates evidence that the witness has not yet given, or requires comment on the character of the witness, or calls into question the conduct of counsel, or anticipates cross-examination, ask the court to excuse the witness before articulating the full objection: "Your Honour, I have an objection to make to this question (or, "this line of questioning"), and would ask that the witness be excused from the court room while I make my objection". It is likely the witness will be excused and you can continue, "Your Honour, during the evidence of Mr. X last week we ran into this same problem when Mr. X purported to testify as to a meeting he did not attend at which the alleged extras were agreed to by my client. At that time you ruled the

evidence was inadmissible. It appears that we are about to get into the same area again and I object for the same reasons". The court will rule, and the witness will not have been tipped off as to the evidence of the previous witness.

11. Introduce exhibits carefully. Have copies for the court if they are not otherwise in the Brief filed as Exhibit # 1 at the opening of trial. Introduce the document as quickly and efficiently as possible: "Ms. Smith, I am placing before you a copy of a letter apparently signed by you and dated the 17th of September, can you identify that document for the court". The witness will do so and you will then say to the court "Your Honour, may we mark this as Exhibit 33?". The court will ask opposing counsel if they object and either admit the document or not. If the document is admitted, you may go on with your questions, but the document should always be referred to in a way that includes the exhibit number, otherwise the record for appeal will be unclear. For example, in the case above there may be more than one letter signed by the witness on September 17, but there will only be one letter signed by the witness on September 17, that is Exhibit 33. If the document is not admitted, then it has no place in the trial, nor in the further examination of that witness, nor in counsel's argument at the conclusion of the trial. If it is not admitted as an exhibit, it ceases to exist for all purposes.

12. If your witness is under cross-examination during a recess or adjournment, caution them not to discuss this evidence with anyone. Once your witness is being cross-examined, you may not discuss their evidence with them unless and until their cross-examination is complete.[170] You may ask the court to caution the

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170 See *Zellers v. Veuta Investments* (April 2, 1997), No. 94-CQ-55831, [1997] O.J. No. 1727 (Gen. Div.) [Master Donkin]: "It appears that it may well be permissible to discuss with the witness any matter not yet covered, if he or she, is giving evidence in brief; but his counsel should not discuss any evidence in chief; but his counsel should not discuss any evidence between examination in chief and cross-examination; and during cross-examination neither evidence nor any issue in the proceedings should be discussed with the witness — L.S.U.C. — Rule 10, Commentary 15(a), (c) and (d)." Commentary 15(d) to Rule 10 reads as follows: "[D]uring cross-examination by an opposing lawyer: while the witness is under cross-examination the lawyer ought not to have any conversation with

witness and the court will do so. You may also do this yourself to your own witness, in open court: "Mr. Jones, you are under cross-examination. We are on recess until Monday. We are obliged to have no communication with you whatsoever regarding your evidence in this case. Do you understand?"

Avoid any contact with a witness under cross-examination. Let them travel to and from court on their own. Let them lunch and dine alone. Let them take smoke breaks alone. Do not be seen in their company. Do not let your staff, clerk, investigator or client be seen in their company. It is better to be able to honestly deny any contact whatsoever, than have to explain what was said or done if you or someone on your behalf did have contact with a witness under cross-examination.

In the unlikely event that something occurs that obliges you or someone on your behalf to have contact with a witness under cross-examination (they may be a witness in another matter in your office for example, or may be instructing you in another matter), disclose this, in advance if possible, to the other side and seek their permission. If it is not forthcoming, take a partner or associate to witness your interaction so that there is some evidence of what happened should it become an issue.

13. Rehearse. Use your clerk or student, friend or family as a focus group. Hire a retired trial judge if your client can afford it. Play the evidence out as often as you can, out loud, before them. Do this in front of your clerk or student, friend or family as part of your preparation. "Pretend for real", by trying out oral arguments or lines of questioning, in advance, out loud, in the privacy of your office or home. If you can make your point understood to a non-lawyer, you are more likely to be able to make it understood to the court. If the trial is large enough, you will be attending with a student, clerk, or co-counsel. Have them watch your delivery, and take notes.

14. Last, but definitely not least, always be civil. Do not let frustrations show. This applies to both counsel and witnesses. Not

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the witness respecting the witness's evidence or relative to any issue in the proceeding."

every ruling will go your way, but there is no reason whatsoever to be anything less than civil to both the court and to opposing counsel. The Ontario Court of Appeal has pointed out that good manners are crucial in litigation.[171] **Rule 6.03** of the *Rules of Professional Conduct* provides that a lawyer shall be courteous, civil, and "act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice". The Law Society's Commentary to this Rule reads as follows: "The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end." The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their function properly. Any ill feeling which may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system. A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

Courts will not hesitate to sanction parties and counsel who contravene these important guidelines. Master Wiebe, in *Unimac-United Management Corp. v. Cobra Power Inc.*,[172] held that "making groundless allegations of misconduct against another lawyer and party is conduct of its own that must be discouraged strongly with stiff sanctions." Uncivil behaviour will get you nowhere. Litigation does not happen in a vacuum. Decisions get re-

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171 *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 2000 CarswellOnt 4362, 51 O.R. (3d) 97 (C.A.); leave to appeal refused 2001 CarswellOnt 3412, 2001 CarswellOnt 3413 (S.C.C.).

172 2015 ONSC 3827, 2015 CarswellOnt 8866 (S.C.J.).

ported, and reported cases get read. Not only will uncivil behaviour alienate the court and opposing counsel, it may also result in serious adverse costs consequences for the client and perhaps even counsel without recourse to the client.[173]

(4) Examination in chief

There are many practice guides to the proper conduct of an examination-in-chief.[174] The focus here is on lien actions, and the distinctions, if any, between normal trial practice and lien trial practice.

Given the factual intensity and lengthy chronologies of most lien cases, it is best to start with a witness that can give the court a comprehensive overview. The well-known principles of "primacy/recency" apply equally to lien actions. Counsel should arrange their case so that their first witness (the client "overview" witness) and their last witness (an expert in most cases) are their strongest and most reliable witnesses.

Each witness should be taken through his or her evidence in whatever natural order suits the case, usually simple chronological order, but, in an appropriate case, chronological order within each issue, or on an issue-by-issue basis. In one case, for example, it made sense to group the 91 disputed change orders around issues of cause and effect, and lead the direct evidence of each witness sequentially from the first group through the last group of change orders. In another case, counsel was particularly effective by having each witness address each point in the chronology, even if just to point out that they had no evidence on a particular sequence of events, and to focus in detail on the section of the chronology in which they participated.

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173 For an extreme case, see *4361814 Canada Inc. v. Dalcor Inc.*, 2015 ONSC 1481, 2015 CarswellOnt 3046 (S.C.J.); additional reasons 2015 ONSC 2486, 2015 CarswellOnt 5431 (S.C.J.). That case also shows that making entirely unfounded allegations of misconduct against the judicial officer presiding over the trial will result in serious cost awards.

174 See Lubet, *Modern Trial Advocacy: Analysis and Practice, Canadian Edition*, Block & Tape, editors (National Institute for Trial Advocacy, Inc. 1995), Cudmore, *Choate on Discovery*, 2nd ed. (Toronto: Carswell, 1993, looseleaf), Ross, *Conducting an Examination for Discovery* (Calgary: Carswell, 1995), White, *The Art of Discovery* (Aurora: Canada Law Book, 1990), Peppiatt & Linton, *Practice on Motions and References* (Toronto: Butterworths, 1988).

The effect was of an overlay of witness after witness on a powerful and compelling chronology, leading to the termination of a construction contract. The nature of the case will determine the best means and order of presenting the evidence in-chief.

The court will allow and even expect counsel to lead the witness on non-contentious matters. This is done by asking questions that suggest their own answer: "You attended the site meeting on December 12, 2001?", "Mr. X, the consultant was there?", "You discussed the punch list of mechanical deficiencies?", "The punch list you discussed is Exhibit 1, Tab 175?". If the issue is contentious and important to your case, however, you will want the evidence to come out of the witness's mouth, in the witness's own words: "Was there a site meeting?", "When?", "Where?", "Who attended?", "What was discussed?", "Was any documentation available at the meeting?", "What documentation was available?", "Was a conclusion reached?", "What conclusion was reached".

If you object, you draw attention to the importance of the testimony that is being led. This is a trade-off. You have to consider this before making your objection.

Thorough preparation of your own witnesses for examination in-chief is important. This involves sitting down with each witness, and the library set of documents, or document brief for trial, and running through their evidence with specific reference to relevant documents that will, or may be put to them at trial. You do not tell the witnesses what to say. You merely induce their own recollection of events, and require them to consider carefully the documentary record and the testimony they are about to give to the court. This allows you to point out inconsistencies in their evidence *before* they testify. Not only does this put the witness (and you) at ease, it prepares your witness for cross-examination. It can be most helpful, if time and budget permits, to rehearse cross-examination as well.

Taken to the extreme, as it is in many large jury trials in the United States, this involves hiring a court room and a judge to stage a "pretend for real" trial, with the hired judge retiring to render a "pretend for real" verdict. Few Canadian lien trials would justify this expense.

On a more practical level, courtroom-like facilities are available for hire in many centres in Ontario, as well as dispute resolution centres with retired trial judges available for arbitrations and mediations, all at relatively modest cost. If the theory of your case is hard to follow,

or a key witness is particularly nervous and the case hinges on their performance, the investment in a day or two of private courtroom and private judge time to run through their evidence, both in-chief and in cross-examination, may be worth the price. Feedback from a retired trial judge on his or her perception of the theory of your case, or the evidence of a key witness can often be pivotal in how the case is presented and received at trial. If this kind of an exercise is conducted within a month of a large trial, the witnesses will be more relaxed, and you will have time to reorganize and reposition your case, based on what you learn in your dry-run examinations.

(5) Cross-examinations

Here again many excellent resources are available to lawyers at all levels of practice and experience, from new call to seasoned litigation professional.[175] Many are excellent. All truly excellent references should be kept in a brief in your office and re-read prior to any major cross-examination.

What rapidly becomes clear is that cross-examination is an art as well as a science and directly related in most cases to the extent and quality of preparation. An experienced trial lawyer once said that the best preparation for cross-examination is the game of bridge, because done well you have the ability to know where cards are, even if you cannot see them, and it allows you to win even though you are playing with a dummy.

Once again, the focus here is on lien actions, and the distinctions, if any, between cross-examination in normal trial practice and cross-examination at a lien trial. There are few differences. The only two significant constraints operating in a lien action are the limited time available to properly address issues in cross-examination and the sheer volume of documentation and range of issues that need to be covered in that time. Lien actions, even those involving small sums of money, can take days or weeks to try, even without comprehensive cross-examinations. If every lawyer cross-examined on every issue in

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175 See Salhany, *Cross-Examination: The Art of the Advocate* (Toronto: Butterworths, 1999). See also Wellman, *The Art of Cross-Examination*, 4th ed. (New York: Touchstone Books, 1998). Lubet, *Modern Trial Advocacy: Analysis and Practice, Canadian Edition*, Block & Tape, editors (National Institute for Trial Advocacy, Inc. 1995).

most lien actions, it is unlikely that they could be tried at all.

The key to cross-examination in a lien action is selectivity. Pick the key issue or issues and focus your cross-examination there. How do you pick the key issue or issues? One way is to list the factual assumptions in your opponent's expert's reports and concentrate your cross-examination on shaking or destroying those factual assumptions. Another way is to prepare a careful note of your opponent's opening statement, or have it transcribed, list the factual elements identified by your opponent as being important to their case and focus your cross-examination there. Yet another way is to listen for the questions the court has of your opponent's witness as the evidence goes in in-chief. The court's questions can be an insight into the determinative issues in the case at that moment (although not necessarily to the ultimate result in the case). This is a starting point. If you can break even one link in your opponent's chain of evidence, then you have broken the chain itself. If this chain of evidence represents one of the assumptions upon which your opponent's expert based their opinion, your cross-examination may also have undermined their expert's testimony.

One of the best organizational tools for cross-examination is a binder of selected documents, or excerpts of selected documents if they are voluminous, with a table of contents by tab number. Each document in this cross-examination binder bears its unique identifier to make it clear that the document had been properly produced in the action. The cross-examination binder is put before the witness and a copy is given to the court and opposing counsel. It is not necessary to refer to all of the documents in the binder, or to confine yourself to documents in the binder, but the use of the cross-examination binders will be appreciated by the master and will save a great deal of time over a multiple-day hearing. After the hearing these cross-examination binders will make an excellent resource for the post-hearing submissions, as they will be keyed by tab number to the evidence.

One significant limitation or cross-examination is a principle of fairness called "The Rule in *Browne v. Dunn*" after the case in which it was laid down. The rule in *Browne v. Dunn*[176] applies equally in

176 (1893), 6 R. 67 (U.K. H.L.). The Rule was adopted by the Supreme Court of Canada in *Peters v. Perras*, 1909 CarswellAlta 2, 42 S.C.R. 244.

lien trials. The rule laid down by Lord Chancellor Herschel, is as follows (pages 70-71):

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

Lord Halsbury said this at pages 76-77:

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

Lord Morris put it this way (page 79):

> My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and which the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can quite understand the case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

The Supreme Court of Canada has affirmed and adopted the statement of Lord Morris more recently, in *R. v. Palmer*.[177] In the Court of Appeal in this case, McFarlane, J.A., said:

> The second ground of appeal argued was that the trial judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn* (1894), The Reports 67, and to *R. v. Hart* (1932), 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at p. 79:
>
> > I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.
>
> In my opinion, the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. Canadian Pacific Limited* (1976), 63 D.L.R. (3d) 294, and cases cited there by Robertson, J.A., at pp. 315–7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain

177 1979 CarswellBC 533, 1979 CarswellBC 541, 106 D.L.R. (3d) 212 (S.C.C.).

> when he was cross-examined. The trial judge gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.
>
> I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer. I would dismiss the appeal.

Thus, there is no absolute rule to the effect that absence or brevity of cross-examination bars counsel from addressing issues not referred to during cross-examination at a later point in time. Counsel is not required to give notice of every detail that will be challenged. The extent and manner of the application of the rule will be determined by the trial judge in all the circumstances of the case. Both the Supreme Court of Canada and the Ontario Court of Appeal have provided guidance to the trial judge making that determination.

The purpose of the principle in *Browne v. Dunn* is to protect against ambush of a witness by means of not giving the witness the opportunity to state his or her position regarding later evidence which contradicts the witness. It is, at bottom, a principle of fairness. In *O'Brien v. Shantz*,[178] counsel attempted to rely on certain records to attack the plaintiff's credibility. Counsel had never referred to those records during the plaintiff's cross-examination. The trial judge, Madam Justice Molloy, held that if the counsel had wanted to use the records to challenge the plaintiff's credibility, he was obliged to have given the plaintiff an opportunity to explain the alleged inconsistencies:

> On the facts of this case, I agree with Mr. O'Hagan's position. I might have ruled differently if the alleged inconsistencies were clearly and blatantly before the Court in earlier evidence, in such a manner as to cry out for some explanation by the plaintiff when he subsequently testified. However, the inconsistencies were buried within five hundred pages of material which had been filed in a routine manner on consent.
>
> In those circumstances, I think it completely unfair to Mr. O'Brien to extract bits and pieces of those documents, including notes regarding snippets of telephone conversations two-and-a-half years ago, and to use those excerpts to attack his credibility now, without giving him any opportunity to

178 1998 CarswellOnt 3965, 167 D.L.R. (4th) 132 (C.A.).

> confirm, deny or explain. This smacks to me of trial by ambush, and I don't believe it should be permitted. It simply doesn't appear to me to be fair or to be in keeping with the principles underlying Section 21 of the *Evidence Act* or the rule in *Browne v. Dunn*.
>
> The Court of Appeal agreed:
>
> > What was fundamentally unfair was that defence counsel deliberately refrained from asking the plaintiff about the inconsistencies while he was in the witness box and instead waited to attack his credibility when he had no opportunity to respond. The appellant submits that because the WCB records were not independent or extrinsic evidence, having been filed by the plaintiff, the rule in *Browne v. Dunn* had no application. In the context of this case, the distinction drawn by the appellant is irrelevant. It is unrealistic and unfair to have expected the plaintiff to have reviewed voluminous material to search for inconsistencies not brought to his attention while being examined. Fairness required that the plaintiff be given an opportunity to explain the inconsistencies before his credibility could be impeached by them.

In *Morrison v. Gravina*,[179] again, counsel attempted to use material to discredit a witness when that witness had not been cross-examined in any detail. Greer J. applied the rule in *Browne v. Dunn*:

> The Plaintiff relies on the rule in *Browne v. Dunn* (1893), 6 R 67 (H.L.) at p. 70 for the proposition that the cross-examiner must put the evidence in question to the witness he or she intends to discredit. If the proposition is not so put to the witness, how then can the trier of fact test the credibility of the witness on that point? This issue was thoroughly canvassed in *O'Brien v. Shantz* (1998), 167 D.L.R. (4th) 132 at pp. 136 to 9 (Ont. C.A.). The Defendant before me did not cross-examine the Plaintiff in any detail at all about what took place between her and the SABS carrier, nor what steps she had taken to try to appeal its decision not to pay her any non-earner income benefits. The matter was dealt with at Trial in only a cursory fashion. As the Court in *O'Brien*, *supra*, said at p. 138:
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> > Fairness required that the plaintiff be given an opportunity to explain the inconsistencies before his credibility could be impeached by them.
>
> I adopt the reasoning of the Court in *O'Brien*. See also: Sopinka J. et al. *The Law of Evidence in Canada* (2d Edition) (Toronto: Butterworths 1999), p. 954–957 and see also: *United Cigar Stores Ltd. v. Buller & Hughes*, [1931] 2 D.L.R. 144. The Plaintiff was never given the opportunity to present her evidence or documents to the Court on the issue of what had happened with

179 2001 CarswellOnt 1870, 29 C.C.L.I. (3d) 129 (S.C.J.).

> her application for non-earner benefits. It was simply not an issue before the Court at Trial. To then be faced with facts after the Jury delivered its verdict, to which the Plaintiff was unable to respond, given the nature of the Motion, and which had not been put to her on cross-examination, leaves the Plaintiff in a vulnerable and unfair position to deal with the issue after Trial.

Once you have decided that you need to cross-examine, have a plan and a theory for the cross-examination. Do not just wade in and start asking questions. It takes preparation and understanding of one's case to be brave enough to address only the key points of an opponent's witness's evidence in a cross-examination, nevertheless this should be the goal of all cross-examination. What is it you want the court to learn from your cross-examination? Do you want the court to see the witness as a liar? This is rare indeed. Do you want the court to re-evaluate a witness's damaging evidence on a key point, in order that it is seen in its true light, and is less significant in determining the outcome of the case? This is more often the case.

Then there is the fear that all trial lawyers have of receiving reasons for decision that contain a sentence like this: "Mr. Smith testified that he did not attend the meeting, and although it does seem unlikely, his evidence was not challenged in cross-examination and must be accepted as correct".

The advantage that a lien action has over a conventional civil action is that the many lien and trial management pre-trials will have so refined the issues, that it will be relatively easy to plan your cross-examinations. Remember that it is a unique feature of lien actions that the court that hears the pre-trials may also be the court that hears the evidence at trial. The lien lawyer, therefore, should be able to be more selective in the issues for cross-examination.

The best cross-examinations tend to be the shortest and most focused cross-examinations. They tend to start by putting a simple proposition of fact to the witness, favourable to the cross-examiner's case, or unfavourable to the case of the party that called the witness, and then asking the witness to agree or disagree with that proposition. If the witness agrees unequivocally, and the court has a note of the evidence, then counsel moves on to the next proposition of fact. If the witness disagrees, or equivocates, then you take the witness through a

"loop"[180] of easy steps to establish premises leading inexorably to the conclusion that the proposition first put to the witness was correct, and that the witness should have accepted the truth of that proposition. The key here is that the steps toward this inevitable conclusion have to be independently, simply and objectively verifiable, so that the witness cannot reasonably or credibly deny them. When a cross-examination conducted in this fashion is completed, cross-examining counsel will have established a series of propositions of fact, from their opponent's witnesses' own mouth, that either supports the cross-examiner's case, or detracts from the opponent's case. This is effective cross-examination.

You will find that after a few such "loops" most witnesses understand what is happening, and what will happen if they disagree, and begin to agree with more of the initial proposition of fact. This speeds up the cross-examination.

Occasionally you will run across a difficult witness that will want to ask you questions, or pretend not to understand your questions, or generally be evasive and unwilling to admit anything. Such witnesses are their own worst enemy. The court sees their demeanor in the witness box for what it is, without you having to point this out in cross-examination.

In a lien court in Toronto, the trier of fact is likely to be a master who has conducted all of the lien pre-trials and trial management pre-trials, prior to the evidentiary portion of the trial. The lien master will be quite familiar with counsel, the case, and maybe even some of the witnesses. A witness who is difficult and argumentative in front of the master during the evidentiary portion of a lien trial will be doing more harm than good for the party that called them.

As is stated above, some rather excellent books have been written on the art and science of cross-examination and they can all be consulted profitably,[181] but in the end, like golf or the violin, it is a "learn by doing" kind of thing. Some rudimentary guidelines for the

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180 See Pozner & Dodd, *Cross-Examination: Science and Techniques* (Albany: LexisNexis/Matthew Bender, 1993), chapter 17. These authors frequently lecture on this subject and their lectures are well worth attending.

181 Probably the best of the lot is Salhany, *Cross-Examination: The Art of the Advocate* (Toronto: Butterworths, 1999). See also Wellman, *The Art of Cross-Examination*, 4th ed. (New York: Touchstone Books, 1998).

new lien lawyer are as follows:

1. Use short, leading, closed ended questions. Take the information in small, undeniable, incremental steps: "Look at Exhibit 6"; "You wrote Exhibit 6"; "You signed Exhibit 6"; "You wrote it and signed it on behalf of (the defendant)"; "You sent it to (the Plaintiff)"; "You knew that (the plaintiff) would receive Exhibit 6" and act on these statements that you wrote, signed and sent". Such a line of questioning is likely to elicit simple "Yes" answers. At this point the cross-examiner could circle back and prove, in the same manner, the falsity of the information conveyed in the exhibit: "Look at Exhibit 6"; "It says that the window mock-ups have been pressure tested"; "This was false"; "You knew it to be false"; "You knew it to be false when you sent your letter, Exhibit 6". Each of these last propositions must be demonstrably so from a piece of *existing* evidence, i.e., an exhibit already in evidence at trial.

2. Think before you ask that final question. In the above example, after going through several cut and dried examples of self-contradiction, you might want to think twice about coming back to the main question, "So, you knew these statements were false when you wrote them" because it will give the witness a chance to equivocate. Do not set a trap and give the witness a means of escape.

3. Make a notation on the actual documents in your copy of the Documents Brief as to the name of the witness and the date, time of day (i.e., a.m. or p.m.) that the document was referred to in chief. When the witness is referred to a particular document in chief, turn to it in your own set of documents and write on the face of the document "Smith, chief, Sept. 4/03, 3 p.m". That way, when you prepare your cross-examination, you have that specific reference when you turn to the document itself. This allows you to be more focused in your cross-examination: "Mr. Smith you should turn to Volume 4, Tab 233, it is a letter"; "You recognize this letter", "You will recall that Ms. Jones took you to this letter in your evidence to this court, in-chief, on last Friday afternoon". This also helps the court turn to the appropriate note of evidence in the event that there is a dispute about what was said. In a two or three week lien trial, where key witnesses can be in the stand

for several days in-chief, this is crucial. You will do this for every witness, both in-chief and in cross-examination. By the end of a lengthy trial, a crucial document may have been addressed a dozen or more times by a half dozen or more witnesses, and each reference will be noted on your copy, with a date, time, witness name, and reference to "chief" or "cross" as the case may be.

4. Be selective. Try to focus on what the witness "stands for" in your opponent's case, and make that the focus of your cross-examination, not all of the collateral points that inevitably arise. For example, if a witness is put in the stand to prove the date that work stopped, make that the focus of the cross-examination, not any of the slips the witness may have made in addressing other matters, like the *minutae* of meetings and correspondence.

(6) Expert evidence

Construction lien matters often deal with issues like the strength of materials, quality of workmanship, and the scheduling of work. This requires expert evidence.

In *White Burgess Langille Inman v. Abbott and Haliburton Co.*,[182] the Supreme Court of Canada held that the basic structure for the law relating to the admissibility of expert evidence has two main components. The first component requires the court to consider the four traditional "threshold requirements" for the admissibility of evidence established by the Supreme Court of Canada in *R. v. Mohan*,[183] being (i) relevance, (ii) necessity in assisting the trier of fact, (iii) absence of an exclusionary rule; and (iv) the need for the expert to be properly qualified.

The second component is a "discretionary gatekeeping step", in which "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks".[184] In *White Burgess*, the court held the lack of independence or impartiality on the part of an expert witness goes to

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182 2015 SCC 23, 2015 CarswellNS 313, 2015 CarswellNS 314.

183 1994 CarswellOnt 1155, 1994 CarswellOnt 66, [1994] 2 S.C.R. 9.

184 See also *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 2017 CarswellOnt 9169; additional reasons 2017 CarswellOnt 13779 (C.A.); leave to appeal refused *Neloni Gunawardena v. Callum Bruff-Murphy and Hope Bruff-McArthur*

the admissibility of the witness's testimony, not just to its weight.

The earlier Supreme Court of Canada decision in *R. v. Abbey* is discussed by the learned authors Sopinka, Lederman and Bryant:[185]

> Emerging from these and other decisions of the Supreme Court of Canada was the principle that expert opinion evidence could be based on hearsay information that was not proven at trial. In *R v. Abbey*, the accused did not testify at his drug trafficking trial. A psychiatrist was the sole witness called in support of the defence of insanity. The psychiatrist testified that the accused told him during the course of interviews about past delusions, visions, hallucinations and sensations which he had experienced in the six-month period preceding his arrest. The psychiatrist said that the accused described certain symptoms of the disease to his mother several months prior to the commission of the offence. The accused also told the psychiatrist about several incidents of bizarre and unstable conduct which the psychiatrist recounted during his testimony.
>
> The issue before the Supreme Court in *Abbey* was the evidentiary value of the psychiatrist's opinion based solely on the events and experiences related to the psychiatrist by the accused during these interviews. Justice Dickson (as he then was) commented on the hearsay element of the psychiatrist's opinion as follows:
>
> > It was appropriate for the doctors to state the basis for their opinions and in the course of doing so, to refer to what they were told not only by [the accused] but by others, but it was error for the judge, to accept as having been proved the facts upon which the doctors had relied in forming their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis upon which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

The *Abbey* decision was affirmed by the Supreme Court of Canada in 1990, in the decision of Madam Justice Wilson in *R. v. Lavallee*,[186] where the court read *Abbey* as standing for the following

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by their Litigation Guardian Liese Bruff-McArthur, et al., 2018 CarswellOnt 3656, 2018 CarswellOnt 3657 (S.C.C.).

185 *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) at 12.197.

186 1990 CarswellMan 198, 1990 CarswellMan 377, 55 C.C.C. (3d) 97 (S.C.C.) at pp. 127-128 [C.C.C.].

propositions:

1. An expert opinion is admissible if relevant, even if it is based on second hand evidence.

2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.

4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

In *The Law of Evidence in Canada*,[187] the learned authors comment further on this line of cases as follows:

> Justice Sopinka concurring in the result pointed out the conundrum arising from the Supreme Court's decision in *Abbey*:
>
> > Upon reflection, it seems to me that the very special facts in *Abbey*, and the decision required on those facts have contributed to the development of a principle concerning the admissibility and weight of expert opinion evidence that is self-contradictory.
>
> The inherent contradiction in the *Abbey* decision is that it seems to hold that an expert opinion relevant to a material issue in a trial is admissible even thought it is based entirely on unproven hearsay (such as statements by an accused who has not testified, as in *Abbey*); but, although admissible, it is entitled to no weight whatsoever. As Sopinka J., asked: "[t]he question that arises is how any evidence can be admissible and yet entitled to no weight". The answer, he said, turns upon whether the hearsay information regularly forms the mass of material upon which an expert relies in the course of his or her expertise or whether it is hearsay going directly to a matter in issue and comes from a source that is inherently suspect:
>
> > The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*) and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*).
>
> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense

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187 *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) at 12.200.

> importance on the basis of the observations of colleagues, often in the form of second or third — hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this court has taken to the analysis of hearsay evidence in general . . .
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.

Thus it can be seen that expert evidence in lien cases must be carefully thought through, and presented in such a manner, and based upon such a factual foundation, established in the end by evidence accepted by the court at trial, that it has usefulness and weight. No court needs an expert to tell them what a construction contract means, for example, but most courts would need expert assistance in knowing when a technical specification was or was not complied with. If they need and receive expert assistance on such a point, it is important that the opinion expressed by the expert *not* be based in whole or in part on hearsay or other inadmissible or non-existent evidence.

Still, the expert is an important part of any major or complex lien action, and the service of an expert's report is a milestone in any lien case. The provisions of **Rule 53.03** apply in lien cases. Notice of the expert's opinion must be given pursuant to the rules in order for properly qualified expert evidence to be accepted by a lien court. Furthermore, the expert in a lien action must be qualified to give the court his or her opinion, and draw inferences for the court from proven facts, all in accordance with the common law.

There are many excellent sources of information on the advocacy aspects of procuring and tendering expert evidence, and these references are generally applicable in lien actions. It is once again beyond the scope of this book to summarize or provide a detailed review of all of these many sources, but the reader is here referred to some of

them.[188] They are well worth a quick re-read prior to any trial.

Given its broad mandate under **s. 51**, the lien court in Ontario is less formal than other courts in requiring strict adherence to the correct use of hypothetical questions. The first step is to qualify the expert, unless the issue of qualification of experts has been dealt with in one of the last trial management pre-trials, which would usually be the case in Toronto. From there, however, the development of the expert's evidence must serve the needs of the case and the court. Generally, the qualified expert would be asked to explain to the court, in his or her own words, the questions that were posed, and the methodology that was adopted by the expert in answering these questions, with express reference to the expert's formal report.

It can be helpful for the court to have an agreed glossary of technical terms, and the list of terms and the appropriate definitions would be a matter for discussion and agreement at a trial management pre-trial. It can be helpful (and it is sometimes required by the master in Toronto at an appropriate lien or trial management pre-trial attendance) that the experts get together with each other (without counsel), prior to their testimony to agree on as many aspects of their opinions as they can. If this agreement can be reached and reduced to writing, it will be filed for the use of the court.

Once the expert has been qualified, and tendered and accepted by the lien court as an expert witness, the elements of the expert's opinion should be developed incrementally and logically. The lien court will likely ask questions directly of the expert witness, and need not be encouraged to do so. If the expert feels that there is a concept that is vital to an understanding of his or her conclusion (limit states analysis, for example, in a materials design case), then it *may* be acceptable for the expert (or, better, counsel tendering this evidence) to ask the court if the concept is fully understood, or if further explanation is required before proceeding with the balance of that expert's evidence.

A complete factual matrix must be established by otherwise admissible evidence to support the expert's opinion, or else the opinion is worthless. Thus, the expert is usually the last witness called in a

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188 See White, *The Art of Using Expert Evidence* (Aurora: Canada Law Book, 1997); Freiman & Berenblut, *The Litigator's Guide to Expert Witnesses* (Aurora: Canada Law Book, 1997); Warren, The Effective Expert Witness: *Proven Strategies for Successful Court Testimony* (Lightfoot, VA: Gaynor, 1997).

party's case.

There are at least four additional, unresolved, issues relating to expert evidence in lien actions, two substantive and two procedural.

The first substantive issue concerns the subject matter of the expert's report, as a limiting factor on the expert's testimony at trial. It often happens in lien matters that an expert who has reported on quantum, for example, will stray in their oral testimony into another area, such as deficiencies. This is a matter for the court's discretion. If there is other evidence on the issue of deficiencies, there may be no prejudice and therefore no issue; but if the only evidence on deficiencies is that of an expert who must stray outside of the four corners of his or her report to give that evidence, then the evidence will likely be inadmissible under **Rule 53.03**.

The second substantive matter, impartiality, is more difficult. There are two schools of thought as to the impartiality of the expert witness in a lien or construction action: should impartiality be a matter of appearance or fact? One school of thought is that the expert should be fully committed to the client's case and should be a fully integrated member of the counsel's legal team, focused on succeeding in the case, but otherwise impartial, of course, in rendering an opinion and testifying before the court. Counsel who adopt this theory of expert evidence require their expert to be privy to every aspect of a large or complex lien case, including every step from pleading to production of documents and discovery, from strategy meetings with counsel to preparation and service of an expert's report and "impartial" testimony at trial. Counsel who accept this theory of expert evidence will strive to retain as many experts in a given field as they can, as soon as they can, so that these experts are unavailable to the opposition, and so that they can locate and choose an expert who shares their point of view. As only materials consulted or prepared by *testifying* experts need be produced,[189] non-testifying experts can safely be used to

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189 See *Potter Station Power Co. v. Inco Ltd.*, 1998 CarswellOnt 4299, 43 C.L.R. (2d) 53 (Gen. Div.) at pp. 65-66 [C.L.R.] [Rosenberg J] ; additional reasons 1998 CarswellOnt 4986 (Gen. Div.):

> In cross-examination of . . . it became apparent that she had submitted a number of draft reports to counsel for Bluebird and that after discussions of these draft reports they had been amended. Mr. Scott then asked for all notes and other material related to the preparation of the report. Mc-

Laughlin argued on the basis of *Bell Canada v. Olympia & York Development et al; The Corporation of the City of Ottawa et al (third parties)* (1990), 36 C.P.C. (2d) 193 that the material should not be produced because it was privileged. In the Bell Canada case an expert gave evidence for one of the parties at trial. The expert's report had been introduced in accordance with the rules. Certain documents were referred to in the reports. During the trial counsel for an adverse party who was cross-examining the expert witness moved for production of everything the expert had ever looked at that came from the lawyer who had retained him. It was conceded that the material sought was at least initially privileged as lawyer and client communications or documents coming into existence for the purpose of litigation. However the moving party argued that once the expert went into the witness box, any privilege attaching to communications between him and the lawyer who employed him on behalf of the client was lost. In that case Eberle J. dismissed the motion and held that: "Communications not only between solicitor and client but between a lawyer and other parties including experts retained for the purposes of the litigation were privileged. The privilege was that of the client not the expert witness or the solicitor. When an expert witness went into the witness box at trial there was no waiver of the solicitor-client or litigation privilege. Further the document sought did not appear to be relevant." However, in the case of *Delgamuukw v. British Columbia* (1988), 32 B.C.L.R. (2d) 152 Chief Justice McEachren ruled that the facts that must be disclosed include the original data, notes and writings upon which the report is based. While this case is decided under Rule 40(a) of the B.C. Rules, it is in my view appropriately applied in Ontario. In challenging the expert's report, once it is disclosed that it has been changed after discussions with counsel, the opposing party is entitled to attack its credibility as having been the subject of amendment at the suggestion of counsel. In the recent Ontario Court of Appeal decision of *Conceicao Farms Inc. v. Zeneca Corp.*, 2006 CarswellOnt 4558, *(*sub nom. *Horodynsky Farms Inc. v. Zeneca Corp.)* [2006] O.J. No. 3012 (C.A. [In Chambers]); reversed 2006 CarswellOnt 5672, [2006] O.J. No. 3716 (C.A.); leave to appeal refused 2007 CarswellOnt 1357, 2007 CarswellOnt 1358 (S.C.C.), the court held that information forming the foundation of an expert's report has to be disclosed on examination under **Rule 31.06(3)**. The court held as follows: "Rule 31.06(3) is to be interpreted bearing in mind the role of the expert and the recent jurisprudence of the Supreme Court of Canada and this court. As such, a broad approach is warranted, one that — in the words of the Supreme Court of Canada in *Stone* — would enable opposing counsel to have access to the 'foundation' of the expert's opinions. This approach would require disclosure of all foundational information for the expert's report, whether or not the final findings, opin-

generate critiques of pleadings, questions for discovery, and cross-examinations of opposing experts.

The other theory of expert evidence is that the testifying expert should be independent of the action, in all respects and at all times, and should be so impartial that he or she would give exactly the same testimony if called by the other side, or by the court itself. Counsel who subscribe to this theory may also retain as many of the best experts in a given area as they can, as early as they can, to help in the preparation of the case and to formulate the assumptions of fact and questions to be put to the testifying expert (whose work product remains immune from production, as these experts are not hired to testify, but only to assist counsel), but the *testifying* expert will be carefully kept totally unaware of the litigation strategy that counsel are pursuing. This latter approach, while it may be counter-intuitive to some, is the correct approach in the author's view. Lien courts are becoming increasingly skeptical of advocacy thinly disguised as expert evidence.[190]

The first procedural issue is to the filing of the expert's report as an exhibit at trial. There are, once again, two schools of thought. One is that the expert's report is merely notice under **Rule 53.03** of oral opinion evidence that will be led at trial and that once this oral evidence is led, it is the evidence of the expert and the report itself is of little or no evidentiary value and should not be marked as an exhibit, except, perhaps for identification purposes. The other school of thought, in its most extreme form, is that the expert's report *is* the expert's testimony at trial, in-chief, and that it should simply be filed as an exhibit to serve that purpose. On this view of the expert's report, the expert then takes the stand only to be cross-examined. Generally, the view in lien actions is that the expert should give oral evidence in-chief, and that the expert's report should be filed as an exhibit once the expert is qualified and accepted by the lien court. The expert's report is received not as the totality of the expert's evi-

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ions or conclusions expressly reflect that information."

190 See, for example, *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, 2002 CarswellNfld 124, 20 C.L.R. (3d) 1 (T.D.), *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 1999 CarswellNS 247, 47 C.L.R. (2d) 273 (S.C.); affirmed 2000 CarswellNS 235 (C.A.); leave to appeal refused 2001 CarswellNS 144, 2001 CarswellNS 145 (S.C.C.).

dence in a lien action, but as a material part of it.

In construction matters, it is often the case that expert's reports (particularly those involving complex materials testing, delay analysis, critical path analysis and the like) are utterly incomprehensible without the help of the expert in the stand. The lien court will rely on the testimony of the expert, in-chief, to establish the organization of the report, the investigation conducted, the definitions of terms of art used in the report, the structure of the report and, lastly, the findings of the expert. The lien court can be expected to have questions of the expert, all leading to what is hoped to be a clear and accurate understanding of the expert's opinions and reasons for same.

The second procedural issue involves the extent of the lien court's general power, under the Rules, to require expert evidence.[191] The lien court has a specific power under **s. 14 of O. Reg. 302/18** of the *Act* to obtain the *technical assistance* of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.[192] Are these provisions "inconsistent" with **Rule 52.03** within the meaning of **s. 50(2)**? Probably not. The important distinction between these two powers, of course, is that while the court appointed "expert" under the rules is an expert witness in the technical sense of that word, the "assistant" to a lien court does not have to be a true "expert" in this sense. The technical assistant to a lien court could be, arguably, a witness that the parties themselves did not call, but who had a direct bearing on one or more of the issues in question.

Most, if not all issues related to the admissibility of expert evidence will have been raised and resolved well prior to the evidentiary hearing, at one of the trial management pre-trials. If an issue arises in which the evidence about to be given by an expert must be challenged at the hearing, counsel should excuse the witness from the

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191 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 52.03(1)** provides that on motion by a party *or on his or her own initiative*, a judge may, at any time, appoint one or more independent *experts* to inquire into and report on any question of fact or opinion relevant to an issue in the action. This Rule goes on to deal with the choice of court appointed expert, remuneration and report.

192 **O. Reg. 302/18, s. 14**.

courtroom *before* fully articulating the objection or challenge. As observed above, it is not uncommon for the master to order that the experts meet, after expert's reports have been exchanged, to resolve areas of disagreement. Anecdotal evidence indicates that such meetings usually result in broad agreement, rather than broad disagreement between the experts on all empirical matters.

The Ontario Court of Appeal has outlined the boundaries of permissible interaction between lawyer and expert. In *Moore v. Getahun*,[193] the Court of Appeal reversed the trial judge's finding that "counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable." The trial judge had also imposed significant disclosure obligations on communications between lawyers and experts, finding that there should be "full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral." The Court of Appeal held that "it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."

While this does not give lawyers *carte blanche* to effectively shape the expert's opinions or conclusions, the court made it clear that "consultation and collaboration" remain entirely appropriate to ensure that a report addresses and is restricted to the relevant issues and is written in a manner and style that is accessible and comprehensible.

Moore v. Getahun was subsequently applied by the Court of Appeal in *Bruell Contracting Ltd. v. J. & P. Leveque Bros. Haulage Ltd.*,[194] in which the court held that it was "not only appropriate but essential for counsel to consult and collaborate with expert witnesses

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193 2015 ONCA 55, 2015 CarswellOnt 911; additional reasons 2015 CarswellOnt 12512 (C.A.); leave to appeal refused 2015 CarswellOnt 14066, 2015 CarswellOnt 14067 (S.C.C.).

194 2015 ONCA 273, 2015 CarswellOnt 5580.

in the preparation of expert reports. Counsel must explain to experts their duties to the court, clarify the relevant legal issues, and assist experts in 'framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case'".

(7) Lay opinion evidence

A common occurrence in a lien trial is that a witness will be asked to express an opinion on an aspect of construction, such as, for example, whether a piece of equipment was "properly installed", or whether a piece of workmanship was "substandard". These are statements that would normally require a properly qualified expert, yet the evidence may be reliable even if it is that of a witness with no professional credentials. For example, a witness with 30 years of experience in installing the relevant piece of equipment, or performing the very type of workmanship that is in question. Are these lay opinions admissible? The answer in lien actions is "yes".[195]

Where a witness's testimony is based on personal knowledge, the traditional distinction between fact and opinion no longer applies. In *R. v. Graat*,[196] Dickson J. held that:

> Except for the sake of convenience, there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear . . . I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

As the authors of *The Law of Evidence in Canada* have noted,[197] Justice Dickson's formulation of the test was put on a rather simple basis, which states the modern rule, and that is the "helpfulness test". The formulation of this test is found at pp. 281-282 of Justice Dickson's decision:

> The witnesses had an opportunity for personal observation. They were in a position to give the Court real help. They were not settling the dispute. They

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195 Cited with approval by Laskin J.A. in *Landmark II Inc. v. 1535709 Ontario Ltd.*, 2011 ONCA 567, 2011 CarswellOnt 8789.

196 1982 CarswellOnt 101, 1982 CarswellOnt 745, 144 D.L.R. (3d) 267 (S.C.C.) at pp. 281-282 [D.L.R.].

197 *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) at 12.9 et seq.

> were not deciding the matter the Court had to decide, the ultimate issue. The judge could accept all or part or none of their evidence.

While a criminal case, *Graat* has been applied often. In *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*,[198] for example, the court adopted the passage just quoted. In its 2002 decision of *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*,[199] the Ontario Court of Appeal adopted the following passage from Sopinka, Lederman & Bryant, under the heading "Modern Statement of the Lay Opinion Rule: Helpfulness":

> Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge; (2) the witness is in a better position than the trier of fact to form the opinion; (3) the witness has the necessary experiential capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about. But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.

Where questions relate to a witness's everyday expertise, it is proper to hear opinion evidence from that witness. In *Air Canada v. McDonnell Douglas Corp.*,[200] the court held as follows:

> In my view, the scope of discovery in this province has broadened considerably and, while I do not suggest that the scope is unlimited, I do think that it is proper to ask questions which might call for a conclusion on subjects within the witness's everyday expertise, or to which expertise he has ready access. This is particularly so when the party on behalf of which he is being examined has gone to considerable time and trouble to reach a conclusion on the very subject.

The significant involvement of the trier of fact in refining the issues and understanding the action even before the commencement of the evidentiary hearing means there will be no prejudice in allowing the

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198 2000 CarswellOnt 4362, 51 O.R. (3d) 97 (C.A.) at p. 122 [O.R.] ; leave to appeal refused 2001 CarswellOnt 3412, 2001 CarswellOnt 3413 (S.C.C.).

199 2002 CarswellOnt 2604, 215 D.L.R. (4th) 193 (C.A.).

200 1995 CarswellOnt 839, 22 O.R. (3d) 140 (Gen. Div.); affirmed 1995 CarswellOnt 4240, 22 O.R. (3d) 382 (Gen. Div.); additional reasons 1995 CarswellOnt 4241 (Gen. Div.).

lien court to receive and determine the weight of lay opinion evidence.

In *Westerhof v. Gee Estate*,[201] the court found that Rule 53.03 of the Ontario *Rules of Civil Procedure* does not apply to some experts who may give opinion evidence based on their participation in the subject matter of the proceeding and who are called upon to give opinion evidence at trial.

(8) Technical assistance

The subject of expert witnesses called as part of the parties' cases has been discussed above. In addition to this, the *Act* provides that the court may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such as it considers fit to enable it to "determine better" any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.[202]

It is to be noted that the *Act* does not require that such persons satisfy the common law evidentiary requirements of expert testimony, or that the person so appointed prepare or serve a report, or otherwise comply with the notice provisions of **Rule 53.03**. The person so appointed may be merely a person with useful information. In fact, it is to be noted that the *Act* specifically provides that the court may "obtain the *assistance*" of any such person, *not the evidence* of any such person. This implies that the contribution of the technical assistant would not be part of the record at the trial or reference. The section does not expressly contemplate a motion, but is phrased in permissive language that has been construed to permit a motion, in a lien action, in other similarly worded sections.[203] The court has the power to appoint a technical assistant on its own motion.[204] It is also

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201 2015 ONCA 206, 2015 CarswellOnt 3977; additional reasons 2015 CarswellOnt 9294 (C.A.); leave to appeal refused *Baker v. McCallum*, 2015 CarswellOnt 16499, 2015 CarswellOnt 16500 (S.C.C.); leave to appeal refused *Gee Estate v. Westerhof*, 2015 CarswellOnt 16501, 2015 CarswellOnt 16502 (S.C.C.).

202 **O. Reg. 302/18, s. 14**. *Construction Act*.

203 *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*, 2003 CarswellOnt 210, [2003] O.J. No. 304 (S.C.J.).

204 **O. Reg. 302/18, s. 14**.

to be noted that there does not seem to be anything inconsistent between the provision of the rules and the provision of the *Act*, therefore, under **s. 50(2)**, both jurisdictions can exist side by side.

Notwithstanding that this section has been with us in this form since 1937,[205] it has produced no case law and appears seldom, if ever, to have been used in practice.[206] The lien masters at Toronto have discussed its use with counsel, in circumstances where counsel appeared unable to agree on the nature or quality of expert evidence in the case. The possibility of the court having access to technical assistance, at the parties' expense, without that assistance forming part of the record is usually enough to persuade the parties to commission and call expert evidence on an appropriate point. It is possible that a technical assistant could be appointed on the court's own motion, but this would rarely, if ever, occur without consultation. The state of expert testimony in construction matters, particularly in such important but still theoretical areas as scheduling and critical path analysis, and delay claim and loss of productivity calculation, is in such a poor state at present that we may see more use of this interesting provision.[207]

The author has argued elsewhere that this section creates (or recognizes) an inquisitorial jurisdiction in the lien court, going to the fundamental nature of the lien trial process.[208] With the technical assistance jurisdiction of **s. 14 of O. Reg. 302/18** and an affirmative mandate in **s. 51(b)** to make all inquiries, give all directions and do all things necessary to dispose finally of the action *and* give all necessary relief to all parties to the action, it appears to the author that the process that is contemplated is not exclusively adversarial, but more inquisitorial in nature. This view is not shared by the lien courts at present.

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205 *Mechanics' Lien Amendment Act, 1937*, c. 41.

206 Master Sandler advised that neither he nor any of the sitting lien Masters at the time had ever had recourse to this jurisdiction nor are they aware, anecdotally, of it having been exercised in any other case.

207 *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, 2002 CarswellNfld 124, 213 Nfld. & P.E.I.R. 1 (T.D.).

208 See Glaholt & Rotterdam, "Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes" (1998), 36 C.L.R. (2d) 159.

(9) Jury notices

The combined effects of **s. 50(3)** of the *Construction Act*, **s. 13 of O. Reg. 302/18** and s. 108(2)6 of the *Courts of Justice Act* do not operate so as to make the issuance of a jury notice irregular in a lien proceeding. Where a counterclaim focusing on allegations of negotiations and bad faith on the part of the plaintiff is consolidated with lien actions, it is not somehow transmuted into the relief sought in any of the lien actions.[209]

(10) Demonstrative evidence and evidentiary aids

Evidentiary rules for the protection of juries are not necessary for the protection of the lien court. In a lien court, demonstrative evidence and evidentiary aids are necessary to the adjudicative process. Charts, graphs, sections of walls, roofs, floors and ceilings are all part of a normal lien trial. Usually no disputes arise about the evidentiary value of such evidence and aids. Thus, the authorities on the point should be read with caution in a lien action.[210] The master on a reference, for example, not only has "all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading . . ."[211], but in doing so has the additional jurisdiction to "take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action",[212] with the result that the master is far more receptive to demonstrative evidence and evidentiary aids than would be a court in a non-lien action. Indeed the court encourages their use.[213]

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209 *Bruce-Grey Roman Catholic Separate School Board v. Carosi Construction Ltd.*, 1998 CarswellOnt 1586, 39 C.L.R. (2d) 75 (Gen. Div.).

210 *Supra* note 599, at pages 284–286.

211 *Construction Act*, R.S.O. 1990, c. C.30, **s. 58(4)**.

212 *Construction Act*, R.S.O. 1990, c. C.30, **s. 51(b)**.

213 Remember that the Master on a lien reference is a "referee" under the *Rules of Civil Procedure*, and that the referee has jurisdiction on a motion for directions following the referee's appointment, to give "special directions" concern-

Counsel in a lien proceeding should make full use of demonstrative evidence (e.g., blow-ups of plans or documents, sections of pipe, fasteners, samples of materials, sections out of walls or floors etc.) and evidentiary aids (e.g., flow charts, organizational charts, animations, PowerPoint or other proprietary timelines) if it assists the court in doing its job.

Nevertheless, it is possible to damage your own credibility and your client's case by misusing such tools. The lawyer who misrepresents the evidence, even unintentionally, in preparing such evidence will likely lose the respect of the court and leave his or her witness open to devastating cross-examination. To avoid any issue, it is always better that all demonstrative evidence or evidentiary aids be fully disclosed to the other side and provisionally agreed to at one of the final trial management pre-trials.

If there are large physical objects, it is important to make arrangements with the court office before bringing them into court, as storage and retrieval can be an issue.

(11) Reading in discovery transcript

This is a necessary component of most lien trials. The provisions of **Rule 31.11** apply in a lien trial. At a lien trial, a party may read into evidence as part of his or her own case against an adverse party any part of the evidence given on the examination for discovery of an adverse party, if the evidence is otherwise admissible. The concept of adversity in interest can become complex in a lien action in which shares of holdback, for example, may make the lien claimants adverse in interest to each other.

As in any trial, the transcript of a witness's discovery can be used for the purpose of impeaching the testimony of the deponent as a witness under **Rule 31.12**.

As a practical matter, if you intend to read in portions of a transcript of an examination for discovery, prepare a small brief containing those extracts, and hand these up to the court during your opening

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ing what evidence is to be received and what documents are to be proved (**Rule 55.02(3)**). Many of these issues concerning demonstrative evidence and evidentiary aids, in the case of a reference, can and should be dealt with on a pre-trial motion for directions under this Rule.

(or at the beginning of the trial), so that the court can follow along as you read. Some care has to be taken here to create a proper record in the event of an appeal. *A compendium of excerpts filed for the convenience of the court does not become part of the evidentiary record at trial, or on appeal, unless and until it is actually read into the record at the trial in accordance with the rule*. If the extracts are many or lengthy, and the intent is not to read these into the record out loud, it may be possible to have the judge or master place a statement on the record, with the consent of counsel, to the effect that "Compendium references Tabs 1 through 14 in the plaintiff's brief of transcript references were read by this court, with the consent of counsel, and form part of the case in-chief of the plaintiff in this action, as if they had been read into the record aloud".

It is good form, although not required, to put a page in the front of each extract identifying the date, name of the witness, page and question reference, and summarizing for the court the point of the extract. This can be done very summarily, such as "Smith discovery, March 5, 2003; Contract dated 02/III/01 affirmed", or "Jones discovery, April 19, 2003; Plaintiff's invoices 32, 33, 34 received", or something of this kind.

(12) Taking a view

The right of a judge or referee to inspect any property concerning which question arises in the action, or the place where the cause of action arises, in the presence of the parties or their counsel is provided for both in the rules relating to trials generally[214] and in the procedures in the rules applicable to references.[215] None of this is inconsistent with the *Construction Act*, within the meaning of s. 50(2). Views are usually taken only on consent of all parties and, to the writer's knowledge at least, rarely if ever taken in the face of a reasoned objection, although there would seem to be no reason at all that a lien court could not order and take a view over an objection of counsel, even on the referee's own motion.

When, how and why do you "take a view"? First, to "take a view"

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214 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 52.05**.

215 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 55.02(3)**; **O. Reg. 302/18, s. 13;** *Construction Act*, R.S.O. 1990, c. C.30, **s. 50(2)**.

is not always necessary or even helpful. If the case is simply an issue of last work, or an issue of delivery of goods or materials, a view is not likely to help. On the other hand, if the case is about interferences in mechanical work, or access to the site, or even deficiencies in some narrow cases, a view can be productive. Second, it is procedurally complex to arrange for and take a proper view in accordance with the rules, and a good deal of advance thought and preparation is necessary. Third, it is very difficult to create an adequate record with respect to a view, so as to be able to deal with it in argument and get it right.

As to the first point, the view itself is not "evidence". It is merely an evidentiary aid, designed to help the court understand the testimony of witnesses it has heard or is about to hear.

As to the second point, logistics can indeed become an almost insurmountable problem. When you take a view, it is part of the trial and subject to all the formalities and protocols of an attendance in court. It is not a social outing. There is no banter or conversation which could result in a mistrial. The information that passes to the trier of fact must be strictly controlled and the protocols for this should all be drafted and agreed by counsel and the court in advance. The court will require plenty of advance notice, transportation separate from the parties, and security in place at all times. Safety equipment is a must. This means hard hats and steel-toed safety shoes not only for the judge or referee, but also for any court officers that attend with the judge. Plenty of co-ordination with the site may be necessary to make sure that the subject of the view is not under construction, or covered up, and so as to obtain, well in advance, the necessary security clearances. There can be serious insurance issues. It may be necessary to have the client take out a separate rider for the court visit. In one case, the court was taken through an operating plant on issues involving the welds of thin walled stainless steel piping, carrying glacial pure sulphuric acid. The view itself passed without incident, but hours after the entourage left the plant, a leak of poisonous gas occurred that would have hurt or maybe even killed those that were present on the "view". Safety and insurance issues should be foremost on the agenda. Finally, someone has to guide the "view". This person must be "issue neutral" so that no argument is made. In fact it is best if this person not be on either side's witness list. Ideally the route of the "view" will have been pre-cleared and a

written narrative provided for each stop along the route.

As to the third point, the court will expect counsel to agree on a statement to be read into the record at the trial to describe the nature, the purpose and the evidentiary value, if any, of the view. It is unlikely that the court will risk taking a view if such a statement has not been agreed to in advance.

Having said all of this, however, it must be said that a "view" can be important in shortening the trial and allowing the court to sort out the evidence of witnesses. If witnesses are going to give protracted evidence based on two-dimensional plans and books of specifications, how much less boring would it be to have actually seen and walked through the finished product?

(13) Closing and arguing a lien case

The trial judge or master will decide whether to hear closing submissions immediately at the end of the evidentiary hearing or at some later date convenient to the court. In smaller cases, counsel should be prepared to argue immediately. The closing and argument of a lien case is indistinguishable from the closing and argument of any other civil proceeding. Usually one counsel will carry the principal argument of common issues on behalf of all plaintiffs, if they are of the same class or on behalf of each class at least. Individual plaintiffs may be required to argue some point unique to their case, a sheltering point for example, but the bulk of the argument can and usually is handled by one volunteer or court appointed plaintiffs' counsel.

Each defendant will argue in turn either after all of the plaintiffs have argued, unless the court directs otherwise. There are many excellent sources for "how to" argue civil cases,[216] from which some of the following is drawn:

1. Start with first principles: Your argument should help the court find a safe, fair, comprehensive path through the evidence and law to the goal you seek. Extreme positions are almost never successful.

2. Argue from a compendium: Prepare a compendium of highlighted extracts from the evidentiary record, in the same order as you intend to come to them in argument. This compendium

216 *Supra* note 157, at pages 361–409.

should be filed with the consent of the parties, at the beginning of the argument phase of the trial, and should be referred to by tab and page number consistently throughout the argument.

This compendium is a final distillation of the mass of material before the court, into a single, useful volume. It contains only that which will be specifically referred to in argument; it is unlikely to contain the whole of any document or exhibit, just that to which counsel will actually refer in argument. The best description of the contents of a compendium is a collection of the pages that end up tabbed with "Post-It" notes at the end of a trial. The compendium should be tabbed from "1", document by document, sequentially to the end. It may contain portions of exhibits, portions of transcript, if daily transcripts have been ordered, as well as photographs, plans and the like. The court should be able to begin at Tab 1 and simply follow the argument by flipping through the compendium sequentially to the end. There is nothing wrong with including a document twice at different tabs, if it is returned to in argument, but unnecessary repetition should be avoided. Use common sense.

It is imperative that the exhibit number of the exhibit from which the compendium extract was drawn be written, typed, or printed on the front of each extract in the compendium, so that the court, if it is inclined, can turn to the actual exhibit for clarification. The court is likely to rely on this compendium in preparing reasons.

3. File a joint law brief: Co-operation of counsel is key. This brief should contain *all* authorities necessary for *all* counsel to make *all* submissions during argument. All cases should be highlighted. All references to case law and authority in any memoranda of argument that are to be filed should be referenced by tab number in this joint law brief.

4. Follow your opening if possible: To prepare your case, you probably began by drafting your argument, and then by identifying the witnesses, evidence and aids you would need to make that argument. This became the backbone of your opening statement. An argument, then, revisits the promises that were made to the court during your opening statement, and follows the same order as the opening, and shows that the promises were all kept and that the result in your favour is inevitable.

5. Be precise with the facts: This hardly bears stating, but in the full flight of oratory it is not unknown for counsel to make statements of facts as they wished they were, not as they were proven on the record at trial. You may think you have proven an element of your case, only to be brought up short in argument, either by your opponent or the court itself, pointing out that no such proof was made. If your point is not in evidence by the time you argue your case, it is too late; it does not exist for any purpose. You can argue for conclusions to be drawn from proven facts (deduction) but you cannot argue for facts to be proven by conclusions based on logic (induction).

6. Drop rhetoric: However much you might like it to be, your lien action is not the Scopes trial and you are not William Jennings Bryan. The argument should be a logical, methodical exposition of the fundamental truths of the case, based on a careful and fair minded review of the evidence, all of which leads inexorably to your desired legal outcome. Easy to say. Hard to do. Try writing out your argument long hand (you will get tired and say less), then go back and black out all intensifiers and adjectives. Type a clean copy out and use that.

7. Avoid overstatement: It is human nature to see things as you want them to be, not necessarily as they are. Try not to look at your case through rose-colored glasses. Examine the evidentiary foundation for your case as objectively and as critically as you are able. Do not overstate the strengths of your case, or underestimate the weaknesses of your case.

Beyond these basics, there is no "one size fits all" advice for the new lien lawyer. It is a matter of trial and error, and, even then, as any experienced lien lawyer (or civil trial counsel for that matter) will tell you, you will win cases you should have lost and lose cases you should have won.[217]

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217 One of the most helpful and charming discussions of what it feels like to be a trial counsel, and how to deal with the occasional ups and many downs of trial advocacy can be found in the remarks of Binnie J. in "In Praise of Oral Advocacy" (2003), 21:4 The Advocates' Society Journal 3 at 17: "Good advice to advocates: Don't brood. Get on with it! You can't carry the burden of your present case load plus the accumulated weight of all your previous courtroom disasters. Remember that we all experience stomach-churning despair. It is the glue

6.4.6 The Report

Few lien actions reach trial. After all of the work of vetting committees, settlement meetings, pre-trial conferences, trial management pre-trials and the like, almost all lien actions settle. Still, some cases do get tried and counsel will be required to prepare a lien judgment or report.

The *Act* provides that the results of the trial shall be embodied in a judgment in the prescribed form, where the trial is conducted by a judge, or in a report in the prescribed form, where the trial is conducted on a reference to a master or person agreed upon by the parties. The prescribed forms of judgment or report can be varied in order to meet the circumstances of the case, so as to afford to any party to the action any right or remedy in the judgment or report to which the party is entitled.[218] This may broaden the jurisdiction of the master to include injunctive relief, prohibitive or mandatory, as required.

The judgment or report may direct any party found liable to make a payment, to make that payment forthwith and execution may be issued immediately in the case of a judgment and after confirmation in the case of a report. The court can order that premises be sold, and direct that the sale take place at any time after the judgment or confirmation of the Report, allowing a reasonable time for advertisement of the sale. The court can also allow any person with a perfected lien who was not served with a notice of trial or whose action was stayed under the *Arbitration Act* to be let in to prove their claim at any time before the amount realized in the action for the satisfaction of the lien (i.e., cash, bond, letter of credit, or proceeds of sale) has been distributed, and the judgment or report shall be amended to include the

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that binds members of the bar together. My personal recipe was to allow myself one night (or maybe two in the case of a real catastrophe) to curse the darkness, to lie on the floor listing well-founded grievances against both the judges and my victorious opponent, perhaps seeking diversion in getting myself thrashed in a game or two of squash (part of the McCarty Tétrault ethos), then to savour a sauna or a double Scotch while ruminating on all the points I had intended to make and forgot. I would fondly repeat to myself Brian Kelsey's dictum: 'Relax, sometimes you get the benefit of their stupidity'."

218 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 62(1)** and **(2)**.

claim of such person.[219]

There are four prescribed forms, two forms of Judgment, where the liens attach to the premises (**Form 24**) and where they do not (**Form 25**), and two forms of Report, where the liens attach to the premises (**Form 26**) and where they do not (**Form 27**).

These forms are expressed in the regulation to be mandatory, although the statute specifically provides that the prescribed form of judgment or report may be varied by the court in order to meet the circumstances of the case, so as to afford to any party to the action any right or remedy in the judgment or report to which the party is entitled.[220]

One matter that is often forgotten when matters settle prior to or during the hearing is that references *must* be concluded by a report or order of the court. If an action has settled, the master will expect a written request for pre-trial directions and will make an order for directions reciting the settlement and dismissing the action.

Similarly, if at the end of a trial the master finds for the plaintiff, the master may ask defence counsel if they have instructions to bring a motion to oppose confirmation of the report confirming that outcome. If defendants' counsel are in a position to advise that they will not oppose confirmation of the Report, the master will issue an order on consent dismissing the action and clearing title upon proof that the amount of the judgment has been paid. If there is any possibility of a motion to oppose confirmation of the report, it is necessary that the procedures in this section be followed and that a Report be issued and served.

The forms may seem like little help when you are faced with the task of drafting a judgment or report in a lien matter of any complexity. The forms have to be adapted and tailored to the circumstances. There is no general precept that can be given. That being said, they do tend to have the following in common:

1. If there has been an order of consolidation, and if it has been properly done, it will have stipulated a title of proceeding for use in the consolidated lien action including the judgment or report. That is the title of proceeding to use;

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219 *Construction Act*, R.S.O. 1990, c. C.30, **ss. 62(4), (5)** and **(6)**.

220 *Construction Act*, R.S.O. 1990, c. C.30, **s. 62(2)**.

2. Be very careful to identify who attended trial and who did not. If a party was not represented at trial, but was properly served with notice of trial, recite both the fact that they were properly served with notice of trial and that an order was made that the trial proceed in their absence. If an order was made allowing a party to be self-represented, or represented by agent, this should be recorded in the preamble to the judgment or report;

3. Because of the *in rem* aspect of the lien action, where lien rights or priorities are found they are "Found and Declared", not "Ordered and Adjudged"; because of the *in personam* aspect of the lien action, the personal liability of any party is "Ordered and Adjudged";

4. The prescribed forms are an excellent inventory of provisions, including the necessity of dealing conclusively with all money or other forms of security in court, particularly if there is a pooling of security with the proceeds of sale of the premises;

5. Pay close attention to the schedules to the prescribed forms. They are much more difficult to get right than the body of the judgment or report itself. Each one is eventually signed separately by the judge, master or referee. There can be as many as six of them in the event that the liens attach to the land, two if the liens do not:

Schedule A sets out the claims in debt,

Schedule B describes the premises,

Schedule C sets out the encumbrancers other than lien claimants,

Schedule D sets out the judgment creditors,

Schedule E sets out the ratable distribution of the holdback amount, as found by the court or master, and

Schedule F sets out the list of proven liens and registration particulars of each lien.

6. Once the judgment is issued and entered, it is a judgment like any other and is immediately enforceable by execution in accor-

dance with the *Rules*.[221] The judgment debtor may be examined in aid of execution. The land can be sold, if the judgment so provides, by sale in the master's office, according to the rules and procedures in that regard, discussed below. In the case of a report, none of this can take place until the report is confirmed;

7. Judgments of reference do not require the master to report back to the court, therefore, under **Rule 54.09** the report or an interim report is confirmed immediately on the filing of the consent of every party who appeared on the reference (not who was served with notice of trial); or, on the expiration of 15 days after a copy of the *report* (note: "report", not "notice of trial", a common mistake in the master's office), with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time. **Section 62(3)** of the Act was repealed, and therefore the only rules that apply to confirmation are **Rules 54.07** and **54.09**;

8. In the case of a judgment only, and not a report, **Rule 59** is generally not inconsistent with the Act and, thus, it applies with respect to the procedures for signing, entering, and setting aside judgments;

9. Sale of the land occurs in the masters' office. The statute provides and the judgment should reflect the fact that the lawyer having carriage is entitled to add to its client's claim the fees and disbursements associated with the eventual sale of the land;[222]

10. The referee will also refrain from issuing a report if there are issues being tried in another forum, such as in an arbitration, which affect, or may affect the outcome of the reference, or at least the distribution of funds as a result of the reference.[223]

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221 *Construction Act*, R.S.O. 1990, c. C.30, **s. 62(4)**: the execution is immediately possible in the case of a judgment, after confirmation in the case of a report.

222 *Construction Act*, R.S.O. 1990, c. C.30, **s. 65(3)**.

223 See, for example, *Oram v. Toronto Transit Commission*, 1997 CarswellOnt 4414, 36 C.L.R. (2d) 190 (Gen. Div.).

(1) Judgment or report in rem and in personam

There has been debate as to whether and to what extent the *in personam* action in debt survives the dismissal of the *in rem* action for a declaration of lien. The statute clearly envisioned that not all liens would be proved at trial and that the trier of fact had to have some residual jurisdiction granted under the statute to see the matter through and grant judgment in debt at least. This provision is found in **s. 63** of the *Act*, which provides that the court may award "any lien claimant"[224] a personal judgment, whether the lien claimant proves a lien or not, on any ground relating to the claim that is disclosed by the evidence against any party to the action for any amount that may be due to the claimant and that the claimant may have recovered in a proceeding against that party.

The problem usually arises where it becomes patent at some relatively late stage in the proceeding that the underlying lien is out of time or otherwise expired. One group of cases said that the lien action could not continue,[225] while the other, more modern group of cases left it to be a matter of discretion, on a case by case basis.[226] It is now authoritatively decided by the Court of Appeal that the latter theory is correct.[227] The court has discretion to consider the stage of the

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224 For an interesting discussion of the internal inconsistency between the words confining the section to "any lien claimant" on one hand, but providing that personal judgment may be entered whether or not that lien claimant proves a lien, see *Irving Oil Ltd. v. M.D.G. Holdings (Bay) Ltd.*, 1985 CarswellOnt 956, 20 C.L.R. 26 (H.C.)

225 See the excellent discussion of this development, and a statement of the current state of the law in *EMCO Supply v. Anduhyaun Inc.*, 1998 CarswellOnt 80, 36 C.L.R. (2d) 91 (Gen. Div.). See also examples of the restrictive approach in *Tilar Roofing Ltd. v. John Boddy Developments Ltd.* (1986), 20 C.L.R. 161 (Ont. Master), and *Benjamin Schultz & Associates Ltd. v. Samet*, 1991 CarswellOnt 792, 4 O.R. (3d) 771, 46 C.L.R. 317, 83 D.L.R. (4th) 574, *(*sub nom. *Schultz (Benjamin) & Associates Ltd. v. Samet)* 52 O.A.C. 180 (Div. Ct.).

226 *612354 Ontario Ltd. v. Tonecraft Corp.*, 1991 CarswellOnt 799, 5 O.R. (3d) 764, 47 C.L.R. 229 (Gen. Div.), *Eurocor Ltd. v. Vernich*, 1992 CarswellOnt 848, 9 O.R. (3d) 631, 2 C.L.R. (2d) 208 (Gen. Div.); additional reasons 1995 CarswellOnt 4534 (Gen. Div.), and *Golden City Ceramic & Tile Co. v. Iona Corp.*, 1993 CarswellOnt 826, 12 C.L.R. (2d) 1, 106 D.L.R. (4th) 532 (Div. Ct.).

227 *Teepee Excavation & Grading Ltd. v. Niran Construction Ltd.*, 2000 CarswellOnt 2335, 49 O.R. (3d) 612 (C.A.).

action and avoid a multiplicity of proceedings.

As a matter of substantive law there is an interesting distinguishing characteristic of the Ontario legislation. The Ontario legislation, almost alone among the lien acts of the other provinces, makes no express provision for the ownership or sale of building materials that may be on site but not yet incorporated into the premises. This is attractive from a common sense point of view, as the lien claimants should have proved liens only to the extent of the value of work, services and materials actually incorporated into or affixed in a legal sense to the real property. If there are materials that are not incorporated, then property in them may not have passed to the defendant whose interest is being sold. In practice, this subtlety can be avoided in some cases by the appointment of an interim receiver/manager of the premises under **s. 68**, with power to sell, and this may be one of the cases in which a variation in the statutory form of judgment or report is necessary under **s. 62(2)**.

(2) Reports and interim reports

The body of a Report usually follows the following format:[228]

> 1. Paragraph 1 of the report "Finds and Declares" the persons who are entitled to a construction lien upon the interest of the owner, by name, in the premises, by legal description. This paragraph requires that the registration numbers of the lien claims be accurately set out and that the particulars of the certificates of action be accurately set out, along with the amount of the debt, and the interest, if any, and costs, and a total, and the name of the primary debtor. If the lien claimants are subcontractors, then the primary debtor is the contractor. If the lien claimant is the general contractor, then the primary debtor is the owner. If some of the lien claimants are sub-subs, and some are subcontractors, then the primary debtor is the person with whom such lien claimant actually had a contract. Where the lien has been "bonded off" by paying money into court or posting security, this paragraph must

228 The following discussion of the form of a master's report is taken, with the permission of the author, from Master Sandler "Anatomy of a construction lien reference under the *Construction Lien Act*", May 1, 2001, with amendments suggested to that text by Master Sandler in June and July of 2003.

be amended to provide that the lien claimant(s) is entitled to a "charge on the security" rather than a "lien on the premises". Where security is paid in, see **s. 44(6)**. Under this subsection, where security is paid in, the lien ceases to attach to the premises and becomes a charge upon the security posted. If only one or two lien claimants are involved, the master will actually avoid the use of the formal schedules provided for by the *Act* as they tend to unnecessarily complicate matters.

2. Paragraph 2, **Form 26**, deals with the entitlement of a mortgagee or other encumbrancer to some charge or encumbrance other than a lien, and deals with both prior and subsequent mortgages, and their priority rights. This paragraph is rarely applicable.

3. Paragraph 3, **Form 26**, deals with the personal liability of the owner to the lien claimants for holdbacks that the owner was required to retain. **Section 23** makes an owner personally liable for these holdbacks to those lien claimants who have valid liens against the owner's interest in the premises. This paragraph provides for writs of execution to be issued forthwith after confirmation of the report, but the master rarely, if ever, allows writs of execution to be issued without further leave if there is security in court for the liens and for the owner's holdback liability.

4. Paragraph 4, **Form 26**, is to be used where there is no security in court, and the liens are still registered against the land. This paragraph provides that upon the owner paying into court, to the credit of the action, the amount of his holdback liability as found by the court, on or before a certain date (usually 30 days following confirmation of the report) then the liens that have been found to be proper, are to be discharged, and the registration of the liens and the certificates of action are to be vacated, and the money paid into court is then to be paid out to the lien claimants so entitled.

5. Paragraphs 5 and 6, **Form 26**, deal with what happens if a defendant owner makes default in payment of the money, namely, that the premises would then be sold under the supervision of the master to realize the money to pay the holdback or other liability of the owner, so found and how such sale proceeds are to be distributed. If there is a letter of credit or bond in court, then the master will provide that if the owner makes default in

payment of the amount found due, then any party can apply back to the court for an order directing the accountant to realize upon the security. If actual money is in court as security, then the master will simply order that it be paid out to the persons so entitled.

6. Paragraph 7, **Form 26**, deals with how the lien claimants are to obtain payment of the difference between the amount they receive from the owner for holdback, and the amount that is owing to them on their contract claim, and how the general contractor is to pay the difference to those lien claimants entitled to payment. This paragraph has no application where the dispute is just between a general contractor and an owner, or a supplier dealing directly with the owner, since the owner in such a circumstance would be liable for the entire debt.

7. Paragraph 8, **Form 26**, deals with those lien claimants who have not proved any claim under the *Act*, and provides for the registration of their liens and certificates of action to be vacated. This paragraph is important to clean up an owner's title, where some lien claimants do not show up for trial or show up and fail to prove valid claims.

8. Paragraph 9, **Form 26**, deals with a situation where a person has not proved a claim for lien, but is entitled to personal judgment against a particular debtor/defendant, and provides for the recovery of specific amounts for claim, interest, and costs, against the particular debtor involved, all as provided for in **s. 63** of the *Act*.

9. Paragraph 10, **Form 26**, deals with issues of priority as between mortgagees and lien claimants, and how much the mortgagee is to pay to the lien claimants under **s. 78** of the *Act*. This paragraph is rarely applicable, because priority issues between lien claimants and mortgagees rarely go to trial. There are reported cases, but, in practice, this is rarely a live issue.

10. The actual mechanics of preparing an official report of the master are dealt with in **Rules 55.02(19), (20)** and **(21)**. The referee is to fix a date to settle the report, and the party having carriage of the reference is to serve a notice of the date on all parties

who appeared on the reference[229] (as opposed to having been served with notice of trial), unless the referee dispenses with notice. Notwithstanding the rule, the master at Toronto in most cases reviews the form of the report with counsel in detail at the conclusion of the trial, when all counsel are present, so as to avoid having yet another attendance to settle the form of the report. If the master reserves judgment, then the form of the report will be dealt with explicitly in the master's formal reasons when they are released. The master will require that the report be approved as to form and content by all counsel before it is signed.

11. A formal date for the settling of the master's report, as contemplated by **Rule 55.02(19)**, will only be necessary where some party disputes the form of the report for some reason that was not raised and dealt with at the end of the evidentiary portion of the trial.

12. It is the party having carriage that prepares the first physical draft of the report (**Rule 55.02(20)**). From there it is served and confirmed.

13. Once the report is "issued" by signature of the master, keep the original signed copy in your file. Under **Rule 54.09**, photocopy the original report and serve the photocopy on all persons who attended the trial. Then attach the affidavit of service to another copy of the original signed report (not the original) and file this affidavit and attached photocopied Report on the 10th floor, masters offices. From the moment of filing, the 15-day period for confirmation starts running under **Rule 54.09**; your alternative, if there is some compelling need to abridge the 15-day period, is to bring a motion to a judge for immediate confirmation (**Rule 54.09(4)**).

14. Only then, once the 15-day period has passed without service

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229 Purely as an aid to counsel in dealing with court administration, it will be necessary for court administration to have some idea as to who had to be served with the draft report. It is customary in Toronto for the master to include, usually as the last paragraph in his or her reasons, that "I further direct that the persons who appeared on this reference were ....., and those are the only persons upon whom service of the report on this reference need be made within the meaning of rule 54.09".

of a motion to oppose confirmation of the master's issued report (or a judge has immediately confirmed the report by order on motion with notice under **Rule 54.09(4)**), does the original signed report get entered. If you have mistakenly served the original, signed report in order to start the period for confirmation, you will be unable to have it entered and will have to start the process all over again. It is a mistake too often made.

15. The motion to oppose confirmation of a master's report is dealt with in section 16.2, below.

16. There is a much simpler way to sort matters out after a lien trial than doing a formal report. Just pay the amounts found owing by the master in his or her reasons for decision in exchange for a release. Unless there are complexities, such as the sale of land, or difficult priority issues, the idea of simply doing what you are directed to do in the master's reasons makes a good deal of sense.

Occasionally, the need will arise for a final and binding interim ruling on certain issues. Interim reports are also appropriate where a case is bifurcated and some issues are fully decided before others. This bifurcation may have occurred for the very reason that you want the appeals from that ruling or issue to be exhausted before proceeding with the balance of the case. Can this be done by a master, or other referee, on a reference? The answer is: "yes", even though there is no express provision for this either in the rules or in the *Act*.[230] The issuance of an interim report is a matter of pure discretion and is usually only sought or granted upon the consent of all parties, such as, for example, to make an interim distribution to some class of lien claimants whom all parties agree are entitled to the money.

(3) Amending, setting aside or varying the report

Rule 59.06 applies to reports, whether confirmed or uncon-

230 See *Oram v. Toronto Transit Commission*, 1997 CarswellOnt 4414, 36 C.L.R. (2d) 190 (Gen. Div.). For an example where an interim report was issued and was later relied upon in an unsuccessful attempt to oppose confirmation of a master's report, see *York Marble, Tile & Terrazzo Ltd. v. Exim Group of Canada Inc.*, 1998 CarswellOnt 3730, [1998] O.J. No. 3828 (Gen. Div.).

firmed.[231] If there is an error arising from an accidental slip or omission, or a report requires amendment on a particular on which the court did not adjudicate, the report can be amended by a motion in the proceedings back to the presiding master who heard the trial. Further, if a party seeks, under **Rule 59.06(2)**, to have a report set aside or varied on the grounds of fraud, or of facts arising or discovered after it was made, or to suspend the operation of the report, or to carry a report into operation, or to obtain other relief than originally ordered, this also can be done by motion back to the master that conducted the reference. If a party has failed to attend at the reference, the master has jurisdiction to set aside or vary the report, on such terms as are just, under **Rule 52.01(3)**.

(4) Pre- and post-judgment interest

Immediately following the trial, or the release of reasons, issues of prejudgment and post-judgment interest and costs need to be addressed. Some courts will require written submissions; others will require a brief oral hearing, which is the preference of the master at Toronto.

The principles guiding a lien court in the award of interest are no different than they are in a civil action. The complexity arises when there is security in court, such as a bond. Technically, the bond answers only for the lien and not for interest,[232] as interest is expressly non-lienable. If there is cash in court, the court will not allow payment out until all issues of interest and costs are resolved, and the source and application of those funds will be a matter for argument and disposition by the court.

(5) Costs

Section 86 governs costs in construction lien actions. It provides as follows:
(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

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231 See Master Sandler "Anatomy of a construction lien reference under the *Construction Lien Act*", May 1, 2001, from which this is quoted, and see *Ontario Electrical Construction v. Stern*, 1997 CarswellOnt 703, 31 C.L.R. (2d) 150 (Gen. Div.).

232 The liability of a contract surety on a lien bond is a matter of contract, and the bonds answer only for the lienable portion of a judgment or reference.

order as to costs may be made against,

(a) a party to the action or motion; or

(b) a person who represented a party to the action, application or motion, where the person,

(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 a 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 substantial indemnity 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.

(2) Where the least expensive course is not taken by a party, the costs allowed to the party shall not exceed what would have been incurred had the least expensive course been taken.

As a general principle, costs in a proceeding under the *Construction Act*, as in an ordinary action, are in the absolute discretion of the court. In fixing or assessing costs the court must consider the facts and circumstances of the particular case. It is not a mechanical exercise. The court must be fair and reasonable in exercising its discretion to award costs.[233] The general rule in lien actions, as in other civil actions, is that costs follow the event and will be awarded on a partial indemnity basis.[234]

While **Rule 57.01(1)** describes relevant factors for the court to consider, to the extent that any of the relevant factors fetter the discretion of the court under **s. 86**, the *Act* takes priority because of **s. 50(2)**. Thus, for example, the mandatory provisions of **Rule 49.10** are not binding on a lien court, as that would be a limitation on the court's discretion on costs that is not provided for in **s. 86**.[235] However, there is nothing that prevents the court from taking into consideration whether offers to settle were more or less favourable than the outcome and what the effect **Rule 49.10** would have been, when exercis-

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233 Cited from *Thyssenkrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.*, 2013 ONSC 2452, 2013 CarswellOnt 4792 (S.C.J.).

234 *Wellington Plumbing & Heating Ltd. v. Villa Nicolini Inc.*, 2012 ONSC 6616, 2012 CarswellOnt 15361 (S.C.J.).

235 *Luxterior Design Corp. v. Gelfand*, 2014 ONSC 990, 2014 CarswellOnt 18880 (S.C.J.).

ing the court's discretion on costs.[236] Master Albert has compiled a non-exhaustive list of relevant factors to guide a court:

1. whether the conduct of any party shortened or unnecessarily lengthened the duration of the proceeding;
2. indemnification;
3. reasonable expectation of the payor;
4. the amount claimed and recovered;
5. the complexity of the proceeding;
6. the importance of the issues;
7. whether any step taken was unnecessary, improper, vexatious or taken by mistake or through negligence or excessive caution;[237]
8. R. 49 offers to settle; and
9. proportionality.[238]

In the ordinary course, costs are calculated on a partial indemnity basis. Elevated costs awards, either on a substantial or a full indemnity basis, may be awarded in the following scenarios:

1. where there has been sanction-worthy conduct by the losing party, including abuse of process and the making of serious, reckless and unsubstantiated allegations;
2. where an offer to settle was refused and the successful party achieved a better result than offered; or
3. where a party thwarts the case management goals of reaching a timely, fair and cost-effective determination of the case on its merits.[239]

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236 *Ibid.*

237 See, for example, *2283624 Ontario Limited v. Performance Painting & Floor Coating Ltd.*, 2017 CarswellOnt 11229 (S.C.J.), where the court held that strong, persuasive evidence that a lien was registered for purely strategic reasons was exactly the type of case contemplated for substantial indemnity costs by **s. 86**.

238 *Ibid.*

239 Cited from *4361814 Canada Inc. v. Dalcor Inc.*, 2015 ONSC 2486, 2015 CarswellOnt 5431 (S.C.J.).

CHAPTER 7

APPEALS AND OPPOSING CONFIRMATION OF THE MASTER'S REPORT

7.0

Part X of the *Act* governs appeals, and this statutory code displaces the provisions of the *Courts of Justice Act*, wherever there may be an inconsistency.[1]

7.1 Judgments

The word "judgments" has been held to apply to any decision by a judge or master by which the rights of a party to the lien proceedings are finally disposed of. The substance of the disposition sought to be appealed is what governs.[2] Thus, a final order constitutes a judgment under the *Act*, notwithstanding the fact that it is referred to as an order, and notwithstanding the fact that it was made without a trial hav-

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1 *Teperman & Sons Inc. v. Alros Products Ltd.*, 1994 CarswellOnt 957, 18 C.L.R. (2d) 228 (Gen. Div.).

2 *Durall Construction Ltd. v. W.A. McDougall Ltd.*, 1979 CarswellOnt 895, 25 O.R. (2d) 371 (C.A.); *Bird Construction Co. v. C.S. Yachts Ltd.*, 1990 CarswellOnt 650, 37 C.L.R. 225 (C.A.); *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, 2001 CarswellOnt 1437, 54 O.R. (3d) 76 (C.A.).

ing taken place.[3]

A master's report not yet confirmed is not a "judgment" within the meaning of **s. 71(1)** of the *Act* and an appeal from such a report does not lie to the Divisional Court.[4] An unconfirmed report has no effect until confirmed,[5] and does not finally determine the rights of the parties. Once a report of a master is confirmed, however, it is a final judgment from which appeals may be taken.[6]

7.2 Final v. interlocutory orders

No appeal lies from an interlocutory order except with leave of the court.[7] This is a departure from the old *Act*, which categorically prohibited such appeals. No appeal lies from a judgment or order on a motion to oppose confirmation of a report if the amount in issue is $10,000 or less.[8] There are no strict guidelines as to what constitutes a final as opposed to interlocutory order. In each case, the court analyzes exactly what it is that the decision achieves. If the result is final, even in the context of an otherwise interlocutory motion provided for by the *Act*, it is a final order and appealable to that extent.[9]

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3 *Bird Construction Co. v. C.S. Yachts Ltd.*, 1990 CarswellOnt 650, 37 C.L.R. 225 (C.A.).

4 *Gryphon Building Solutions Inc. v. Danforth Estates Management Inc.*, 2009 CarswellOnt 4324 (Div. Ct.); additional reasons 2009 CarswellOnt 4741 (Div. Ct.).

5 Rule 54.07(1).

6 *Baker v. Dumaresq*, 1934 CarswellOnt 134, [1934] S.C.R. 665.

7 *Construction Act*, R.S.O. 1990, c. C.30, **s. 71(3)**.

8 *Construction Act*, R.S.O. 1990, c. C.30, **s. 71(4)**.

9 As to the distinction between final and interlocutory orders in lien proceedings generally, see *V. Gibbons Contracting Ltd. v. Losani Homes (1998) Ltd.*, 2008 CarswellOnt 5787, [2008] O.J. No. 3841 (S.C.J.); additional reasons 2008 CarswellOnt 6091 (S.C.J.); *I.C.I. Construction Ltd. v. Altavista Properties Inc.*, 2008 CarswellOnt 613 (Div. Ct.); *John Bianchi Grading Ltd. v. Belrock Design Build Inc.*, 2005 CarswellOnt 3034, 44 C.L.R. (3d) 198 (S.C.J.); *McGowan Construction of Ravenna Ltd. v. Cedar Highland Ski Club*, 2004 CarswellOnt 5832, 194 O.A.C. 309 (Div. Ct.).

(a) Examples of Interlocutory Orders

- An order vacating a lien for full security;[10]
- An order denying a party leave to bring a motion for security for costs;[11]
- An order setting aside a default judgment under the Act;[12]
- An order refusing to hold that a lien had expired and refusing to order delivery of security posted;[13]
- An order flowing from a motion to appoint a trustee;[14] and
- A judgment of reference of an ordinary non-lien action to be heard with lien actions already referred to the master.[15]

(b) Examples of Final Orders

- An order reducing security required to vacate a lien from title pursuant to **s. 44(2)**;[16]
- An order cancelling security paid into court to vacate a lien;[17]
- An order validating a claim for lien where the wrong lands

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10 *Albern Mechanical Ltd. v. Newcon Construction Ltd.*, 1970 CarswellOnt 723, [1971] 1 O.R. 350 (H.C.).

11 *I.C.I. Construction Ltd. v. Altavista Properties Inc.*, 2008 CarswellOnt 613 (Div. Ct.).

12 *McGowan Construction of Ravenna Ltd. v. Cedar Highland Ski Club*, 2004 CarswellOnt 5832, [2004] O.J. No. 5480 (Div. Ct.).

13 *Teperman & Sons Inc. v. Alros Products Ltd.*, 1994 CarswellOnt 957, 18 C.L.R. (2d) 228 (Gen. Div.).

14 *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*, 2003 CarswellOnt 210, 25 C.L.R. (3d) 279 (S.C.J.).

15 *UNIMAC v. Cobra Power Inc.* (June 26, 2015), Doc. COA File No. C59995 (Ont. C.A.).

16 *HMI Construction Inc. v. Index Energy Mills Road Corp.*, 2017 ONSC 4075, 2017 CarswellOnt 10314 (Div. Ct.).

17 *Interhaven Development Corp. v. Slovak Village Non-Profit Housing Inc.* (April 14, 1998), Doc. 873/97, [1998] O.J. No. 2378 (Div. Ct.).

are named;[18]

- An order setting a trial date;[19]
- An order denying a defendant's request for leave to amend its statement of defence and to add a counterclaim;[20]
- An order striking the defence and counterclaim;[21] and
- An order discharging a claim for lien and vacating a certificate of action.[22]

7.3 Divisional Court jurisdiction

Appeals from judgments and final orders under the *Act* (as opposed to motions to oppose confirmation of reports) are to the Divisional Court.[23]

Traditionally, appeals concerning lien claims under **Part III** have gone to the Divisional Court while appeals concerning trust claims under **Part II** have gone to the Court of Appeal. The reason appeals concerning trust claims have traditionally gone to the Court of Appeal may have been that they are often joined with non-statutory causes of actions, so that the Court of Appeal could have taken jurisdiction under **s. 6(2)** of the *Courts of Justice Act*, which provides the Court of Appeal with jurisdiction to hear and determine an appeal that lies to the Divisional Court "if an appeal in the same proceeding

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18 *Bravo Cement v. University of Toronto*, 1991 CarswellOnt 790, 46 C.L.R. 207 (Div. Ct.); additional reasons 1991 CarswellOnt 6595 (Div. Ct.).

19 *John Bianchi Grading Ltd. v. Belrock Design Build Inc.*, 2005 CarswellOnt 3034, 44 C.L.R. (3d) 198 (S.C.J.).

20 *Atlas Construction Inc. v. Brownstones Ltd.*, 1996 CarswellOnt 644, 46 C.P.C. (3d) 67 (Gen. Div.).

21 *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, 2009 CarswellOnt 3431, [2009] O.J. No. 2480 (Div. Ct.).

22 *Wood Lumber Co. (Ontario) Ltd. v. Eng*, 1999 CarswellOnt 4315, 50 C.L.R. (2d) 139 (C.A.).

23 *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, 2001 CarswellOnt 1437, 54 O.R. (3d) 76 (C.A.).

lies to and is taken to the Court of Appeal".[24]

However, where the judgment appealed concerns only claims under the *Construction Act*, it is now clear that both lien claims and trust claims are properly appealed to the Divisional Court.[25]

Although there is precedent for the full panel of the Divisional Court to hear an appeal from a final decision of a master in a construction lien matter,[26] the Divisional Court has recently held that any appeal of a master's final order should be heard by a single judge of the court.[27] The court held that this approach was consistent both with the practice of the Divisional Court regarding appeals from the master and with the objective of **s. 50(3)** to promote prompt resolution in construction lien matters. Where there are possible different appeal routes arising from the application of lien legislation and federal insolvency legislation, the issue is determined by answering the question "whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*".[28] Where it is, even in part, the appeal provisions of that statute are applicable and the appeal will be heard by the Court of Appeal. In *Dal Bianco v. Deem Management Services Limited*,[29] the parties sought directions from the Court of Appeal on where to appeal from a ruling that certain construction lien claimants had priority over a mortgagee in the

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24 See the discussion in *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, 2001 CarswellOnt 1437, 54 O.R. (3d) 76 (C.A.).

25 *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, 2001 CarswellOnt 1437, 54 O.R. (3d) 76 (C.A.).

26 *Benjamin Schultz & Associates Ltd. v. Samet*, 1991 CarswellOnt 792, 4 O.R. (3d) 771 (Div. Ct.); *Wood Lumber Co. (Ontario) Ltd. v. Eng*, 1999 CarswellOnt 2839, 45 O.R. (3d) 795 (Div. Ct.); *G.C. Rentals Ltd. v. Falco Steel Fabricators Inc.*, 2000 CarswellOnt 1040, [2000] O.J. No. 1055 (Div. Ct.); *Meo & Associates v. Gottenu Developments Ltd.*, 2000 CarswellOnt 737, [2000] O.J. No. 782 (Div. Ct.); *Furlan v. Structform International Ltd.*, 2006 CarswellOnt 4660, [2006] O.J. No. 2925 (Div. Ct.); *Select Acoustic Supply Inc. v. College of Physicians & Surgeons (Ontario)*, 2008 CarswellOnt 3284, [2008] O.J. No. 2163 (Div. Ct.).

27 *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, 2009 CarswellOnt 3431, [2009] O.J. No. 2480 (Div. Ct.).

28 *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585, 2020 CarswellOnt 13345.

29 2020 ONCA 585, 2020 CarswellOnt 13345.

sale proceeds of a debtor's property under s. 78 of the *Construction Act*. Under s. 193 of the *Bankruptcy and Insolvency Act*, the appeal route was to the Court of Appeal, whereas s. 71 of the *Construction Act* would have sent the matter to the Divisional Court. Since the order appealed from was granted at least partly in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*, the appeal route led to the Court of Appeal.

7.4 Timeliness of appeal

The appellant must file and serve a notice of appeal within 15 days of the date of the judgment or order, which time may be extended by the written consent of all parties or by a single judge of the Divisional Court where an appropriate case is made out for doing so. Note that the period for serving the notice of appeal is 15 days in a lien matter, and not the 30 days provided for in civil actions by **Rule 61.04(1)**. Once the notice of appeal is served and filed in accordance with **s. 71(2)**, the procedures for perfecting an appeal to the Divisional Court are the procedures set out in **Rule 61**.

Courts have been relatively lenient with regard to extending the time limit. In *Cornell Pump Co. v. York (Regional Municipality)*,[30] the court extended the time where it was satisfied that the moving party had a firm intention to appeal and that the potential settlement discussions were a reasonable explanation for the delay. In a case of plain inadvertence, the period may be extended in the absence of prejudice.[31] In *Deman Construction Corp. v. 1429036 Ontario Inc.*,[32] the Divisional Court dismissed an appeal which was initially brought to the wrong court (the Court of Appeal) 29 days after the judgment of the motions judge. On further appeal to the Court of Appeal, however, the appeal was allowed to proceed without a discussion of **s. 71(2)**, based on the fact that the appellant had initially taken

30 (June 27, 2003), Doc. 240/03, [2003] O.J. No. 3655 (Div. Ct.).

31 *Verly Construction Group Inc. v. Gregmen Construction Ltd.*, 1998 CarswellOnt 550, [1998] O.J. No. 2376 (Gen. Div.).

32 2004 CarswellOnt 4430, 41 C.L.R. (3d) 235 (Div. Ct.); varied 2005 CarswellOnt 4859 (C.A.); additional reasons 2008 CarswellOnt 2196 (C.A.).

some steps to oppose the judgment.[33] Where, however, absolutely no intention to appeal was indicated during the 15-day period, and where the land in question had been sold after the expiration of the time limit, the court refused to allow the appeal to proceed.[34]

7.5 Standard of review

On appeal, the decision of a master is entitled to the same level of deference with respect to findings of fact and the exercise of discretion as would be accorded to the decision of a judge. The standard of review of an order, whether final or interlocutory, is correctness with respect to questions of law. Where the master exercises discretion, the court on appeal must determine whether the correct principles were applied and whether the master misapprehended the evidence such that there is a palpable and overriding error.[35]

7.6 Motions to oppose confirmation of a master's report

If issues were decided on reference, the "appeal" is from a report or interim report of the master and is brought in the form of a motion to oppose confirmation of the master's report. While not strictly speaking an appeal, the motion to oppose confirmation of a master's report is in the nature of an appeal and should be dealt with substantially as an appeal from the report.[36]

Rule 54.09 provides as follows:

54.09 (1) Fifteen-Day Period to Oppose Confirmation — Where the or-

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33 2005 CarswellOnt 4859, [2005] O.J. No. 4214 (C.A.); additional reasons 2008 CarswellOnt 2196 (C.A.).

34 *Plaza Electric II Ltd. v. CMGC Management Inc.* (April 17, 1997), Doc. 172/97, 4235/95CLA, [1997] O.J. No. 2708 (Gen. Div.).

35 *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, 2009 CarswellOnt 3431, [2009] O.J. No. 2480 (Div. Ct.); *Zeitoun v. Economical Insurance Group*, 2008 CarswellOnt 2576, 91 O.R. (3d) 131 (Div. Ct.); additional reasons 2008 CarswellOnt 3734 (Div. Ct.); affirmed 2009 ONCA 415, 2009 CarswellOnt 2665.

36 *Solmon Rothbart Goodman v. Davidovits*, 1996 CarswellOnt 668, 46 C.P.C. (3d) 314 (Gen. Div.); *Jordan v. McKenzie*, 1987 CarswellOnt 573, 26 C.P.C. (2d) 193 (H.C.); affirmed 1989 CarswellOnt 453 (C.A.).

der directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,

(a) immediately on the filing of the consent of every party who appeared on the reference; or

(b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

(2) To Whom Motion to Oppose Confirmation Made — A motion to oppose confirmation of a report shall be made to a judge other than the one who conducted the reference.

(3) Notice of Motion to Oppose Confirmation — A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;

(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion.

(4) Motion for Immediate Confirmation — A party who seeks confirmation before the expiration of the fifteen-day period prescribed in subrule (1) may make a motion to a judge for confirmation.

(5) Disposition of Motion — A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

(1) Timeliness of motion

The motion to oppose confirmation of a master's report must be brought within the 15-day period for confirmation of the master's report. It is possible to move to a judge for an extension of time for the period of confirmation, if for some reason it is practically impossible to serve notice of motion to oppose confirmation within the statutory 15-day period. Unless a motion to oppose is served within that time, the report is automatically confirmed on the expiration of 15 days.

It has been held, however, that it might be possible to oppose a report even after it was automatically confirmed by expiration of

time. In *Cass v. Muir*,[37] the Divisional Court dismissed an appeal from a motions court judge who extended the time for bringing a motion to object to a report on a reference. It was held that the motions court judge did not err in extending the time for moving to object to the report:

> The decision to extend the time for bringing a motion to oppose confirmation was within the power of the learned motions judge under Rule 3.02. The power is a discretionary one and his decision should not be interfered with on appeal unless he was clearly wrong. That would be the case if the judge below made an error in principle or based his decision on extraneous matters.
>
> Despite the powerful argument of Mr. Reynolds, and with some anxious consideration, I have decided that the learned motions judge did not err in principle in granting the extension of time for opposing confirmation, or base his decision on extraneous matters. In my opinion the learned motions judge directed his mind to the appropriate considerations, particularly the lack of prejudice to the clients.

(2) Venue

Under **Rule 54.09(2)(a)**, the motion to oppose confirmation of a report must be made to a judge other than the one who conducted the reference.

(3) Standard of review

The standard of review on such a motion is very strict. The referee is shown considerable deference on all matters. It was held that the master's award should not be disturbed unless it appears unsatisfactory on all the evidence or is clearly wrong,[38] and that an error in principle, an excess or absence of jurisdiction, or some patent misapprehension of the evidence is required to be shown to successfully oppose confirmation of a master's report.[39] Since a motion to oppose

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37 1995 CarswellOnt 597, 27 O.R. (3d) 208 (Div. Ct.); additional reasons 1996 CarswellOnt 3785 (Div. Ct.); additional reasons 1996 CarswellOnt 3786 (Div. Ct.); leave to appeal refused 1996 CarswellOnt 4263 (C.A.).

38 *Komorowski v. Van Weel*, 1993 CarswellOnt 856, 12 O.R. (3d) 444 (Gen. Div.).

39 *Michelin Masonry Inc. v. Borat Investment Ltd.*, 1994 CarswellOnt 3173, 17 C.L.R. (2d) 295 (Gen. Div.). See also *Jordan v. McKenzie*, 1987 CarswellOnt 573, 26 C.P.C. (2d) 193 (H.C.); affirmed 1989 CarswellOnt 453, 39 C.P.C. (2d)

confirmation of a master's report is in the nature of an appeal, new evidence is not admissible unless it would otherwise meet the test for new evidence on appeals.[40] The onus is on the party opposing confirmation to demonstrate that the decision is wrong.[41]

(4) Appeal

An appeal from an order on a motion to oppose confirmation of a master's report lies to the Divisional Court.[42]

7.7 Conduct of an appeal

As to the "how to" of appeals in lien matters, the best analogy is to golf. If you hold the club this way, and address the ball that way, and swing just like this, and do this consistently over a long course, you may shoot par. Right. Then go out and play a round. Similarly, there are endless "how to" references for the preparation and conduct of an appeal.[43] They are mostly excellent. The best of the bunch is written by a Court of Appeal judge who advises to "forget the windup and make the pitch".[44] It is something to aspire to in every appeal; it is

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217 (C.A.), and *Regan v. Regan-Graham Ltd.*, 1993 CarswellOnt 4413, [1993] O.J. No. 2877 (Gen. Div.); affirmed 1994 CarswellOnt 3865, [1994] O.J. No. 2039 (C.A.).

40 *Solmon Rothbart Goodman v. Davidovits*, 1996 CarswellOnt 668, 46 C.P.C. (3d) 314 (Gen. Div.); *Komorowski v. Van Weel*, 1993 CarswellOnt 856, 12 O.R. (3d) 444, 9 C.L.R. (2d) 39 (Gen. Div.).

41 *Komorowski v. Van Weel*, 1993 CarswellOnt 856, 12 O.R. (3d) 444 (Gen. Div.); *Jordan v. McKenzie*, 1987 CarswellOnt 573, 26 C.P.C. (2d) 193 (H.C.); affirmed 1989 CarswellOnt 453 (C.A.); *Lensen v. Lensen*, 1987 CarswellSask 391, 1987 CarswellSask 520, [1987] 2 S.C.R. 672.

42 *Construction Act*, **s. 71(1)**.

43 The standard texts are Sopinka & Gelowitz, *The Conduct of an Appeal*, 2nd ed. (Toronto: Butterworths, 2000) and White & Stratton, *The Appeal Book* (Aurora: Canada Law Book, 1999).

44 Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums", available on the Ontario Court of Appeal's website at <https://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>: "Before the appeal is heard, you can be sure that each member of the panel will have read the reasons for judgment or the charge to the jury, the appellant's factum and the respondent's factum. We all would like to read more and, in many appeals we

not something to expect the first time out. Distilling all of this good advice down, are there any precepts that can be recommended to counsel unfamiliar with the appeal process?

1. Clarify, simplify, and focus. Put your first draft notice of appeal or *factum* aside for a few days, go on to other work, and come back to it to clarify, simplify and focus once again. You may have to repeat this process two or three times to get it right.

2. You cannot prepare an appeal alone. You need someone to listen to your presentation and tell you if they understand it and are persuaded by it. It is sometimes better if the person you rehearse in front of is not a lawyer. If the listener does not understand your appeal, or is not persuaded by your arguments, then go back to the drawing board and clarify, simplify and focus until they do. If they become bored and stop listening to you, so will the Divisional Court, and it is better to know this before you argue for real. If you are lucky enough to have a bright associate, student, clerk, or co-counsel, they can correct your facts and law; they can suggest arguments that you may have missed; and they can listen to the argument when it is fully formed, and test your logic.

3. Your advocacy begins with your factum. Not to downplay oral advocacy, but your first opportunity to speak to the court (and to the clerks of the court, whose briefing memoranda are very important to the process) is through your *factum*. As Walter Pater said, on a quite different topic, once your *factum* is completed, it should burn with a hard, gem-like flame.[45] You are trying to achieve the irreducible minimum that you need to drive home your best argument (not all your arguments). Begin with an over-

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do, but, in truth, we don't always have the time to read more than the reasons or charge and the factums. Judges cannot help but form an initial impression of your case from your factum. The factum, as former Chief Justice Dubin put it, 'whets the appetite of the judge.' But often the factum does more than that. The factum may leave the judge not just with an initial impression of your appeal, but a lasting impression."

45 Walter Pater (1839–1894): "To burn always with this hard, gem-like flame, to maintain this ecstasy, is success in life". *The Renaissance: Studies in Art and Poetry*, Oxford's World's Classics, Oxford University Press.

view paragraph, distilling the point of the appeal into a sentence or two, and then follow the provisions of **Rule 61.11** or **61.12**, as may be appropriate.

4. As it was memorably put: Forget the wind up and make the pitch.[46] Seize and hold the court's attention with the first two or three sentences out of your mouth, by way of overview, and then proceed to make your points. Chances are you will not get far before a member of the appeal panel begins to ask questions. The key to oral advocacy on such an appeal is to anticipate these questions, and answer them directly, simply and without hesitation. These questions will either clarify important facts, test an argument by putting it another way, or challenge the reading of an authority. It is not a good idea (ever) to tell a judge, "I'm coming to that". Chances are you are not, or that you will forget, or that the judge will remember that you did not answer the question too late, after you are gone.

5. The appellant's consolation is to have the respondent called upon. This means that the appeal was at least arguable. The respondent's consolation is in the dismissal of the appeal.

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46 J.I. Laskin, "Forget the wind up and make the pitch: Some suggestions for writing more persuasive factums", available at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/forget.htm>.

CHAPTER 8

EXECUTION AND SALE OF LAND

8.0

The statute clearly provides that the court may order that the interest in the premises be sold and may direct the sale to take place at any time after the judgment or confirmation of the report, allowing a reasonable time for advertising the sale.[1] The court may make all orders necessary for the completion of a sale and for vesting an interest in the premises in the purchaser.[2] Not all sales are approved.[3]

The judicial sale of land in satisfaction of a lien judgment or report is conducted by way of a reference to the master's office in the case of a judgment, or a continuation of the lien reference, in the case of a

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1 *Construction Act*, R.S.O. 1990, c. C.30, **s. 62(5)**.

2 *Construction Act*, R.S.O. 1990, c. C.30, **s. 65(1)**.

3 For an excellent consideration of these issues in the context of sale by a court appointed receiver and manager, see *Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, 2002 CarswellOnt 1149, 59 O.R. (3d) 376 (S.C.J. [Commercial List]) at pp. 381-382 [O.R.]: "The oft-quoted decision *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.) outlines the need for deference by the court for the receiver's decisions to safeguard the integrity and fairness of the bidding process adopted by the receiver. The nightmare of courtroom auctions and commercial chaos must be avoided. Galligan J.A. adopts [at p. 6 O.R.] the principles outlined in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.) with respect to the duties of the court when reviewing a receiver's decision: '1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently. 2. It should consider the interests of all parties. 3. It should consider the efficacy and integrity of the process by which offers are obtained. 4. It should consider whether there has been unfairness in the working out of the process.'"

report.[4] This reference is called a "reference for the conduct of a sale", and follows **Rule 55.06**. The single best guide to the law and practice in this area is Marriott & Dunn on mortgage remedies.[5]

Rule 55.06 provides a complete code for the judicial sale of land in lien actions, including advertisement, conditions of the sale (Form 55F), hearing(s) for directions, who may bid, who conducts the sale (the referee if no auctioneer is ordered), signature of the eventual agreement of purchase and sale with the successful bidder, terms of the deposit, delivery of vacant possession, and payment into and out of court of the proceeds of sale.

As with any lien reference, and as thoroughly canvassed above,[6] the master controls the conduct of the reference and will give directions from time to time as the nature of the case requires. For example, in a lien case, the master can be expected to protect the rights of unrepresented parties, and require proof of notice to execution creditors, prior mortgagees, and other persons with interests, or possible interests in the land who were not otherwise served with notice of trial in the lien action. The standard conditions of sale, as stipulated by Form 55F, are somewhat antiquated, and may require modification. They are as follows:

> 1. No person shall advance the bidding in an amount less than $10 at any bidding under $500, nor in an amount less than $20 at any bidding over $500. No person shall be allowed to retract a bid.
>
> 2. The property shall be sold to the highest bidder. Where any dispute arises as to who is the last or highest bidder, the property shall be put up again.
>
> 3. All parties to the proceeding may bid, except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary relationship to the party.
>
> 4. The purchaser shall, at the time of sale, pay to the party having carriage of the sale or to the party's lawyer a deposit of 10% of

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4 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **R. 55.06**.

5 Gray, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, 5th ed. (Toronto: Carswell, looseleaf), chapter 21.

6 See chapter 4.2.

the purchase price and shall pay the balance of the purchase price on completion of the sale. On payment of the balance, the purchaser shall be entitled to receive a transfer and to take possession. The purchaser shall, at the time of sale, sign an agreement for the completion of the sale.

5. The purchaser shall have the transfer prepared at the purchaser's own expense and tender it to the party having carriage of the sale for execution.

6. Where the purchaser fails to comply with any of these conditions, the deposit and all other payments made shall be forfeited and the property may be resold. Any deficiency on the resale, together with all expenses incurred on the resale or caused by the default, shall be paid by the defaulting purchaser.

The conditions of sale found at Form 150 of Marriott & Dunn, by way of comparison, and with slight adaptation to a lien proceeding, are as follows:

1. Subject to a reserve bid fixed by the referee, the highest tenderer shall be the purchaser (or, where there is no reserve bid: the highest or any tenderer will not necessarily be the purchaser).

2. The parties to the proceeding may tender, except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary position to the party.

3. Every tender shall be unconditional.

4. The tender shall be accompanied by a certified cheque or bank draft payable to the accountant of the Superior Court of Justice equal to ten per cent (10%) of the tendered amount as a deposit, and the purchaser shall pay the balance of the tender price into court to the credit of this action on or before ....., without interest, subject to adjustments as approved by the referee.

5. All adjustments shall be made at the date of closing, ...

6. The purchaser shall not be entitled to a conveyance, but may apply for a vesting order at the purchaser's own expense upon payment of the purchase price and confirmation of the referee's interim report on sale.

7. On payment of the balance, the purchaser shall be entitled to take possession of the property.

8. Where the purchaser fails to comply with any of these condi-

tions, the deposit and all other payments made shall be forfeited and the property may be resold.

9. Any deficiency on the resale or caused by the default shall be paid by the defaulting purchaser.

10. The vendor shall not be required to produce any abstract of title, deed or evidences of title, other than those in the vendor's possession.

11. The purchaser shall be allowed ..... days from the date of acceptance and approval of the offer to purchase to investigate the title which shall be done at the purchaser's own expense, and if within that time the purchaser raises an objection to title in writing to the vendor which the vendor is unable or unwilling to remove, the vendor may, by notice in writing to the purchasers lawyer, rescind the sale, in which case the vendor shall not be liable for any compensation, costs, damages or expenses incurred by the purchaser.

12. (Add such further provisions with respect to financing, environmental clearances, satisfactory structural reports, etc. as are applicable to the property in question).

13. If within the said ..... days, the purchaser has not objected to title as aforesaid, the purchaser shall be deemed to have accepted the same.

14. The sale is to be closed within ..... days from the date of acceptance and approval of the offer to purchase, with adjustments as of the date of closing.

15. Any notice required to be given by the vendor or purchaser shall be given in writing addressed to the party to whom it was directed, as follows:

16. Further particulars and conditions of sale may be obtained by contacting: .....

The form for sale by auction provided by Marriott & Dunn, Form 196, provides a sample set of advertisement terms for sale by auction. The form of agreement of purchase and sale will have to be agreed by the parties and approved by the referee in advance. The agreement will have to ensure that there are no representations relied upon, that no chattels are included, that the premises are purchased on an "as is, where is" basis, that there are no representations about tenancy, use

or occupancy, that there is no warranty or liability for existence or non-existence of urea formaldehyde, asbestos, PCB's, radium, radon, or radon daughters, or any other substance or liquid or material which may be hazardous. A sample schedule containing these terms is found at Form 197 of the Marriott & Dunn reference.

The rule provides that where a sale is made through an auctioneer, the auctioneer shall make an affidavit concerning the result of the sale, and where no auctioneer is employed, the referee shall enter the result in the procedure book and, in either case, the referee *may* make an interim report on the sale. Form 55G is stipulated for the interim report on sale. The master will modify this order as required to suit the circumstances of the case. Sample terms in this interim report are as follows:

> 1. In accordance with the directions given by me on ..... for the sale of the property described in schedule "A" hereto, and in the presence of counsel for ....., ... not attending although duly served with notice of the hearing for directions, as appears from the affidavit of ....., sworn ....., filed, I settled the form of an advertisement and the conditions of sale for the sale of the property referred to the judgment (report) of ....., dated .....
>
> 2. I find that the advertisement was published as directed by me, and the property was offered for sale by public auction by ....., appointed by me by directions made in this matter on ....., for that purpose.
>
> 3. The sale was conducted on ....., as advertised and in accordance with the directions given by me in this matter.
>
> 4. The sale was conducted in a fair, open and proper manner and ..... was declared the highest bidder for and became the purchaser of the property at the price of ....., payable as follows:

The interim report is to be confirmed under **Rule 54.09**, by passage of 15 days after service upon all parties who attended the reference of a copy of the report, or upon order of a judge of the court for immediate confirmation. The procedure to oppose confirmation of such an interim report on sale would be the same as a motion to oppose confirmation of any master's report.[7] The purchase money is paid into

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[7] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, **r. 54.09(3)**.

court. It is paid out of court in accordance with **Rule 55.06(14)** in accordance with the initial judgment, or report of the master in the lien trial, but either with the consent of the purchaser or the purchaser's lawyer, or upon proof to the accountant or registrar that the purchaser has received a transfer or vesting order of the property for which the money in question was paid into court.

CHAPTER 9

THE CONSTRUCTION ACT TRUSTEE

9.0

9.1 Guide

Section 68(1) of the *Act* allows for the appointment of a trustee. The trustee is also permitted to act as a receiver and manager. The section provides as follows:

> 68. (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Ontario courts have generally concluded that this remedy is to be used with caution, and that based on the powers given to a trustee, it may be of use only in a limited range of circumstances. The primary purpose of this remedy is to protect the interests of the lien claimants, with care being taken to protect the interests of others in the process. **Section 68(3)** of the *Act*, for example, makes the lien a charge upon any amounts recovered by the trustee. The *Act*, however, does not indicate under what circumstances a court will grant an order under this section and permit the appointment of a trustee.

9.2 When to appoint a lien trustee

An earlier authority, decided under the former *Mechanics' Liens*

Act,[1] suggests that a trustee may be appointed in two circumstances: mismanagement or abandonment of a project. In *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.*,[2] Justice Grange held as follows:

> The remedies provided under **s. 34** of the *Mechanics' Liens Act* are intended to be resorted to only when the present management is clearly unable to carry on with the business, either by reason of incompetence or dishonesty or neglect of the undertaking.
>
> I do not feel however, that the court should appoint a receiver or a trustee upon the application of one unsatisfied lien claimant where there is no evidence of abandonment of the premises or mismanagement of the project . . .

Based on the powers given to a trustee under **s. 68(2)**, there are three generally accepted circumstances when it may be appropriate to appoint a trustee:

1. Where the premises is an income earning property, and the lien claim may be satisfied out of the income.

2. Where the owner has become insolvent but the project itself would be a viable one if it were refinanced and carried to completion.

3. Where the appointment of a trustee may be of use to obtain management of the premises, in order to prevent its deterioration.[3]

In addition, although it is not necessary that a preserved or perfected lien be in place at the time the order is sought and made, there must at least be a subsisting lien.[4] *Royaledge Industries* suggests that although any person with an interest in the premises, such as an owner or mortgagee, may apply to appoint a trustee, there must be a lien that is capable of preservation and perfection, or a lien that is preserved and perfected before the court has jurisdiction under this section of the *Act*. In most cases, this is a low threshold. Work on the project must have commenced, such that the lien claimant requires assistance of the court to protect its interests. The court in *Royaledge*

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1 *Mechanics' Liens Act*, R.S.O. 1970, c. 267, s. 34.

2 (April 18, 1975), [1975] O.J. No. 438, Grange J. (H.C.).

3 *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.*, 1991 CarswellOnt 776, 2 O.R. (3d) 488 (Gen. Div.).

4 *Ibid.*

Industries held as follows:

> Although on a literal interpretation, s. 70(1) [now s. 68(1)] could be interpreted as applicable even in the absence of a lien, I do not so read it. It must be remembered that it is found in a part of the *Construction Lien Act*, which is headed "Extraordinary Remedies" and the wide powers given to the trustee indicate it is a remedy to be used with caution.

Courts have consistently refused the appointment of a trustee where the appointment is sought for some collateral purpose. For example in *Ru-Ko Inc. v. Croatia (Republic)*,[5] the owner, the state of Croatia, had taken the position that it was entitled to diplomatic immunity from the claim of the contractor. The contractor lien claimant both preserved and perfected a claim for lien. The owner had sought, in a separate proceeding, a determination on the availability of the defence of diplomatic immunity and lost. The owner was then selling the property and sought the consent of the contractor to an order to vacate the contractor's lien upon posting security into court. The contractor would not consent without extracting an agreement from the owner that it submit to the jurisdiction of the Ontario courts and would not claim diplomatic immunity. The owner refused and proceeded without notice to post security and vacate the registration of the contractor's lien by paying into court the value of the lien plus the appropriate amount for costs.

The lien claimant applied to appoint a trustee under **s. 68** to receive and hold the proceeds of sale to the extent of the value of the lien. The court refused the application, in part, because the lien had been vacated, and the court was of the view that the lien claimant no longer had an interest in the land. This analysis is correct, of course, as once security is posted the lien ceases to attach to the premises and instead becomes a charge upon security posted.[6] The claimant is no longer a person having a lien, but rather a lien claimant with a "charge" upon the security posted to vacate that lien.

The contractor argued that Croatia's claims of diplomatic immunity would be diminished if the sale proceeds did not pass into Croatia's hands but rather into the hands of a court appointed trustee. The master observed that the contractor's lien was not at risk as the full

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5 1998 CarswellOnt 1865, 38 C.L.R. (2d) 269 (Gen. Div.).

6 *Construction Act*, R.S.O. 1990, c. C.30, **s. 44(6)**.

amount of the lien claim plus an amount for security for costs was paid into court. The master refused to appoint the trustee and concluded that the facts of the case did not reflect the situations contemplated by s. 68 nor did they warrant the application of this extraordinary remedy.

In *Royaledge Industries*, the developer, Royaledge, had sold its lands to Perma-Roof, a builder, on terms that required Royaledge to install and pay for all of the servicing and all local and regional levies, park dedications and roadways for a subdivision of 137 lots. Perma-Roof had the right to review and approve of the subdivision agreement. Royaledge, however, negotiated the subdivision agreement with the Town, without consulting Perma-Roof, who refused to execute the agreement on the grounds that it was not in accordance with the contractual obligations of Royaledge. Perma-Roof changed the agreement to delete any reference to it as developer and to make it clear that all liability for the servicing, levies and dedications was the responsibility of Royaledge. Royaledge refused these changes and the agreement remained unsigned. The Town would not issue building permits until the subdivision agreement was signed. It was a classic stalemate.

Royaledge engaged a contractor to install the services. The contractor did the work and was owed $800,000. There was no serious dispute as to the quality or value of the work. Royaledge refused to pay the contractor without the subdivision agreement being signed. The contractor liened.

On the application to appoint a trustee, Justice Lane noted that the real dispute has nothing to do with the contractor's lien and everything to do with the contractual relations between Royaledge and Perma-Roof. In refusing to appoint the trustee, Justice Lane stated as follows:

> There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk. The problem underlying this litigation is a dispute between Perma-Roof and Royaledge as to the meaning of the arrangements between them and as to whether the draft contract settled by Royaledge with the Town is in harmony with those contractual arrangements.

9.3 How to appoint a lien trustee

Section 68(1) permits a person having a lien or a person with an interest in the premises to apply to the court for the appointment of a trustee. The issue that has yet to be conclusively determined is whether the party seeking the appointment of a trustee is to proceed by way of motion or application. There is no definitive answer, as some authorities suggest that the courts view this type of objection as a technicality,[7] and will not permit the technicality to be used to defeat the substantive issue. In addition, as some authorities do not provide details as to the state of the action when the appointment is sought, it is not clear whether the relief sought should be by motion or application.

One aspect of this issue came before Master Sandler in *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*[8] The issue was whether a construction lien master had jurisdiction to hear a motion to appoint a trustee where the lien action had been referred to the lien master under a judgment of reference. Master Sandler's comments are *obiter*, as he referred the matter to the Divisional Court as a stated case. The matter was never heard by the Divisional Court, however, Master Sandler's comments are instructive and the proper forum for the proceeding to appoint a trustee can be summarized as follows:

No.	Circumstance	Proceeding
1.	Lien exists (subsisting or preserved), however no action commenced to enforce lien.	*Application* to a judge
2.	Lien action commenced, however no judgment of reference referring lien action to lien master.	*Motion* in the lien action, to a judge.

7 *Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608, 2 C.L.R. (2d) 275 (Gen. Div.), *G.C. McDonald Supply Ltd. v. Preston Heights Estates Ltd.*, 1991 CarswellOnt 782, 45 C.L.R. 293 (Gen. Div.).

8 2003 CarswellOnt 210, [2003] O.J. No. 304 (S.C.J.).

No.	Circumstance	Proceeding
3.	Lien action commenced and action referred by judgment to lien master.	*Motion* in the lien action, to the lien master.

Whether the proceeding is by application or motion, there must be affidavit evidence sufficient to establish three generally accepted criteria for a court to exercise its discretion and appoint a trustee. The affidavit should include a complete chronology of the project as it is known to the applicant, the status of the project and a basic accounting of the project. Exhibits should include all available progress certificates, any responses to **s. 39** demands and the current title search. The affidavit may need to refer to the status of all pending or completed sales or the condominium declaration, the cost of completion and any safety considerations. There should be reliable evidence as to the deterioration of the building or value of the work and copies of all liens and the pleadings in all lien actions. The affidavit should also include the trustee's signed agreement to act as trustee. Although not required, the accepted and proper practice is to include a copy of the draft order sought on the motion or application.

The key is "transparency". The process must not only be fair and reasonable, but must be seen to be fair and reasonable by all those participating in the process.

In *Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.*,[9] the trustee had been previously appointed over a golf course development under **s. 68** of the *Act*, on a motion by the mortgagee. The trustee came back before the court to seek approval of the sale of the golf course.

The trustee sought to sell the golf course for some $8.5 million. On the eve of the trustee's motion to approve the sale, an offer was received for some $9.5 million. The lien claims totaled approximately $2 million. If the trustee sold under the first offer, the prior, secured creditor would be paid in full, leaving little or nothing for the lien claimants.

The lien claimants objected on the basis that the process was tainted by unfairness and that the trustee had not acted in an even-

[9] 2002 CarswellOnt 1149, 59 O.R. (3d) 376 (S.C.J. [Commercial List]).

handed manner with respect to all creditors. The lien claimants also objected on the basis that they had not been informed in any meaningful way of the status of the proceeding until four days before the trustee's motion to approve the sale. Justice Wilson asked several critical questions regarding the process generally and the conduct of the receiver, five of which are key:

> 1. Were the lien claimants given notice of the proceedings to appoint the trustee and the Order granting the trustee the authority to negotiate with four prospective purchasers?
>
> 2. Were the lien claimants given notice of the motion to seek approval of the sale?
>
> 3. What was the rationale for imposing a deadline of 28 days from the day the trustee was appointed for the presentation of offers to purchase the golf course, when selling the golf course in the dead of winter?
>
> 4. How was the list of potential purchasers put together and what were the criteria? and,
>
> 5. Did other potential purchasers express an interest in buying the property only to be advised that it was too late?

The court refused to approve the sale. Justice Wilson noted that there were serious concerns with respect to whether sufficient efforts had been made by the trustee to market the golf course. With respect to the procedure, Justice Wilson stated as follows:

> Notice of the proceedings is, in my view, a fundamental prerequisite to ensure that participants have an opportunity to satisfy themselves as to the fairness and impartiality of the process. Objections may be made to the court to an approach taken by the receiver before those steps become written in stone. If participants choose not to participate and have been given an opportunity to be heard, they cannot later complain about the fairness and reasonableness of the procedures.

9.4 Pros and cons of lien trustees

Some of the disadvantages and advantages of appointing a lien trustee can be briefly summarized as follows:

Disadvantages

1. The cost of the application or motion to appoint the lien trustee may be steep; the owners will usually resist this step

resulting in responding material being filed followed by cross-examinations on the affidavits;

2. The fees of the trustee can be substantial and are a first charge on any proceeds of sale or rents collected; and

3. The process to appoint the lien trustee may be slow, such that mortgage enforcement proceedings over take the appointment of the lien trustee.

Advantages

1. The motion or application to appoint a lien trustee, whether granted or refused, is interlocutory. No appeal can be taken from the order made;

2. The lien trustee can also act as a receiver and manager;

3. Rationalize and consolidate all liens and lien actions;

4. The lien claimants may be paid more than if the project was not completed and the proceeds of sale applied to satisfy the liens;

5. The motion or application to appoint the lien trustee may be brought at any time, even before a lien is preserved;

6. Steps can be taken by the trustee to maintain the economic value of the premises so that the lien security (the value of the premises) does not diminish;

7. Once a lien trustee is appointed, the courts give deference to the receiver's decisions and the sale process adopted by the receiver; the courts rarely, if ever, second guess the decisions by the trustee;

8. The procedures adopted by the receiver must be commercially reasonable and fair (some might think that this is a low threshold making this a con);

9. The process or conduct by the lien trustee is done in an even handed manner with respect to all creditors, including lien claimants, such that there is disclosure of information, notice of proceedings and an opportunity to be formed and participate in the legal process; and

10. The steps taken by and the expenses incurred by the lien trustee are reviewed by the court, the lien claimants and the other creditors, so that the premises are protected to ensure

maximum value is obtained for the property.

Although most mortgage documents permit the mortgagee the remedy of possession and sale, it may be more appropriate for the mortgagee to seek the appointment of a trustee under the *Construction act*, particularly when the mortgagee expects to incur expenses preserving the property, or seeing the property to completion. In *Avenue Structures Inc. v. Pacific Empire Development Inc.*,[10] the mortgagee, the Bank of China, took control of the construction project using its contractual right in the standard mortgage terms to do so. In the course of preserving the property, the bank incurred expenses aggregating some $255,000 related to realty taxes and penalties, interest and bailiff's costs, winter protection, hydro bills, insurance premiums, replacement of stolen electrical cable, fees of an architect, legal fees, inspection fees and payment to the City under a letter of credit. — The bank was not able to provide adequate evidence as to the necessity of these so called "forced" expenses.

The master held that the only expense that would rank ahead of the lien claimants would be municipal taxes paid by the bank, excluding penalties, interest and bailiff's costs. Master Sandler made it clear that a trustee appointed under **s. 68** could recoup under **s. 68(3)** of the *Act* all reasonable business expenses and management costs incurred. Had the expenditures arisen while a **s. 68** trustee was in place, the trustee could have applied to the court for directions as to whether such expenditures were absolutely necessary or essential for the preservation of the property and for the authorization to pay them. The lien claimants would have made submissions, and the decision of the court would have been binding on the lien claimants which may have resulted in permitting these expenses, paid by the mortgagee, a priority over the liens.[11]

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10 2001 CarswellOnt 643, 8 C.L.R. (3d) 128 (S.C.J.).

11 *Construction Act*, R.S.O. 1990, c. C.30, **s. 68(3)** provides that "Subject to subsection 78(7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2)".

CHAPTER 10

PROMPT PAYMENT AND ADJUDICATION

10.0

10.1 Prompt payment and adjudication

The prompt payment and adjudication provisions of Ontario's *Construction Act* came into force on October 1, 2019. Subject to the transition provisions, Ontario's statutory prompt payment regime is now mandatory on the vast majority of projects in this Province.[1]

Once a contractor delivers a "proper invoice" to an owner, the owner is now obliged to pay that proper invoice within 28 days of receipt unless the owner has issued a notice of non-payment to the contractor within 14 days of receiving the proper invoice.

A contractor receiving payment of a proper invoice must then forward that payment down to its responsible subcontractors within seven days of receiving payment unless the contractor has issued a notice of non-payment to a particular subcontractor.

Similarly, a subcontractor receiving payment must pay a sub-subcontractor within seven days of receiving payment unless the subcontractor has issued a notice for non-payment, and so on down the construction pyramid.

This prompt payment regime is supported by a mandatory statutory adjudication process.

Given the focus of this text on the procedural aspects of lien, trust and adjudication proceedings, after a brief overview of the basic concepts underlying the new regime, this chapter will discuss the adjudication process. For a discussion of substantive issues with respect to prompt payment and adjudication, the reader is referred to the new

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[1] Section 1.1(2.1) provides that prompt payment does not apply with respect to any portion of a project agreement that provides for the operation or maintenance of the improvement by the special purpose entity, or to any portion of an agreement between the special purpose entity and the contractor or any other subcontract made under the project agreement that pertains to the operation or maintenance of the improvement by the special purpose entity.

edition of *Construction, Builders' and Mechanics' Liens in Canada*.[2]

10.2 Basic concepts

10.2.1 Statutory minimums

Section 13.6 of the *Act* provides that an adjudication must be conducted in accordance with the adjudication procedures set out in the *Act* and the regulations, and in accordance with any additional adjudication procedures that may be set out in the contract or subcontract. Adjudication procedures set out in a contract or subcontract apply only to the extent that they do not conflict with the *Act* and the regulations, and their application is subject to the exercise of the adjudicator's powers under section 13.12.

In other words, the *Act* sets out minimums for adjudication. The parties may agree to more, but the statutory minimums must be met.

10.2.2 Targeted adjudication

Only disputes with respect to the following matters may be referred to adjudication in Ontario:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17(3) (lien set-off).
5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.[3]

Section 13.5(4) of the *Act* stipulates that an adjudication may ad-

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[2] D. Bristow, D. Glaholt, B. Reynolds & H. Wise, *Construction Builders' and Mechanics' Liens in Canada*, 8th ed. (Toronto: Carswell, 2019), chapter 13. The following discussion is excerpted from that text.

[3] *Construction Act*, s. 13.5(1) and (2).

dress only a single matter unless the parties and the adjudicator agree otherwise.[4] Parties may also agree to consolidate multiple adjudications.[5] If the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 13.5(1) and (2), the contractor may, in accordance with the regulations, require the consolidation of the adjudications over the objections of the other party.[6]

Case law from the U.K. indicates that the word "dispute" in adjudication legislation will be given its ordinary meaning. U.K. courts have said that they "should not adopt an over legalistic analysis of what the dispute between the parties are; instead [they] will determine in broad terms what the disputed claim, assertion or position is".[7]

In Canada, "dispute" has been defined simply to mean a "conflict or controversy, especially one that has given rise to a particular lawsuit".[8] If an issue has arisen in the context of an attempt to avoid dispute, the situation is not yet ripe for arbitration, for example.[9] In other words, it is not enough that the parties' interests are opposed on a matter. There must be some "formulated dispute",[10] subject to party agreement to the contrary.[11]

It remains to be seen how adjudicators and courts will interpret the

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4 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.5(4).

5 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.8.

6 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.8(2).

7 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 100, citing *Allied P & L Limited v. Paradigm Housing Group Limited*, [2009] EWHC 2890 (T.C.C.).

8 *Sport Hawk USA Inc. v. New York Islanders Hockey Club*, [2008] O.J. No. 1732 (S.C.J.) at para. 8 ; additional reasons [2008] O.J. No. 2294 (S.C.J.).

9 *Zittrer c. Sport Maska Inc.*, 1988 CarswellQue 27, 1988 CarswellQue 134, [1988] 1 S.C.R. 564, [1988] S.C.J. No. 19.

10 *Cummings v. Solutia SDO Ltd.*, 2008 CarswellOnt 4922, 49 B.L.R. (4th) 307, [2008] O.J. No. 3259 (S.C.J. [Commercial List]); affirmed 2009 CarswellOnt 3557, 59 B.L.R. (4th) 23, [2009] O.J. No. 2618 (C.A.); *Zittrer c. Sport Maska Inc.*, 1988 CarswellQue 27, 1988 CarswellQue 134, [1988] 1 S.C.R. 564, [1988] S.C.J. No. 19.

11 *Huras v. Primerica Financial Services Ltd.*, 2001 CarswellOnt 2848, 55 O.R. (3d) 449, [2001] O.J. No. 3318 (C.A.). This paragraph is cited from D.W.

added words "under the contract" in s. 13.5(1). In the United Kingdom, where parties can refer "any dispute arising under the contract" to adjudication, it has been held that while adjudication is not available for non-contractual claims such as a negligence claim against a contractor, claims for rectification, restitution and specific performance have been allowed to proceed to adjudication under the specific wording of the contract.[12]

10.2.3 Proper invoice

The triggering event for statutory prompt payment obligations is delivery of a "proper invoice" as defined in the *Act*. The term "proper invoice" is defined in s. 6.1 of the *Act* as follows:

> In this Part,
>
> "proper invoice" means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:
>
> 1. The contractor's name and address.
>
> 2. The date of the proper invoice and the period during which the services or materials were supplied.
>
> 3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
>
> 4. A description, including quantity where appropriate, of the services or materials that were supplied.
>
> 5. The amount payable for the services or materials that were supplied, and the payment terms.
>
> 6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
>
> 7. Any other information that may be prescribed.

While parties are free to specify the supporting documentation or information that must accompany a proper invoice, certification by a payment certifier cannot be made a contractual precondition; any

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Glaholt and M. Rotterdam, *The Law of ADR in Canada*, 2nd ed. (Markham: LexisNexis, 2018) at 70-1.

12 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 115-6.

such certification must follow submission of the proper invoice.[13]

Unless the contract specifies otherwise, proper invoices must be given to the owner on a monthly basis.[14] A contractor may revise a proper invoice after giving it to the owner only if the owner agrees in advance to the revision, in which case the date of the proper invoice is not changed, and only if and the invoice continues to meet the requirements referred to in the definition of "proper invoice".[15]

10.2.4 Binding until and unless overturned

Under s. 13.15(1), the determination is binding on the parties to the adjudication until a determination of the matter by a court, by an arbitrator under the *Arbitration Act, 1991*, or by written agreement between the parties respecting the matter of the determination. Nothing in the *Act* prevents a party from commencing proceedings in court or before an arbitrator to finally determine the matter at any time. All the *Act* does is to keep the money flowing while that process takes place. In this sense, prompt payment and adjudication add to the industry's list of unique remedies. They take nothing away.

10.2.5 Enforcement of adjudicator's determination

Adjudicators' determinations are enforceable as orders of the court. There is no need to go to court to obtain judgment on a determination. The determination is like a judgment, albeit an *interim* one. An application to set aside a determination will only rarely succeed based on the very strict test stipulated by s. 13.18.

10.2.6 Adjudication timelines in Ontario

Readers are referred to the ODACC website, https://odacc.ca, for current information as to adjudication processes and suggested timelines. Consistent with its mandate, ODACC has provided a complaints procedure, an adjudicator registry, fee schedules, a custom ODACC online dispute resolution system, and more.

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13 *Construction Act*, R.S.O. 1990, c. C.30, s. 6.3(2) and (3).

14 *Construction Act*, R.S.O. 1990, c. C.30, s. 6.3(1).

15 *Construction Act*, R.S.O. 1990, c. C.30, s. 6.3(5).

10.2.7 ODACC predetermined processes

Statutory adjudication is part of a mandatory scheme that applies province wide. It must be cost effective and available at all levels, to all stakeholders. Thus, the expectations of parties with relatively low dollar value claims must by met and managed. Low dollar value disputes require low cost solutions. The issue is one of proportionality. In order to address this issue in a province-wide scheme, ODACC created four predetermined adjudication processes, which may be summarized as follows:

1. **Two-Page Written Adjudication:** Adjudication in writing only, with parties' submissions and photographs limited to two pages each (not including the contract, and disputed invoice, which may be required by the adjudicator), and the adjudicator's reasons are expected to be approximately one to two pages.

2. **Five-Page Written Adjudication:** Adjudication in writing only, with the parties' submissions and photographs limited to five pages each (not including the contract, and disputed invoice, which may be required by the adjudicator), with the adjudicator's reasons are expected to be approximately one to two pages.

3. **Five-Page Written Adjudication plus Ten Pages of Documents:** Adjudication in writing only, with the parties' submissions and photographs limited to five pages each (not including the contract and disputed invoice, which are mandatory), plus additional documents, excerpts, and/or witness statements limited to ten pages. The adjudicator's reasons are expected to be approximately five pages.

4. **Oral Webcast Adjudication, Ten-Page Submissions and Documents:** Adjudication in writing only, with submissions and photographs limited to 10 pages each (not including the contract and disputed invoice, which are mandatory), plus additional documents, excerpts, and/or witness statements limited to 25 pages. The oral presentation will not be in person and will be conducted by videoconference or teleconference. Reasons are expected to be approximately 5 pages.

5. A fifth option is that the adjudication process determined during a teleconference with the adjudicator.

While certain processes restrict the page limit of submissions and/or supporting documentation, all of the processes allow for sub-

mission of the disputed contract and invoice. All four predetermined processes share the same four suggested first steps, all triggered by the appointment of an adjudicator on the first day. Step by step, the ODACC process would proceed as follows:

1. **Day 1:** The adjudicator is selected by the parties or appointed by ODACC.

2. **Day 5:** The claimant submits a copy of the disputed invoice and construction contract. The claimant also submits its submissions, depending on the value of the claim, the types of documents allowed in the predetermined process, and the page limit of those supporting documents.

3. **Day 7:** The adjudicator determines the balance of the adjudication process and communicates that to the parties, including the respondent's deadline to respond to the claimant's submission.

4. **Day 12**: The respondent submits a response, the length and content of which depends on the value of the claim, the types of documents allowed in the predetermined process, and the page limit of those supporting documents.

Following these initial four steps, the remaining steps are suggested as follows:

- Predetermined processes 1 through 3 all contemplate adjudicators' draft decisions being released to ODACC on Day 20.
- Predetermined process 4 contemplates an oral hearing on Day 18 followed by submission of the draft decision to ODACC on Day 25.
- Where no predetermined process is chosen, the adjudicator may suggest a site visit on Day 17, an oral hearing on Day 20, the appointment of an assistant on Day 22, and a draft determination to ODACC on Day 28.

All of the predetermined processes state that a decision will be released by ODACC 35 days after an adjudicator is appointed pursuant to the requirements in the *Act*. Parties can suggest a process to the adjudicator, and the adjudicator can suggest a process, and it will be a rare case in which the adjudicator will not follow the process agreed by the parties.

The statute contemplates exceptionally short timeframes for certain stages of an adjudication. Among the shortest timelines are a four-

day deadline for a claimant to provide its complete submission package after the appointment of an adjudicator.

10.2.8 Statutory timelines

A party giving the other party written notice of adjudication must include in that notice the name of a proposed adjudicator.[16] If the parties cannot agree on the proposed adjudicator within four days, or if the proposed adjudicator does not consent to conducting the adjudication within four days, the party who gave the notice of adjudication must request that ODACC as Adjudicator Nominating Authority make the appointment.[17] ODACC has seven days from receiving that request to nominate the adjudicator.[18]

No later than five days after an adjudicator is agreed upon or nominated, the party giving notice of adjudication must provide the adjudicator with a copy of the originating notice, a copy of the relevant contract or subcontract, and any documents it intends to rely on during the adjudication.[19]

The adjudicator must make a "determination" of the referred issues no later than 30 days after receiving these documents. This period may be extended by 14 days to a total of 44 days at the adjudicator's request, but only if the parties agree.[20] The parties may agree on further extensions.[21] A party who is required by an adjudicator's determination to pay an amount to another person must pay that amount no later than 10 days after the determination has been communicated to the parties.[22]

Any motion for leave to bring an application for judicial review of the determination must be filed with the Divisional Court within 30 days of the determination.[23]

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16 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.7(1)(d).

17 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(2) and (4).

18 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(5).

19 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.11.

20 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(1) and (2)(a).

21 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(2)(b).

22 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19(2).

23 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.18(2).

10.2.9 Choosing an adjudicator

An adjudication may be conducted by an adjudicator listed in a registry to be established and maintained by ODACC only.[24] A party wishing to initiate adjudication must name an adjudicator in the notice of adjudication.[25] If no agreement can be reached on an adjudicator, the parties may request that ODACC nominate an ODACC-registered adjudicator for them.[26] Importantly, the parties' choice of an adjudicator cannot be made part of the underlying contract or subcontract.[27]

10.2.10 Minimum qualifications

An adjudicator's minimum qualifications are set out in ss. 3 to 5 of O. Reg. 306/18. Aside from having at least 10 years of relevant experience in the construction industry,[28] adjudicators must complete a training program designed by ODACC called *Construction Adjudication and ODACC Orientation Program* and, upon completion, may apply to ODACC for certification.[29]

Matters such as conflicts of interest and related procedural issues are governed by the ODACC Adjudicator's Code of Conduct.[30]

As for adjudicator qualifications, it has been suggested that a capable adjudicator should possess excellent technical ability (i.e., knowledge of construction industry and legal issues, experience and awareness of current developments), procedural competence (i.e., awareness of procedural requirements common in adjudications), and case management skills (i.e., the ability to steer the adjudication through its very dense timelines).[31] They should possess excellent

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24 *Construction Act*, R.S.O. 1990, c. C.30, ss. 13.9(1); 13.3(1)(c).

25 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.7(1)(d).

26 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(2).

27 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.9(3).

28 Which may include experience working in the industry as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator, or lawyer: O. Reg. 306/198, s. 3(3).

29 https://odacc.ca/en/adjudicators/certification-process/.

30 O. Reg. 306/18, s. 7.

31 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 165-6.

writing skills (i.e., the ability to write clearly and concisely). They should be able to dedicate sufficient time to any adjudication they accept.

10.2.11 Preparing a claim for adjudication

No more than five days after the appointment of the adjudicator, the notice of adjudication must be provided to the adjudicator, and a copy of the contract and all documents the party intends to rely on during the adjudication must be provided to the adjudicator and to the other party.[32]

10.2.12 The notice of adjudication

The notice of adjudication is a crucial document. It requires careful attention. In the United Kingdom, the purpose of the notice has been described as follows:

> The purposes of such a notice are first, to inform the other party of what the dispute is; secondly, to inform those who may be responsible for making the appointment of an adjudicator, so that the correct adjudicator can be selected; and finally, of course, to define the dispute of which the party is informed, to specify precisely the redress sought, and the party exercising the statutory right and the party against whom a decision may be made so that the adjudicator knows the ambit of his jurisdiction.[33]

It has further been held that it is the notice of adjudication, not the subsequent and more detailed referral notice served in UK adjudications, that defines the scope of the adjudication. [34]

10.2.13 Detailed submissions

In the U.K., the notice of adjudication is followed by a referral notice, a more detailed statement of the party's case that has been described as the equivalent of a statement of case in an arbitration.[35]

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32 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.11.

33 *Ken Griffin & John Tomlinson, T/A K & D Contractors v. Midas Homes Limited*, [2000] 7 WLUK 649, 2000 WL 1544681 (T.C.C.).

34 *J G Walker Groundworks Ltd v. Priory Homes (East) Ltd.*, [2013] EWHC 3723 (T.C.C.).

35 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 174. See, generally, Sir Peter Coulson, *Coulson*

Pickavance suggests the following contents for the referral notice:

> The referral notice should set out the referring party's case in full. Often this will include an overview of the case and the redress sought, the relevant contractual provisions relied on, the factual background to the dispute and claims, and the legal basis for making the claim and a detailed statement of the redress sought.
>
> A focused chronology of events is appropriate more often than not, although if it is a long chronology, it may be better to consign it to the supporting documents and cherry-pick events to insert into the submission.[36]

While such a document is not mandated by the Ontario *Construction Act*, it is likely that in all but the most straightforward disputes, similar documents will be submitted to the adjudicator here as well. For the predetermined processes discussed above, this will all be part of what the parties submit.

10.2.14 Documents relied upon

Documents "relied upon" must be submitted to the adjudicator no later than five days after the notice of adjudication. The *Act* does not prescribe what types of document may be admissible. The scope of production should be informed by the type of dispute referred. Voluminous documentation might be necessary where the valuation of services is concerned, while in straightforward cases of non-payment of holdback in the absence of a **s. 27.1** notice, for example, a few documents (or even no documents at all) might suffice. Evidence of fact or expert witnesses may be made without formality.

Adjudicators are expected to issue practical, efficient and effective directions respecting disclosure of reliance documents while ensuring in the extremely tight timeframes available that each party has an opportunity to review the documents produced.[37]

10.2.15 Serving the claim

Both the notice of arbitration and the documents a party intends to rely upon must be "given" to the other party. Under s. 87 of the *Act*,

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on Construction Adjudication, 3rd ed. (Oxford: Oxford University Press, 2015) at 18.25 et seq.

36 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 177.

37 O. Reg. 306/18, s. 20.

"giving" documents means serving them in any manner permitted under the Rules of Civil Procedure or by certified or registered mail addressed to the intended recipient at the recipient's last known mailing address. ODACC is currently developing a platform that will facilitate the giving of documents as well as all communications between parties and adjudicators.

10.2.16 Responding to a claim

Under s. 13.11.1, a party has a right to respond to a notice of arbitration. Section 17 of O. Reg. 306/18 states that the right of a party to respond to a notice of adjudication is subject to the directions of the adjudicator as to the time and manner of the delivery of the response. Section 13 of the *Act* gives the adjudicator the general power to conduct the adjudication in the manner he or she considers appropriate and to issue directions respecting the conduct of the adjudication. At a minimum, the responding party will be entitled to bring any defence within the scope of the dispute.[38] It has been held in the U.K., however, that a defence that the amount claimed is exaggerated, or that there are amounts to be deducted from the amount claimed, should be admitted only where the respondent has served a valid withholding notice or pay less notice in respect of the disputed claim.[39] Of course, the parties can expressly make provision for a response in their contract or subcontract.[40]

10.2.17 Rebuttals, replies, sur-rebuttals and sur-replies

The *Act* does not provide for replies or further submissions. In lien actions, replies require leave, as the Rules of Civil Procedure regarding replies are inconsistent with the *Act*, which does not otherwise provide for such a pleading. Given the wide powers given to an adjudicator to conduct the adjudication, it is likely entirely within the adjudicator's discretion to allow or disallow replies and sur-replies in appropriate circumstances, although given the extremely tight timelines, it would seem unlikely that such material would be allowed

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38 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 181.

39 *Ibid.* at 181-2.

40 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.6(2).

except in rare circumstances.

10.2.18 In-person hearings will be the exception, not the rule

Subject to party agreement, it is up to the adjudicator whether an in-person hearing takes place. Section 13.12(1) of the *Act* allows the adjudicator to issue directions regarding the conduct of the adjudication; to take the initiative in ascertaining the relevant facts or law; to obtain the assistance of an expert to determine a matter of fact in question; and to conduct an on-site inspection of the improvement.

Presumably, all of these details will be the subject of party submissions and an early procedural order. The adjudicator may convene meetings to discuss such matters. Given the very tight time frames mandated by the *Act*, however, it is likely that most adjudications will be decided on a documents-only basis. That is the experience after more than 20 years in the United Kingdom.[41]

Should the adjudicator find it necessary to request an in-person hearing, it is important that the adjudicator identify the issues the parties must address to allow the parties to focus their limited time available on those issues.[42] While oral submissions at hearings will not be the norm, there will be scenarios in which they may be useful or even necessary. As explained in *Coulson on Construction Adjudication*:[43]

> It is rare for an adjudicator to require oral evidence to be given in an adjudication. However, this is principally because of the time constraints, rather than the existence of any sort of rule that outlaws the reception of such oral evidence in adjudication. Indeed, there will be some disputes in respect of which the adjudicator may have no alternative but to hear oral evidence and make decisions on the basis of which evidence or oral explanation he accepts, if he is going to resolve the dispute properly. Take again the example of the dispute as to what was said at a particular site meeting. If the adjudi-

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41 Sir Peter Coulson, *Coulson on Construction Adjudication*, 3rd ed. (Oxford: Oxford University Press, 2015) at 19.12; James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 186. According to a survey cited by the author, only about 30% of adjudications in the U.K. involve some kind of interview, meeting or conference call.

42 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 492.

43 Sir Peter Coulson, *Coulson on Construction Adjudication*, 3rd ed. (Oxford: Oxford University Press, 2015) at 19.12.

> cator is faced with two entirely conflicting statements as to the contents of the discussions on a particular occasion, he would probably have to arrange for a hearing at which this evidence can be tested orally. It is almost inevitable that he is going to have to conclude that one or other of the parties is mistaken as to what was said at the meeting and it is unlikely, in the absence of any other relevant contemporaneous documentation, that he could reach such a conclusion without hearing oral evidence. Likewise, if extensive experts' reports have been attached by both parties to the referral notice and/or the response, the adjudicator may feel it necessary to arrange a short hearing at which the principal points advocated by each expert can be tested by way of cross-examination.

10.3 The adjudicator's determination

10.3.1 Form and timing

The adjudicator must make a determination no later than 30 days after receiving the copy of the contract or subcontract and supporting documentation from the party that gave the notice of adjudication. That deadline can be extended at any time before its expiry, either on the adjudicator's request and the written consent of the parties, for a period of no more than 14 days; or upon the written agreement of the parties and the adjudicator's consent, for the period specified in the agreement.[44] A determination made by an adjudicator after the date so determined is of no force or effect.[45]

The adjudicator's determination must be reasoned and written. While written in the context of the standard of review from administrative decisions, the recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[46] contains a very helpful summary on what a reasoned decision should look like:

> 79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the per-

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44 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(1) and (2).

45 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(5).

46 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (references omitted).

> ception of arbitrariness in the exercise of public power. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given". And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate".
>
> 80 The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons".
>
> 81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision. In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'". The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

In Ontario, the determination of an adjudicator is admissible as evidence in court.[47] As the adjudication is summary in the extreme and likely conducted on a very preliminary record, it is unlikely in most cases that determinations will carry much weight. The adjudicator must provide the parties with an electronic copy of the determination on the day it is made; and further provide them with a certified copy of the determination no later than five days following the making of a determination.[48]

10.3.2 Interim binding nature of determination

Determinations are binding on an interim basis and enforceable as if orders of the court.[49] There is no need to go to court to obtain judgment on a determination; the determination is akin to a judgment,

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47 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.13(6) and (7).

48 O. Reg. 306/18, s. 22.

49 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.20(1).

albeit an interim one.

An application to set aside a determination will only rarely succeed based on the very strict test stipulated by s. 13.18. Nothing in the *Act* prevents a party from commencing proceedings in court or before an arbitrator to finally determine the matter. This is a substantial improvement on the entirely unsatisfactory situation that prevailed prior to these reforms.

10.3.3 Costs

Generally, the parties to an adjudication will bear their own costs. If, however, the adjudicator determines that a party to the adjudication has acted in a manner that is frivolous, vexatious, an abuse of process, or other than in good faith, the adjudicator may require that party to pay some or all of the other party's costs, any part of the adjudicator's fee that would otherwise be payable by the other party, or both.[50]

The parties and the adjudicator may try and negotiate an agreed-upon fee. ODACC will list suggested hourly rates and will state whether adjudicators are willing to adjudicate on a flat -fee basis. If the parties and the adjudicator cannot agree, they may turn to ODACC, in which case set fees approved by the Minister will apply.

10.3.4 Compliance with determination

Within ten days of receiving the determination, the party ordered to make payment in the determination must pay the amount it is ordered to pay.[51] That requirement is made subject only to any requirement that the payor retain holdback.[52]

If such payment is not made to a contractor or subcontractor, the contractor or subcontractor may suspend further work under the contract or subcontract until the party ordered to pay pays the amount required to be paid under the determination, together with any interest accrued on that amount and the reasonable costs incurred by the contractor or subcontractor as a result of the suspension of work.[53]

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50 *Construction Act*, R.S.O. 1990, c. C.30, ss. 13.16 and 13.17.

51 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19(2).

52 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19(1).

53 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.19(5).

10.4 Application to set aside adjudicator's determination

10.4.1 Statutory grounds

There are very limited grounds on which a court may set aside an adjudicator's determination. These grounds mirror the grounds on which arbitral awards may be set aside:[54]

1. A party participated in the adjudication while under a legal incapacity.

2. The contract or subcontract is invalid or has ceased to exist.

3. The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication.

4. The adjudication was conducted by someone other than an adjudicator.

5. The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject under this Part, and the failure to comply prejudiced the applicant's right to a fair adjudication.

6. There is a reasonable apprehension of bias on the part of the adjudicator.

7. The determination was made as a result of fraud.

An application to set aside an adjudicator's determination must be made no later than 30 days after the determination is communicated to the parties. Such application does not stay the enforcement of the determination unless a court orders otherwise.

10.4.2 Natural justice

In virtually all jurisdictions in which adjudication has been enacted, an adjudicator's determination can be set aside if there has been a denial of natural justice. While it is true that the Ontario *Act* does not mention natural justice by name, there is little doubt that natural justice is a fundamental requirement of adjudication in Ontario. Section 13.18(5) requires that the procedures followed must provide the par-

54 *Construction Act*, R.S.O. 1990, c. C.30, s. 13.18.

ties with a "fair" adjudication. The Expert Review held as follows:

> A summary of each jurisdiction's enforcement procedures is found in Appendix C. To oversimplify, these jurisdictions generally provide that an adjudicator's decision will be enforced barring a breach of natural justice or want of jurisdiction. These fundamentals should carry forward into adjudication in Ontario.

In a different context, it has been held that the adjudication of a dispute is quasi-judicial in character and the rules of natural justice must be strictly observed.[55]

Similarly, domestic arbitration legislation also does not expressly mention natural justice, but requires that the parties be treated equally and fairly. It is clear that arbitrations are subject to natural justice.[56] In *Kane v. University of British Columbia*,[57] the Supreme Court of Canada enumerated the following fundamental principles a quasi-judicial tribunal must adhere to:

> The following propositions, in my view, govern the outcome of this appeal:
>
> > 1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a board of governors of a university, sitting in appeal, pursuant to legislative mandate. The board need not assume the trappings of a court. There is no *lis inter partes*, no prosecutor and no accused. The board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case. Members of the board are drawn from all constituencies of the community. They normally serve without remuneration in the discharge of what is frequently an arduous and thankless form of public service. Few, if any, of the members of the board will be legally trained. It would be wrong, therefore, to ask of them, in the discharge of their quasi-judicial duties, the high standard of technical performance which one may properly expect of a court. They are not fettered by the strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice: per Lord Parmoor in *Loc. Govt. Bd. v. Arlidge*, [1915] A.C. 120 at 140 (H.L.). Let me make it clear that in this appeal nothing has been said which in any way impugns the integrity or bona fides of any member of the Board of Governors of the University of British

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55 *Greenhut v. Scott*, 1975 CarswellBC 119, [1975] 4 W.W.R. 645 (S.C.).

56 D.W. Glaholt and M. Rotterdam, *The Law of ADR in Canada*, 2nd ed. (Markham: LexisNexis, 2018) at 91.

57 1980 CarswellBC 1, 1980 CarswellBC 599, [1980] 1 S.C.R. 1105.

Columbia.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said (*Ridge v. Baldwin*, [1963] 1 Q.B. 539, [1962] 1 All E.R. 834 at 850; reversed on other grounds [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.)) is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth": per Tucker L.J. in *Russell v. Norfolk (Duke)*, [1949] 1 All E.R. 109 at 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake: *Abbott v. Sullivan*, [1952] 1 K.B. 189 at 198[1952] 1 All E.R. 226; *Russell v. Norfolk (Duke)*, supra, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views": *Bd. of Education v. Rice*, [1911] A.C. 179 at 182 (H.L.); *Loc. Govt. Bd. v. Arlidge*, supra, at pp. 133 and 141.

5. It is a cardinal principle of our law that, unless expressly or by necessary implication empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses (de Smith, Judicial Review of Administrative Action, 3rd ed. (1973), p. 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Govt. of Malaya*, [1962] A.C. 322 at 337 (P.C.), "know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them . . . whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other". In *Errington v. Minister of Health*, [1935] 1 K.B. 249 (C.A.), Greer L.J. held that a quasi-judicial officer must exercise powers in accordance with the rules of natural justice, and must not hear one side in the absence of the other (p. 268):

> . . . if . . . he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given *ex parte* afterwards without the owners having any opportunity whatsoever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act.

Since adjudicators fulfil a quasi-judicial role, there is no reason why they should not be held to these principles.

It has been held, however, that the principles of natural justice must be weighed against the time constraints inherent in the adjudication model, as well as the provisional nature of the decision.[58] A leading U.K. text interprets this to mean the following:

> In effect, this means that the goalposts of what might amount to a breach of natural justice in other circumstances are shifted in adjudication. Only in instances where it is clear that there is actual or apparent bias, or a party's right to a fair hearing has been impinged, such that it is likely to have had a significant effect on the outcome of the adjudication, will there be a breach of natural justice.[59]

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58 *Try Construction Ltd. v. Eton House Group Ltd.*, [2003] EWHC 60 (T.C.C.); cited in James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 363.

59 James Pickavance, *A Practical Guide to Construction Adjudication* (Chichester: Wiley Blackwell, 2016) at 363.

APPENDICES

Appendix I

Appendix II

Precedents

Appendices

Please keep "Toronto" together.

APPENDICES
REGULATIONS

I Construction Lien Act

Ont. Reg. 302/18 — Procedures for Actions Under Part VIII of the Act

made under the *Construction Lien Act*

O. Reg. 302/18 [*Note*: The title of this Regulation was changed from "*Procedures for Actions Under Part VIII*" to "*Procedures for Actions Under Part VIII of the Act*" by O. Reg. 110/19, s. 1.], as am. O. Reg. 110/19

1. Statement of claim — (1) An action shall be commenced by the issuing of a statement of claim in a court office in the county in which the premises or part of the premises are situate.

(2) Subject to subsection (3), a statement of claim shall be served within 90 days after it is issued.

(3) The court may, on a motion served and filed before or after the period of time mentioned in subsection (2) has expired, extend the time for service of the statement of claim.

2. Statement of defence, crossclaim and counterclaim — (1) A defendant may,

(a) counterclaim against the person who named the defendant as a defendant in respect of any claim that the defendant may be entitled to make against that person, whether or not that claim is related to the making of the improvement; and

(b) crossclaim against a co-defendant in respect of any claim that the defendant may be entitled to make against that person related to the making of the improvement.

(2) Subject to subsection (3), a crossclaim or counterclaim by any person shall accompany the person's statement of defence.

(3) The court may, on a motion served and filed before the date the statement of defence is delivered, grant leave to deliver a crossclaim or counterclaim after the statement of defence is delivered.

(4) If the court grants leave under subsection (3), the court may,

(a) make any order as to costs that it considers appropriate; and

(b) give directions as to the conduct of the action.

(5) The time for delivering a statement of defence to a lien claim, crossclaim, counterclaim or third party claim shall be 20 days.

3. Joinder — (1) Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.

(2) A plaintiff may, in an action, join a lien claim and a claim for breach of a contract or subcontract.

O. Reg. 110/19, s. 2

4. Third party claims — (1) Subject to subsection (2), a person against whom a claim is made in a statement of claim, crossclaim, counterclaim or third party claim may join a person who is not a party to the action as a third party for the purpose of claiming contribution or indemnity from the third party in respect of that claim.

(2) A person may be joined as a third party only with leave of the court on a motion served and filed with notice to the owner and all persons having subsisting preserved or perfected liens at the time of the motion.

(3) A court may grant leave under subsection (2) only if it is satisfied that the trial of the third party claim will not,

(a) unduly prejudice the ability of the third party or of any lien claimant or defendant to prosecute a claim or conduct a defence; or

(b) unduly delay or complicate the resolution of the action.

(4) The court may give directions as to the conduct of third party claims.

5. Noting in default — (1) If a person against whom a claim is made in a statement of claim, counterclaim, crossclaim or third party claim defaults in the delivery of a defence to that claim, the person against whom the claim is made may be noted in default.

(2) If a defendant or third party has been noted in default under subsection (1), the defendant or third party may not contest the claim of the person who named the defendant or third party as a defendant or third party, or file a statement of defence, except with leave of the court.

(3) A court may grant leave under subsection (2) only if the court is satisfied that there is evidence to support a defence.

(4) If the court grants leave under subsection (2), the court may,

(a) make any order as to costs that it considers appropriate; and

(b) give directions as to the conduct of the action.

(5) The following rules apply with respect to a defendant or third party who has been noted in default under subsection (1), if leave is not granted under

subsection (2):

1. The defendant or third party is deemed to admit all allegations of fact made in the statement of claim, counterclaim, crossclaim or third party claim, as the case may be.

2. Despite anything to the contrary in this Regulation, the defendant or third party is not entitled to notice of the trial of the action or of any step in the action, or to participate in the trial of the action or in any step in the action.

3. Default judgment may be given against the defendant or third party.

6. Parties — (1) The person serving the notice of trial and all persons served with notice of trial are parties to the action.

(2) The court may at any time add or join any person as a party to the action.

7. Carriage of action — The court may at any time make an order awarding carriage of the action to any person who has a perfected lien against the premises.

8. Consolidation of actions — If more than one action is brought to enforce liens in respect of the same improvement, the court may,

(a) consolidate all the actions into one action; and

(b) award carriage of the action to any person who has a perfected lien against the premises.

9. Motion to fix date for trial or settlement meeting — (1) Any party may, at any time after the following, make a motion to the court, without notice to any other person, to have a day, time and place fixed for the trial of the action, or for the holding of a settlement meeting under section 10, or both:

1. The delivery of the statements of defence, including the statements of defence to all crossclaims, counterclaims or third party claims.

2. The expiry of the time for the delivery of the statements of defence referred to in paragraph 1.

(2) If the court orders the holding of a settlement meeting, the moving party shall, at least 10 days before the scheduled meeting date, serve a notice of settlement meeting on any person who, on the twelfth day before the scheduled meeting date, was,

(a) the owner of the premises or any other person named as a defendant in a statement of claim in respect of the action;

(b) if the lien attaches to the premises,

(i) a person with a registered interest in the premises, or

(ii) an execution creditor of the owner;

(c) any other person having a preserved or perfected lien against the

premises; or

(d) a person joined as a third party under section 4.

(3) If the lien does not attach to the premises, the moving party shall request from the owner the identity of every person described in clause (2)(c).

(4) If the court fixes a date for trial, the moving party shall serve a notice of trial, at least 10 days before the trial date, on any person who is or would be entitled to a notice of a settlement meeting under subsection (2).

10. Settlement meeting — (1) A settlement meeting ordered by the court shall be conducted in accordance with this section.

(2) The settlement meeting shall be for the purpose of resolving or narrowing any issues to be tried in the action.

(3) The settlement meeting shall be conducted by,

(a) a person selected by a majority of the persons present at the meeting; or

(b) if no person is selected, the moving party.

(4) The results of the settlement meeting shall be recorded in a statement of settlement, which shall summarize those issues of fact and law that have been settled by the parties.

(5) The statement of settlement shall be filed with the court and shall be attached to and form part of the record.

(6) A filed statement of settlement is binding on all persons served with notice of the settlement meeting, and on all defendants who have been noted in default.

(7) Despite subsection (6), the court may vary or set aside a filed statement of settlement on such order as to costs as it considers appropriate.

(8) On the filing of a statement of settlement with the court, the court may,

(a) if there was no dispute at the settlement meeting with respect to a claim for lien, declare the lien valid and give such further judgment as it considers appropriate;

(b) enter a judgment or make a report on consent on those issues that have been settled by the parties;

(c) make any order that is necessary to give effect to any judgment or report of the court under clause (a) or (b); and

(d) make any order that is necessary for, or will expedite the conduct of, the trial.

(9) Rule 50 of the *Rules of Civil Procedure* does not apply to actions.

11. Reference of action — (1) For the purposes of subsection 58(1.1) of the Act,

(a) notice of a motion for a reference under clause 58(1)(b) of the Act shall be given to every person who is or would be entitled to a notice

of settlement meeting under subsection 9(2) of this Regulation; and

(b) notice of a motion for a reference under clause 58(1)(c) of the Act shall be given to any other person having a preserved or perfected lien against the premises.

(2) In the case of a reference mentioned in clause (1)(b), if the lien does not attach to the premises, the moving party shall request from the owner the identity of every person described in clause (1)(b).

(3) On a motion for a reference mentioned in clause (1)(b), the moving party shall file the following documents with respect to the action and any other action that involves a lien claim arising from the same improvement:

1. A copy of the claim for lien.

2. A copy of the pleadings, including in any counterclaim, crossclaim or third party claim in the action.

12. Motion for directions — If a person is in possession of an amount that may be subject to a trust under Part II of the Act, the person may make a motion for directions and the court may give any direction or make any order that the court considers appropriate in the circumstances.

13. Interlocutory steps — Interlocutory steps, other than those provided for under the Act, shall not be taken without the consent of the court on proof that the steps are necessary or would expedite the resolution of the issues in dispute.

14. Technical assistance — (1) The court may, for the purpose of enabling it to determine better any matter of fact in question, obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in any way it considers fit.

(2) The court may fix the remuneration of a person mentioned in subsection (1) and direct the payment of the remuneration by any of the parties.

(3) The parties are entitled to make submissions regarding the payment of remuneration before an order is made under subsection (2).

15. Commencement — This Regulation comes into force on the later of the day subsection 62(3) of the *Construction Lien Amendment Act, 2017* comes into force and the day this Regulation is filed.

Appendix I

Ont. Reg. 303/18 — Forms

made under the *Construction Lien Act*

O. Reg. 303/18, as am. O. Reg. 111/19; 324/19

1. Reference to forms — In this Regulation, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and that is available on the Internet through www.ontariocourtforms.on.ca.

2. Forms — (1) For the purposes of the definition of "written notice of a lien" in subsection 1(1) of the Act, a written notice of a lien shall be in Form 1.

(1.1) A notice of non-payment,

(a) under subsection 6.4(2) of the Act shall be in Form 1.1;

(b) under subsection 6.5(5) of the Act shall be in Form 1.2;

(c) under subsection 6.5(6) of the Act shall be in Form 1.3;

(d) under subsection 6.6(6) of the Act shall be in Form 1.4; and

(e) under subsection 6.6(7) of the Act shall be in Form 1.5.

(2) A notice to a contractor under section 18 of the Act may be in Form 2.

(3) A notice to a lien claimant under subsection 19(3) of the Act may be in Form 3.

(4) A letter of credit under subsection 22(4) of the Act shall be in Form 4.

(5) A demand-worded holdback repayment bond under subsection 22(4) of the Act shall be in Form 5.

(6) A notice of non-payment of a holdback under section 27.1 of the Act shall be in Form 6.

(7) A declaration of last supply under subsection 31(5) of the Act shall be in Form 7.

(8) A notice of termination under subsection 31(6) of the Act shall be in Form 8.

(9) A certificate of the substantial performance of a contract under section 32 of the Act shall be in Form 9.

(10) A certificate of completion of a subcontract under subsection 33(1) of the Act shall be in Form 10.

(11) A notice of intention to register land described in a description in accordance with the *Condominium Act, 1998* under section 33.1 of the Act shall be in Form 11.

(12) A claim for lien under section 34 of the Act shall be in Form 12.

(13) A notice of preservation of lien regarding common elements of a con-

dominium under subsection 34(9) of the Act shall be in Form 13.

(14) A certificate of action under section 36 of the Act shall be in Form 14.

(15) A notice given by a defendant under subsection 36(4) of the Act may be in Form 15.

(16) A notice of cross-examination under clause 40(3)(a) of the Act may be in Form 16 and under clause 40(3)(b), (c) or (d) of the Act may be in Form 17.

(17) A withdrawal of written notice of a lien under subsection 41(2) of the Act shall be in Form 18.

(18) A discharge of lien under section 41 or 42 of the Act shall be in Form 19.

(19) A notice of postponement of lien under section 43 of the Act shall be in Form 20.

(20) A bond posted as security under section 44 of the Act shall be in Form 21.

(21) An order under section 58 of the Act directing a reference of the whole action or any part of it for trial to a master, a case management master or a person agreed on by the parties shall be in Form 22.

(22) An order under section 58 of the Act directing a reference of the whole action or any part of it for trial to a deputy judge of the Small Claims Court or to the Small Claims Court Administrative Judge shall be in Form 23.

(23) A judgment at trial under section 62 of the Act shall be,

(a) in Form 24, if the lien attaches to the premises; or

(b) in Form 25, if the lien does not attach to the premises.

(24) A report under section 62 of the Act relating to a reference by a master, a case management master or a person agreed on by the parties shall be,

(a) in Form 26, if the lien attaches to the premises; or

(b) in Form 27, if the lien does not attach to the premises.

(25) A report under section 62 of the Act relating to a reference by a deputy judge of the Small Claims Court or the Small Claims Court Administrative Judge shall be,

(a) in Form 28, if the lien attaches to the premises; or

(b) in Form 29, if the lien does not attach to the premises.

(26) A financial guarantee bond under subsection 78(10) of the Act shall be in Form 30.

(27) A labour and material payment bond under section 85.1 of the Act shall be in Form 31.

(28) A performance bond under section 85.1 of the Act shall be in Form 32.

(29) A notice of trial under section 9 of Ontario Regulation 302/18 (*Procedures For Actions Under Part VIII*) made under the Act may be in Form 33.

(30) A notice of settlement meeting under section 9 of Ontario Regulation 302/18 (*Procedures For Actions Under Part VIII*) made under the Act may be in Form 34.

O. Reg. 303/18, s. 3

3. Section 2 of this Regulation is amended by adding the following subsection:

(1.1) A notice of non-payment,

(a) under subsection 6.4(2) of the Act shall be in Form 1.1;

(b) under subsection 6.5(5) of the Act shall be in Form 1.2;

(c) under subsection 6.5(6) of the Act shall be in Form 1.3;

(d) under subsection 6.6(6) of the Act shall be in Form 1.4; and

(e) under subsection 6.6(7) of the Act shall be in Form 1.5.

4. [Repealed O. Reg. 111/19, s. 1.]

5. Commencement — (1) Subject to subsection (2), this Regulation comes into force of the later of the day subsection 2(16) of the *Construction Lien Amendment Act, 2017* comes into force and the day it is filed.

(2) Sections 3 and 4 come into force on the day section 7 of the *Construction Lien Amendment Act, 2017* comes into force.

TABLE OF FORMS [1]

Column 1 Form Number	Column 2 Form Name	Column 3 Date of Form
1	Written Notice of Lien under Subsection 1(1) of the Act	2018/04
1.1	Owner Notice of Non-Payment (Subsection 6.4 (2) of the Act)	2019/01
1.2	Contractor Notice of Non-Payment Where Owner Does not Pay (Subsection 6.5 (5) of the Act)	2019/01
1.3	Contractor Notice of Non-Payment if Dispute (Subsection 6.5 (6) of the Act)	2019/01
1.4	Subcontractor Notice of Non-Payment Where Contractor Does not Pay (Subsection 6.6 (6) of the Act)	2019/01
1.5	Subcontractor Notice of Non-Payment if Dispute (Subsection 6.6 (7) of the Act)	2019/01
2	Notice to Contractor under Section 18 of the Act	2018/04
3	Notice to Lien Claimant under Subsection 19(3) of the Act	2018/04

Column 1 Form Number	Column 2 Form Name	Column 3 Date of Form
4	Letter of Credit under Subsection 22(4) of the Act	2018/04
5	Holdback Repayment Bond under Subsection 22(4) of the Act	2019/08
6	Notice of Non-Payment of Holdback under Section 27.1 of the Act	2019/01
7	Declaration of Last Supply under Subsection 31(5) of the Act	2018/04
8	Notice of Termination under Subsection 31(6) of the Act	2019/01
9	Certificate of Substantial Performance of the Contract under Section 32 of the Act	2019/01
10	Certificate of Completion of Subcontract under Subsection 33(1) of the Act	2018/04
11	Notice of Intention to Register a Condominium in accordance with the *Condominium Act, 1998* under Section 33.1 of the Act	2018/04
12	Claim for Lien under Section 34 of the Act	2018/04
13	Notice of Preservation of Lien under Subsection 34(9) of the Act	2018/04
14	Certificate of Action under Section 36 of the Act	2019/01
15	Notice Given by Defendant under Subsection 36(4) of the Act	2019/01
16	Notice of Cross-Examination under Clause 40(3)(a) of the Act	2018/04
17	Notice of Cross-Examination under Clause 40(3)(b), (c) or (d) of the Act	2019/01
18	Withdrawal of Written Notice of Lien under Subsection 41(2) of the Act	2018/04
19	Discharge of Lien under Section 41 or 42 of the Act	2018/04
20	Notice of Postponement of Lien under Section 43 of the Act	2018/04
21	Financial Guarantee Bond under Section 44 of the Act	2018/04
22	Order Directing a Reference for Trial under Section 58 of the Act	2018/04

Appendix I

Column 1 Form Number	Column 2 Form Name	Column 3 Date of Form
23	Order Directing a Reference for Trial under Section 58 of the Act (Small Claims Court)	2019/01
24	Judgment at Trial under Section 62 of the Act if Lien Attaches to Premises	2019/01
25	Judgment at Trial under Section 62 of the Act if Lien Does Not Attach to Premises	2019/01
26	Report under Section 62 of the Act if Lien Attaches to Premises	2019/01
27	Report under Section 62 of the Act if Lien Does Not Attach to Premises	2018/04
28	Report under Section 62 of the Act if Lien Attaches to Premises (Small Claims Court)	2019/01
29	Report under Section 62 of the Act if Lien Does Not Attach to Premises (Small Claims Court)	2019/01
30	Financial Guarantee Bond under Subsection 78(10) of the Act	2018/04
31	Labour and Material Payment Bond under Section 85.1 of the Act	2019/08
32	Performance Bond under Section 85.1 of the Act	2019/08
33	Notice of Trial	2018/04
34	Notice of Settlement Meeting	2018/04

O. Reg. 111/19, s. 2; 324/19, s. 1

Form 1 — Written Notice of Lien Under Subsection 1(1) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of person having a lien: .....

Address for service: .....

Name of payer: .....

Address: .....

Name of person to whom person having a lien supplied services or materials: .....

Address: .....

Time within which services or materials were supplied:

..... (date supply commenced) to ..... (date of most recent supply)

Short description of services or materials that have been supplied:

.....

Description of premises:

.....

Contract price or subcontract price: $ .....

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

Date: ....

(signature of person having a lien)

Form 1.1 — Owner Notice of Non-Payment (Subsection 6.4(2) of the Act) [Heading amended O. Reg. 111/19, s. 2(1).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of owner: .....

Address: .....

Description of premises:

.....

Name of contractor: .....

Address: .....

Address for service, if known .....

The owner disputes the proper invoice dated ....., 20....., submitted to the owner by the contractor in respect of the improvement. The owner will not pay the following amount payable under the invoice:

(Use A or B, whichever is applicable)

A. The full amount of the proper invoice, being $ .....

B. A portion of the amount of the proper invoice, being $ .....

The reasons for non-payment are as follows:

.....

Date: ....

(owner)

O. Reg. 111/19, s. 2(1)

Form 1.2 — Contractor Notice of Non-Payment Where Owner Does not Pay (Subsection 6.5(5) of the Act) [Heading amended O. Reg. 111/19, s. 2(1).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of contractor: .....

Address: .....

Description of the premises:

.....

Name of subcontractor: .....

Address: .....

Address for service, if known: .....

The contractor submitted a proper invoice to the owner in respect of the improvement on ....., 20.....

The contractor has not received payment from the owner and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.5(1) of the *Construction Act*.

Amount that will not be paid:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being $ .....

B. A portion of the amount of the services or materials supplied by the subcontractor, being $ .....

The contractor hereby undertakes to refer the matter to adjudication under Part II.1 of the *Construction Act*, no later than 21 days after giving this notice of non-

payment to the subcontractor.

A copy of the Notice of Non-Payment under Subsection 6.4(2) of the Act is enclosed.

Date: ....

(Contractor)

O. Reg. 111/19, s. 2(1)

Form 1.3 — Contractor Notice of Non-Payment if Dispute (Subsection 6.5(6) of the Act) [Heading amended O. Reg. 111/19, s. 2(1).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of contractor: .....

Address: .....

Description of the premises:

.....

Name of subcontractor: .....

Address: .....

Address for service, if known: .....

The contractor submitted a proper invoice to the owner in respect of the improvement on ....., 20.....

The contractor disputes the entitlement of the subcontractor to payment of an amount under the subcontract that was included in the proper invoice. The contractor will not pay the following amount:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being $ .....

B. A portion of the amount of the services or materials supplied by the subcontractor, being $ .....

The reasons for non-payment are as follows:

.....

Date: ....

(Contractor)

O. Reg. 111/19, s. 2(1)

Form 1.4 — Subcontractor Notice of Non-Payment Where Contractor Does not Pay (Subsection 6.6(6) of the Act) [Heading amended O. Reg. 111/19, s. 2(1).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of subcontractor: .....

Address: .....

Description of the premises:

.....

Name of contractor: .....

Address: .....

(Complete for the subcontractor who supplied services or materials to an improvement in relation to the proper invoice)

Name of subcontractor: .....

Address: .....

Address for service, if known: .....

The contractor submitted a proper invoice to the owner in respect of the improvement on ....., 20.....

(Use A or B, whichever is applicable)

❑ A. The subcontractor has not received payment from the contractor and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the *Construction Act*.

❑ B. [*Non-payment to a subcontractor who is entitled to payment from a subcontractor in accordance with subsection 6.6(11) of the Construction Act*]. The subcontractor has not received payment from the subcontractor and will not pay another subcontractor the amount payable under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the *Construction Act*.

Amount that will not be paid:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being $ .....

B. A portion of the amount of the services or materials supplied by the subcontractor, being $ .....

(Include the following where applicable)

The subcontractor hereby undertakes to refer the matter to adjudication under Part II.1 of the *Construction Act*, no later than 21 days after giving this notice of non-payment to the subcontractor.

A copy of any notice of non-payment received by the subcontractor is enclosed.

Date: ....

(Subcontractor)

O. Reg. 111/19, s. 2(1)

Form 1.5 — Subcontractor Notice of Non-Payment if Dispute (Subsection 6.6(7) of the Act) [Heading amended O. Reg. 111/19, s. 2(1).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of subcontractor: .....

Address: .....

Description of the premises:

.....

Name of contractor: .....

Address: .....

(Complete for the subcontractor who supplied services or materials to an improvement in relation to the proper invoice)

Name of subcontractor: .....

Address: .....

Address for service, if known: .....

The contractor submitted a proper invoice to the owner in respect of the improvement on ....., 20.....

The subcontractor disputes the entitlement of another subcontractor to payment of an amount under the subcontract that was included in the proper invoice in accordance with subsection 6.6(7) of the *Construction Act* or subsection 6.6(11) of the *Construction Act*. The subcontractor will not pay the following amount:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being $ .....

B. A portion of the amount of the services or materials supplied by the subcontractor, being $ .....

The reasons for non-payment are as follows:

.....

Date: ....

(Subcontractor)

O. Reg. 111/19, s. 2(1)

Form 2 — Notice to Contractor Under Section 18 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

TO: ....., contractor.

FROM: ....., a joint owner or owner in common with ..... of the following premises:

..... (address of premises)

The joint owner or owner in common assumes no responsibility for the improvements to the premises, to be made by you under a contract between you and: ..... (name of owner).

Date: ....

(joint owner or owner in common or agent)

Form 3 — Notice to Lien Claimant Under Subsection 19(3) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a*

form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]

TO: ....., lien claimant.

FROM: ....., the landlord of the following premises:

..... (address of premises)

The landlord intends to

(Use A or B, whichever is applicable)

❑ A. enforce forfeiture against the lease of the premises;

❑ B. terminate the lease of the premises

for non-payment of rent.

In order to protect your lien rights against the interest of the tenant, the amount of the unpaid rent as stated below must be paid to the landlord within ten days of your receiving this notice. If you pay this amount, you may add it to your claim for lien.

Amount of unpaid rent: $ .....

Payment of this amount may be made on: ..... (days) between the hours of ..... and ....., at ..... (address for payment)

Date: ....

(landlord or agent)

Form 4 — Letter of Credit Under Subsection 22(4) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Draft Irrevocable Letter of Credit regarding Holdback Repayment

[Insert name of financial institution]

Date of Issue:

Irrevocable Standby Letter of Credit No.:

Appendix I

Financial Institution Branch No.:
Amount: Not exceeding CAD $
Date of Expiry:
Applicant:
Name of contractor:
Address of the contractor:
Description of the improvement:
Address of the improvement:

To:

Pursuant to the request of ..... (hereinafter called "the Applicant"), we, the bank of, [insert name and address of financial institution] hereby establish and give to you an irrevocable standby letter of credit no. ..... in your favour in the total amount of $ ..... (Canadian dollars) which may be drawn on by you at any time and from time to time upon written demand for payment made upon us by you which demand we shall honour without enquiring whether you have a right as between yourself and the said applicant to make such demand, and without recognizing any claim of the said applicant for objection by it to payment by us.

Your drawing by written demand for payment must bear reference to this letter of credit no. ..... and be accompanied by:

(a) A Certificate signed by two officers of the beneficiary certifying that the Applicant is in default of its contractual obligation having failed to make a holdback reimbursement and that you are entitled to draw on this irrevocable standby letter of credit and that an amount of up to $ ..... (Canadian dollars) be paid; and

(b) Presentation of the original of this letter of credit.

Partial drawings are permitted under this letter of credit.

This irrevocable standby letter of credit no. ..... shall expire on the ..... day of ..... subject to the following:

This letter of credit shall be deemed to be automatically extended, without amendment for successive one year periods from the present day or any future expiration date, unless cancelled upon receipt of this original letter of credit accompanied by your written authorization to us to cancel same;

[Add any additional commercial conditions]

The drawings under this irrevocable standby letter of credit are to state that they are drawn under [insert name of financial institution] irrevocable standby letter of credit no. .....

Yours very truly,

.....	.....
Authorization/Signature of Financial Institution	Authorization/Signature of Financial Institution

Form 5 — Holdback Repayment Bond Under Subsection 22(4) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

No. ..... (the *"Bond"*) ..... (name of the contractor*), as a principal, hereinafter called the *"Contractor"*, and ..... (name of the surety company**), a corporation created and existing under the laws of ..... (place of incorporation), as a surety, and duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter called the *"Surety"*, are held and firmly bound unto ..... (name of the owner ***) as obligee, hereinafter for the purposes of this Bond called the *"Owner"*, in the amount of 10% of the price of the Original Contract (defined below), or, as such price is adjusted in accordance with the terms of the Original Contract and Performance Bond No. ....., hereinafter called the *"Bond Amount"*, for the payment of which sum the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the *"Obligation"*).

WHEREAS the Contractor has entered into a written contract with the Owner dated the .....day of ..... (name of month) in the year .....for ..... (title or description of the contract) (the *"Original Contract"*) and, for the purpose of specifying the conditions of the Obligation, this contract together with amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to collectively as the "Contract";

AND WHEREAS the Contract allows for the Owner to make payments to the Contractor without retaining the holdback, as defined in the *Construction Act* (the *"Act"*), in the form of funds;

AND WHEREAS the Act provides that the Owner may satisfy its obligation to retain the holdback in the form of this Bond;

AND WHEREAS the Act provides that the Owner shall maintain the holdback until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under the Act;

NOW THEREFORE the condition of this Obligation is such that if all liens in respect of the Contract that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under the Act, then this Obligation shall be null and void; otherwise it shall remain in full force and effect,

subject to the following terms and conditions:

1. Whenever a lien or liens against the holdback in respect of the Contract have not expired or been satisfied, discharged or otherwise provided for under the Act but is or are preserved, the Owner may make demand on this Bond for an amount necessary for the Owner to comply with its holdback obligations under the Act, substantially in the form set out at Schedule A executed by two (2) officers of the Owner (a *"Demand"*). For greater clarity, the Demand may include amounts required for security for costs. Partial and multiple Demands not exceeding the Bond Amount in the aggregate may be made. The Demand shall certify the amount of the lien or liens against the holdback in respect of the Contract and that such liens have not expired or been satisfied, discharged or otherwise provided for under the Act.

2. This Bond shall be irrevocable and payment will be made within ten (10) business days of receipt of a Demand, notwithstanding any objection by the Contractor. The Demand shall be accepted by the Surety as conclusive evidence that a Default has occurred and that the amount set out in the Demand is an appropriate amount, and the Surety shall not assert as a defense or grounds for not paying the Bond Amount, in whole or in part, pursuant to such Demand that a default has not occurred, that the amount set out in the Demand is not appropriate, warranted or otherwise not in accordance with the Contract or that the Owner is in default under the Contract. The Surety's liability under this Bond is unconditional and shall not be discharged or released or affected by any arrangements made between the Owner and the Contractor, or by any dispute between the Surety and the Contractor, or the taking or receiving of security by the Owner from the Contractor, or by any alteration, change, addition, modification, or variation in the Contractor's obligations under the Contract, or by the exercise by the Owner of any of the rights or remedies reserved to it under the Contract or by any forbearance to exercise any such rights or remedies whether as to payment, time, performance or otherwise (whether or not any arrangement, alteration or forbearance is made without the Surety's knowledge or consent). All payments by the Surety shall be made free and clear without deduction, set-off or withholding. The Surety's obligation to pay a Demand arises solely upon the Owner delivering a Demand in the prescribed form to the Surety, and the Surety shall not assert as a defence that the lien is invalid and shall not seek relief in any court to avoid this payment or assert any other defence other than the Demand has not been delivered in accordance with this Bond.

3. Notwithstanding any other provision in this Bond, the Surety's total liability under this Bond shall be limited to the lesser of the amount of holdback paid to the Contractor in respect of the Contract or the Bond Amount.

4. As a condition precedent to any suit or action under the Bond, a Demand must be received by the Surety on or before a period of one hundred and twenty (120) calendar days from the last date on which a lien arising from the Contract could have been preserved under the Act.

5. The parties to this Bond agree that any suit or action under the Bond is to be

made to a court of competent jurisdiction in Ontario and agree to submit to the jurisdiction of such court notwithstanding any terms to the contrary in the Contract.

6. No right of action shall accrue on this Bond, to or for the use of, any person or corporation other than the Owner named herein, or the heirs, executors, administrators or successors of the Owner.

7. All Demands and notices under this Bond shall be delivered by facsimile or registered mail to the Surety, with a copy to the Contractor, at the addresses set out below, subject to any change of address in accordance with this Section. All other correspondence may be delivered by any of facsimile, regular mail, registered mail, email or courier. A change of address for the Surety is publicly available on the Financial Services Regulatory Authority of Ontario website. The address for the Contractor may be changed by giving notice to the other parties setting out the new address in accordance with this Section.

The Surety:	*The Contractor:*
[Surety corporate name]	*[Contractor proper name]*
[address]	*[address]*
[fax]	*[fax]*
[email]	*[email]*

8. This Bond shall be governed by the laws of the Province of Ontario.

IN WITNESS WHEREOF, the Contractor and the Surety have Signed and Sealed this Bond this ..... day of ..... in the year .....

[Contractor proper name]	Witnessed by:
By:	.....
Name:	Name of Witness:
	.....
Title:	Address of Witness:
	.....

I have authority to bind the corporation.

[Surety corporate name]

By: .....

Name: .....

Attorney-in-fact

** IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD "COLLECTIVELY" AFTER THE WORD "HEREINAFTER" IN THE FIRST LINE.*

*** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE "[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation]," FOR*

EACH SURETY, FOLLOWED BY "each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the "Surety"".

**** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.*

Schedule A

Demand

[date]
[Surety name]
[Surety address]
[Surety address]
[Surety's electronic/email address]
[Attention]
Re: .....
Holdback Repayment Bond No: .....
Contractor: .....JV
Contract:

We hereby certify that a lien or liens against the holdback in the amount of $ ....., in respect of the Contract, have not expired or been satisfied, discharged or otherwise provided for under the *Construction Act* and that we are entitled to make Demand on the captioned Holdback Repayment Bond.

We hereby demand payment of *(insert here the lesser of the amount of the lien or liens, plus the amount of the statutory security for costs, and the amount of the holdback)* $ ..... within ten (10) business days of your receipt of this Demand.

Payment should be made by cheque to our address at ....., or by bank wire transfer as follows:

Beneficiary: .....
Credit account number: .....
Bank name: .....
Bank address: .....
SWIFT/IBAN code: .....
Executed this ..... day of ....., 20....., on behalf of *[Owner's full corporate title]*

By:	By: .....
Name:	Name: .....
Title:	Title: .....
Phone:	Phone: .....
Email address:	Email address: .....
I have authority to make this certification and to bind the *[Owner]*.	I have authority to make this certification and to bind the *[Owner]*.

cc: *[Contractor]*

O. Reg. 111/19, s. 2(2); 324/19, s. 1

Form 6 — Notice of Non-Payment of Holdback Under Section 27.1 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name: ..... (Name of owner, contractor or subcontractor)

Address: .....

Description of the premises:

.....

Name of [contractor/subcontractor (choose one)]: .....

Address: .....

Address for service, if known: .....

The [owner/contractor/subcontractor (choose one)] will not pay the following amount required to be paid under sections 26 and 27 of the *Construction Act*:

(Use A or B, whichever is applicable)

A. The full amount of the holdback, being $ .....

B. A portion of the amount of the holdback, being $ .....

[If applicable] A copy of any notice of non-payment of holdback from the [contractor/subcontractor (choose one)] is enclosed.

Date: ....

(Owner)

O. Reg. 111/19, s. 2(2)

Form 7 — Declaration of Last Supply Under Subsection 31(5) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through*

www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]

..... (name of supplier), a supplier of services or materials to an improvement being made to: ..... (address of premises), declares that:

1. The following services or materials were supplied: ..... (description of services or materials).

2. These services or materials were supplied under a contract (or subcontract) with ..... (name of payer) dated the ..... day of ....., 20.....

3. The last supply of services or materials made by the supplier to the improvement under contract (or subcontract) was made on ..... (date of last supply).

4. No further services or materials will be supplied under the contract (or subcontract).

Declared before me at the
.....
of ..... in the
.....
of ....
(supplier)

on the ..... day of
....., 20.....
.....
A Commissioner, etc.

Form 8 — Notice of Termination Under Subsection 31(6) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

..... (name of owner, contractor or other person whose lien is subject to expiry)

Description of the premises:

.....

(Use A or B, whichever is appropriate)

❑ A. Identification of premises for preservation of liens:

..... (if a lien attaches to the premises, a legal description of the premises, including all property identifier numbers and addresses for the premises)

❑ B. Office to which claim for lien must be given to preserve lien:

..... (if the lien does not attach to the premises, the name and address of the person or body to whom the claim for lien must be given)

Termination of contract or subcontract:

The contract or subcontract with ..... (name of contractor or subcontractor) dated the ....., 20..... is terminated on the ..... day of ....., 20.....

Date: .....

.....
(owner, contractor or other person)

O. Reg. 111/19, s. 2(2)

Form 9 — Certificate of Substantial Performance of the Contract Under Section 32 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

..... (County/District/Regional Municipality/Town/City in which premises are situated), ... (street address and city, town, etc., or, if there is no street address, the location of the premises),

This is to certify that the contract for the following improvement:

..... (short description of the improvement) to the above premises was substantially performed on ..... (date substantially performed).

Date certificate signed: .....

.....	.....
(payment certifier where there is one)	(owner and contractor, where there is no payment certifier)

Name of owner: .....

Address for service: .....

Name of contractor: .....

Address for service: .....

Name of payment certifier (where applicable): .....

Address: .....

(Use A or B, whichever is appropriate)

❑ A. Identification of premises for preservation of liens:

..... (if a lien attaches to the premises, a legal description of the premises, including all property identifier numbers and addresses for the premises)

❑ B. Office to which claim for lien must be given to preserve lien:

..... (if the lien does not attach to the premises, the name and address of the person or body to whom the claim for lien must be given)

O. Reg. 111/19, s. 2(2)

Form 10 — Certificate of Completion of Subcontract Under Subsection 33(1) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

This is to certify the completion of a subcontract for the supply of services or materials between ..... (name of subcontractor) and ....., dated the ..... day of ....., 20.....

The subcontract provided for the supply of the following services or materials:

..... to the following improvement:

..... (short description of the improvement) of premises at ..... (street address, or if there is none, the location of the premises).

Date of certification .....

.....	.....
(payment certifier where there is one)	(owner and contractor)

Name of owner: .....

Address for service: .....

Name of contractor: .....

Address for service: .....

Name of payment certifier (where applicable): .....

Address: .....

(Use A or B, whichever is appropriate)

❑ A. Identification of premises for preservation of liens:

..... (if a lien attaches to the premises, a legal description of the premises, including all property identifier numbers and addresses for the premises)

❑ B. Office to which claim for lien must be given to preserve lien:

..... (if the lien does not attach to the premises, the name and address of the person or body to whom the claim for lien must be given)

Form 11 — Notice of Intention to Register a Condominium in Accordance with the *Condominium Act, 1998* Under Section 33.1 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of declarant: .....

Address for service: .....

Concise overview of the land (include reference to the lot and plan number and the parcel number(s)):

.....

(Complete for each contractor who supplied services or materials to an improvement during the 90-day period preceding the date on which the description is to be submitted for approval under subsection 9(3) of the *Condominium Act, 1998*)

Name of contractor: .....

Address: .....

Address for service (if known): ..... (Add the name, address and address for service of other contractors if applicable)

Appendix I

Form 12 — Claim for Lien Under Section 34 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of lien claimant: (In the case of a claim on behalf of a worker by a workers' trust fund, the name of the trustee) .....

Address for service: .....

Name of owner: .....

Address: .....

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

Address: .....

Time within which services or materials were supplied:

from ..... (date supply commenced) to ..... (date of most recent supply)

Short description of services or materials that have been supplied:

.....

Contract price or subcontract price:	$ .....
Amount claimed as owing in respect of services or materials that have been supplied:	$ .....

(Use A where the lien attaches to the premises; use B where the lien does not attach to the premises)

❑ A. The lien claimant (if claimant is personal representative or assignee, this must be stated) claims a lien against the interest of every person identified above as an owner of the premises described in Schedule A to this claim for lien.

❑ B. The lien claimant (if claimant is personal representative or assignee, this must be stated) claims a charge against the holdbacks required to be retained under the Act and any additional amount owed by a payer to the contractor or any subcontractor whose contract or subcontract was in whole or in part performed by the services or materials that have been supplied by the lien claimant in relation to the premises at:

..... (address or other identification of the location of

the premises)

Date: ....

(signature of claimant or agent)

Schedule A

To the claim for lien of .....

Description of premises:

..... (Where the lien attaches to the premises, provide a description of the premises and address sufficient for registration under the *Land Titles Act* or the *Registry Act*, as the case may be. Where the lien does not attach to the premises, the address or other identification of the premises)

Form 13 — Notice of Preservation of Lien Under Subsection 34(9) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of lien claimant: .....

Address for service: .....

(Use A or B, whichever is appropriate)

❑ A. Owner of a unit in the corporation under the *Condominium Act, 1998*.

❑ B. Owner of a parcel of land mentioned in subsection 139(1) of the *Condominium Act, 1998* to which a common interest is attached and which is described in the declaration of the corporation.

Name of owner: .....

Description of the premises:

.....

Short description of services or materials that have been supplied:

.....

The amount claimed in respect of services or materials that have been provided: $ .....

Date: ....

(lien claimant)

Appendix I

Form 14 — Certificate of Action Under Section 36 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Certificate of Action

I certify that an action has been commenced in the Superior Court of Justice under the *Construction Act* between the above parties in respect of the premises described in Schedule A to this certificate, and relating to the claim(s) for lien bearing the following registration numbers:

Date: ....
(registrar or local registrar)

Schedule A

Description of premises:

..... (The description of the premises must be the same as in the statement of claim, and must be sufficient for registration under the *Land Titles Act* or the *Registry Act*, as the case may be.)

O. Reg. 111/19, s. 2(2)

Form 15 — Notice Given by Defendant Under Subsection 36(4) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the govern-*

ment form as published on this website is reproduced below.]

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

TO: ....., a lien claimant,

FROM: ....., a defendant in the above-named action.

This action has been commenced to realize a claim for lien in respect of an improvement to the following premises:

..... (address) and you may be entitled to realize your lien in this action.

You are required to furnish the above-named defendant with particulars of your claim and, specifically, the following facts alleged in your claim for lien:

..... (set out facts)

Date: ....
(defendant, lawyer or agent)

Address for service: .....

O. Reg. 111/19, s. 2(2)

Form 16 — Notice of Cross-Examination Under Clause 40(3)(a) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

TO: ..... (name of lien claimant, agent or assignee of lien claimant or trustee of the workers' trust fund), a person who is liable to be cross-examined on a claim for lien dated ..... with respect to the following premises:

..... (street address of premises)

YOU ARE REQUIRED TO ATTEND TO BE CROSS-EXAMINED ON OATH respecting the claim for lien on ..... (date), at ..... (time), at the office of ..... (name, address and

telephone number of examiner) and to bring with you all documents relating to the claim.

If you fail, without due cause, to attend your lien may be discharged or you may be liable for any legal costs arising from your non-attendance.

Date: .....

..... (name, address and telephone number of person or lawyer requiring cross-examination)

Form 17 — Notice of Cross-Examination Under Clause 40(3)(b), (c) or (d) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

TO: ..... (a person named in the claim for lien as having an interest in the premises, the contractor or the payer of the lien claimant or the lawyer of any of the foregoing)

This is notice that ..... (name of lien claimant, agent or assignee of lien claimant or trustee of the workers' trust fund), a person who is liable to be cross-examined on the claim for lien in respect of an improvement to the following premises:

..... (street address of premises) will be cross-examined regarding that claim on ..... (date), at ..... (time), at the office of ..... (name, address and telephone number of examiner)

You are entitled to be present at the cross-examination either personally or by a lawyer and to participate in the cross-examination. Only one cross-examination may be held in respect of this claim for lien.

Date: .....

..... (name, address and telephone number of person or lawyer requiring cross-examination)

O. Reg. 111/19, s. 2(2)

Form 18 — Withdrawal of Written Notice of Lien Under Subsection 41(2) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that*

number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]

Name of person having a lien: .....

Address for service: .....

Description of premises:

.....

The person having a lien withdraws the written notice of lien dated the ..... day of ....., 20....., in respect of an improvement to the premises owned by .....

Date: ....

(person having a lien)

Form 19 — Discharge of Lien Under Section 41 or 42 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of lien claimant: .....

Address of lien claimant: .....

1. The lien claimant discharges the lien claimed in the claim for lien dated the ..... day of ....., 20....., in respect of an improvement to the premises owned by ..... and described in Schedule A to this discharge.

2. *(complete where lien attaches to the premises)*

The registration number of the claim for lien is .....

The amount claimed in respect of services or materials that have been provided: $ .....

Date: .....

....

(witness) (lien claimant)

NOTE: Where the lien claimant is not a corporation, the discharge must be verified by an affidavit of a subscribing witness.

Schedule A

(Where the lien attaches to the premises, provide a description of the premises sufficient for registration under the *Land Titles Act*, or the *Registry Act*, as the case may be. Where the lien does not attach to the premises, provide the address, or, where there is none, the location of the premises.)

Form 20 — Notice of Postponement of Lien Under Section 43 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

Name of lien claimant: .....

Address of lien claimant: .....

The lien claimant postpones the lien claimed in the claim for the lien dated ....., 20....., registered as Instrument No. ..... to Instrument No. ....., in respect of the lands described in Schedule A upon the following terms and conditions:

Date: .....

....

(witness) (signature of lien claimant)

NOTE: Where the lien claimant is not a corporation, the postponement must be verified by the affidavit of a subscribing witness.

Schedule A

(Where the lien attaches to the premises, provide a description of the premises sufficient for registration under the *Land Titles Act*, or the *Registry Act*, as the case may be. Where the lien does not attach to the premises, provide the street address, or, where there is none, the location of the premises.)

Form 21 — Financial Guarantee Bond Under Section 44 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the govern-*

ment form as published on this website is reproduced below.]

Bond No. ..... *Amount $* .....

The surety of this bond is ....., an insurer licensed under the *Insurance Act* to write surety and fidelity insurance.

The principal of this bond is .....

The obligee of this bond is the Accountant of the Ontario Court.

WHEREAS ..... has registered (or where the lien does not attach to the premises, has preserved the lien by giving to the appropriate office) a claim for lien with respect to an improvement to the premises described in Schedule A to this bond.

AND WHEREAS ..... and others may prove liens with respect to the improvement to the premises.

AND WHEREAS this bond is being posted pursuant to section 44 of the *Construction Act*.

THEREFORE, subject to the conditions contained in this bond, the surety and the principal bind themselves, their heirs, executors, successors and assigns, jointly and severally, to the obligee as follows:

1. The principal shall on or before the date specified in the judgment, order or report of the court, in any action to enforce lien claims arising from the improvement, pay to the obligee the amounts for lien(s) and costs as is directed by the court, unless in the meantime an appeal has been taken from the judgment, order or report in which case payment is not required until the final disposition of the appeal.

2. The surety, in default of payment by the principal, shall pay to the obligee within such further time as is specified by the court, the amount of any deficiency in the payment by the principal but the surety is not liable to pay more than a maximum amount of $ ..... The surety shall make the payment upon the written demand of the obligee without the right to question the merit of the demand and despite any objection by the principal.

This bond is subject to the following conditions:

1. The total amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order, report or judgment of the court.

2. The surety shall be entitled to an assignment of the rights of any person who receives a payment or benefit from the proceeds of this bond, to the extent of the payment or benefit received.

Signed and sealed by the principal and the surety on the ..... day of ....., 20.....

SIGNED AND SEALED in ..... (seal)
the presence of:

(principal)

..... (seal)

(surety)

NOTE: If the principal is not a corporation, the principal's signature must be verified by the affidavit of a subscribing witness.

Form 22 — Order Directing a Reference for Trial Under Section 58 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....

Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE

....

(name of judge) (day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Order

On motion of the plaintiff made under subsection 58(1) of the *Construction Act* in the presence of the lawyer for the plaintiff(s) and defendant(s), and on reading the pleadings in this action and on hearing what was alleged by the lawyer for the parties (or the parties by their lawyer consenting to judgment, or as the case may be),

1. THIS COURT ORDERS that this action be referred to the master, case management master or person agreed on by the parties at Toronto (or other place) for trial.

2. AND THIS COURT ORDERS that the parties found liable forthwith after confirmation of the report of the master, case management master or person agreed on by the parties pay to the parties the respective amounts due them.

3. AND THIS COURT ORDERS that the master, case management master or person agreed on by the parties determine all questions arising in this action and on the reference and all questions arising under the *Construction Act* and that the findings of the master, case management master or person

agreed on by the parties be effective on the confirmation of the report.

4. AND THIS COURT ORDERS that the master, case management master or person agreed on by the parties determine the question of costs in this action and of the reference, and the costs be assessed and paid as the master shall direct.

Date: ..... Signed by: .....
(judge)

Form 23 — Order Directing a Reference for Trial Under Section 58 of the Act (Under $25,000) [Heading amended O. Reg. 111/19, s. 2(3).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

....
(name of judge) (day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Order

On motion of the plaintiff made under subsection 58(1) of the *Construction Act* in the presence of the lawyer for the plaintiff(s) and defendant(s), and on reading the pleadings in this action and on hearing what was alleged by the lawyer for the parties (or the parties by their lawyer consenting to judgment, or as the case may be),

1. THIS COURT ORDERS that this action be referred to either a deputy judge of the Small Claims Court or to the Small Claims Court Administrative Judge, sitting as a referee, for trial.

2. AND THIS COURT ORDERS that the parties found liable forthwith after confirmation of the report of the referee pay to the parties the respective amounts due them.

3. AND THIS COURT ORDERS that the referee determine all questions

arising in this action and on the reference and all questions arising under the *Construction Act* and that the findings of the referee be effective on the confirmation of the report.

4. AND THIS COURT ORDERS that the referee determine the question of costs in this action and of the reference, and the costs be assessed and paid as the referee shall direct.

Date: ..... Signed by: .....

(Judge)

O. Reg. 111/19, s. 2(3)

Form 24 — Judgment at Trial Under Section 62 of the Act if Lien Attaches to Premises

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....

Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE

....

(name of judge) (day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Judgment

THIS ACTION was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or ....., appearing in person or as the case may be).

(Use the appropriate paragraphs)

1. THIS COURT DECLARES AND ADJUDGES that the persons named in Column 1 of Schedule A to this judgment are respectively entitled to a lien under the *Construction Act*, upon the interest of the owner, ... (name of owner), in the premises described in Sched-

ule B of this judgment for the amounts set opposite their respective names in Column 5 in Schedule A, and the primary debtors of those persons respectively are as set out in Column 6 in Schedule A.

2. AND THIS COURT DECLARES AND ADJUDGES that the persons mentioned in Column 1 of Schedule C to this judgment are entitled to some charge or encumbrance other than a lien under this Act on the interest of the owner in the premises for the amounts set opposite their respective names in Column 4 of Schedule C.

3. AND THIS COURT ORDERS AND ADJUDGES that the personal liability of the owner ..... to the persons named in Column 1 of Schedule E in respect of the holdbacks the owner was required to retain is $ ....., and writs of execution may be issued forthwith for the amounts set out opposite their respective names in Column 2 of Schedule E.

4. AND THIS COURT ORDERS AND ADJUDGES that upon the defendant ..... (the owner) paying into court to the credit of this action the amount of $ ..... on or before the day of ....., 20....., the liens mentioned in Schedule A are discharged and the registration of those liens and the certificates of action in relation to those liens are vacated and the money paid into court is to be paid in payment of the persons entitled to a lien.

5. AND THIS COURT ORDERS AND ADJUDGES that if the defendant ..... (owner) makes default in payment of the money into Court that the owner's interest in the premises be sold under the supervision of the master of this court and that the purchase money be paid into court to the credit of this action.

6. AND THIS COURT ORDERS AND ADJUDGES that the purchase money be applied in or towards payment of the claims mentioned in Schedule(s) A (and C) as the master directs, with subsequent interest and subsequent costs to be computed and assessed by the master.

7. AND THIS COURT ORDERS AND ADJUDGES that if the purchase money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons, as set out in Column 6 of Schedule A, shall pay the amount remaining due to those persons forthwith after the amount has been ascertained by the master.

8. AND THIS COURT ORDERS AND ADJUDGES that the persons named in Column 1 of Schedule F have not proved any lien under the *Construction Act*, and orders and adjudges that the claims for lien registered by them and the certificates of action related to those claims as set out in Column 2 of Schedule F are vacated against the premises described in Schedule B.

9. AND THIS COURT ORDERS AND ADJUDGES that the persons whose names are set out in Column 1 of Schedule D to this judgment, although they have not proven their claims for lien, are entitled to personal

judgment for the amounts set opposite their respective names in Column 4 of Schedule D against their respective debtors as set out in Column 5 opposite their names and the respective debtors shall forthwith pay to their respective judgment creditors the amount found due.

10. AND THIS COURT ORDERS AND ADJUDGES that since the owner's interest in the premises has been sold by ....., a mortgagee, and it has been determined by this court that the liens were entitled to priority over the mortgage under subsection 78(2) [or subsection 78(5) as the case may be] of the Act, therefore the mortgagee shall pay to the persons named in Schedule E the amount set out opposite each of their respective names on or before the ..... day of ....., 20.....

.....

(signature of judge)

Schedule A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6
Names of persons entitled to construction lien	**Registration numbers of claims for lien and certificates of action**	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
		$	$	$	

.....

Schedule B

The premises in respect of which this action is brought is as follows:

..... (set out a description sufficient for registration purposes)

.....

Schedule C

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
Names of persons entitled to encumbrances other than construction liens	**Amount of debt and interest (if any)**	**Costs**	**Total**
	$	$	$

.....

Schedule D

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....

Schedule E

COLUMN 1	COLUMN 2
Names of persons entitled to share in holdback	**Amount to be paid**
	$

.....

Schedule F

COLUMN 1	COLUMN 2
Names of persons not entitled to lien	**Registration numbers of claims for lien and certificates of action**

.....

O. Reg. 111/19, s. 2(2)

Form 25 — Judgment at Trial Under Section 62 of the Act if Lien Does Not Attach to Premises

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the govern-*

ment form as published on this website is reproduced below.]

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

....
(name of judge) (day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Judgment

THIS ACTION was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or as the case may be),

(Use the appropriate paragraphs)

1. THIS COURT DECLARES AND ADJUDGES that the amount for which the defendant-owner ..... (owner), is liable under section 21 [or subsection 17(4)] of the *Construction Act* is $ .....

2. AND THIS COURT DECLARES AND ADJUDGES that the persons named in Column 1 of Schedule A to this judgment are respectively entitled to a lien under the *Construction Act* which lien is a charge under section 21 upon the amount for which the defendant-owner is liable; for the amounts set opposite their respective names in Column 4 and the primary debtors of those persons are set out in Column 5 of Schedule A.

3. AND THIS COURT ORDERS AND ADJUDGES that upon the defendant-owner ..... (owner) paying into court to the credit of this action the amount of $ ..... for which the owner is liable on or before the ..... (day), ... (date) that the liens mentioned in Schedule A are discharged, that the money paid into court is paid in payment of the persons entitled to a lien.

4. AND THIS COURT ORDERS AND ADJUDGES that if the money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons as set out in Column 5 of Schedule A shall pay the amount remaining due to those persons forthwith after this amount has been ascertained by the master.

5. AND THIS COURT ORDERS AND ADJUDGES that the following per-

sons have not proved any lien under the *Construction Act*:

..... (names of persons) and are not entitled to a personal judgment against any of the parties to this action.

6. AND THIS COURT DECLARES AND ADJUDGES that the persons whose names are set out in Column 1 of Schedule B to this judgment, although they have not proven their claims for lien, are entitled to personal judgment for the amounts set opposite their respective names in Column 4 of Schedule B against their respective debtors as set out in Column 5 opposite their names and the respective debtors shall forthwith pay to their respective judgment creditors the amount found due.

.....
(signature of judge)

Schedule A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Names of persons entitled to construction lien	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
	$	$	$	

.....

Schedule B

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....
O. Reg. 111/19, s. 2(2)

Form 26 — Report Under Section 62 of the Act if Lien Attaches to Premises

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through*

Appendix I

www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

....
(name of master or case management master) (day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Report

In accordance with an order of reference dated ....., trial of this action was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or as the case may be),

(Use the appropriate paragraphs)

1. I FIND AND DECLARE THAT the persons named in Column 1 of Schedule A to this report are respectively entitled to a lien under the *Construction Act*, upon the interest of the owner, ... (name of owner), in the premises described in Schedule B of this report for the amounts set opposite their respective names in Column 5 in Schedule A, and the primary debtors of those persons respectively are as set out in Column 6 in Schedule A.

2. I FIND AND DECLARE THAT the persons mentioned in Column 1 of Schedule C to this report are entitled to some charge or encumbrance other than a lien under this Act on the interest of the owner in the premises for the amounts set opposite their respective names in Column 4 of Schedule C.

3. AND I FIND AND DECLARE AND DIRECT THAT the personal liability of the owner ..... to the persons named in Column 1 of Schedule E in respect of the holdbacks the owner was required to retain is $ ....., and writs of execution may be issued forthwith after confirmation of this order for the amounts set out opposite their respective names in Column 2 of Schedule E.

4. AND I DIRECT that upon the defendant ..... (the owner) paying into court to the credit of this action the amount of $ ..... on or before the ..... day of ....., 20....., the liens mentioned in Schedule A are discharged and the registration of those liens and the certifi-

cates of action in relation to those liens are vacated and the money paid into court is to be paid in payment of the persons entitled to a lien.

5. AND I DIRECT that if the defendant ..... (owner) makes default in payment of the money into court that the owner's interest in the premises be sold under the supervision of the master of this court and that the purchase money be paid into court to the credit of this action.

6. AND I DIRECT that the purchase money be applied in or towards payment of the claims mentioned in Schedule(s) A (and C) as the master directs, with subsequent interest and subsequent costs to be computed and assessed by the master.

7. AND I DIRECT that if the purchase money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons, as set out in Column 6 of Schedule A, shall pay the amount remaining due to those persons forthwith after the amount has been ascertained by the master.

8. AND I FIND AND DECLARE THAT the persons named in Column 1 of Schedule F have not proved any lien under the *Construction Act*, and I direct that the claims for lien registered by them and the certificates of action related to those claims as set out in Column 2 of Schedule F be vacated against the premises described in Schedule B.

9. AND I FIND AND DECLARE THAT that the persons whose names are set out in Column 1 of Schedule D to this report, although they have not proven their claims for lien, are entitled to personal judgment for the amounts set opposite their respective names in Column 4 of Schedule D against their respective debtors as set out in Column 5 opposite their names and the respective debtors shall forthwith after confirmation of this report pay to their respective judgment creditors the amount found due.

10. AND I DIRECT that since the owner's interest in the premises has been sold by ....., a mortgagee, and it has been determined by this court that the lien claimants were entitled to priority over the mortgagee under subsection 78(2) [or subsection 78(5) as the case may be] of the Act, therefore the mortgagee shall pay to the persons named in Schedule E the amount set out opposite each of their respective names on or before the ..... day of ....., 20.....

.....
(signature of master)

Appendix I

overlapping table text

Schedule A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6
Names of persons entitled to construction lien	**Registration numbers of claims for lien and certificates of action**	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
		$	$	$	

.....

Schedule B

The premises in respect of which this action is brought is as follows:

..... (set out a description sufficient for registration purposes)

.....

Schedule C

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
Names of persons entitled to encumbrances other than construction liens	**Amount of debt and interest (if any)**	**Costs**	**Total**
	$	$	$

.....

Schedule D

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....

Schedule E

COLUMN 1	COLUMN 2
Names of persons entitled to share in holdback	**Amount to be paid**
	$

.....

Schedule F

COLUMN 1	COLUMN 2
Names of persons not entitled to lien	**Registration numbers of claims for lien and certificates of action**

.....

O. Reg. 111/19, s. 2(2)

Form 27 — Report Under Section 62 of the Act if Lien Does Not Attach to Premises

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

....
(master or case management master) (day and date)

BETWEEN ..... Plaintiff(s)

and

..... Defendant(s)

Report

In accordance with an order of reference dated ....., trial of

this action was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or as the case may be),

(Use the appropriate paragraphs)

1. I FIND AND DECLARE that the amount for which the defendant-owner ..... (owner), is liable under section 21 [or subsection 17(4)] of the *Construction Act* is $ .....

2. I FIND AND DECLARE that the persons named in Column 1 of Schedule A to this report are respectively entitled to a lien under the *Construction Act* which lien is a charge under section 21 of the Act upon the amount for which the defendant-owner is liable; for the amounts set opposite their respective names in Column 4 and the primary debtors of those persons are set out in Column 5 of Schedule A.

3. AND I DIRECT that upon the defendant-owner ..... (owner) paying into court to the credit of this action the amount of $ ..... for which the owner is liable on or before the ..... (day), ... (date) the liens mentioned in Schedule A are discharged, and that the money paid into court is paid in payment of the persons entitled to a lien.

4. AND I DIRECT that if the money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons as set out in Column 5 of Schedule A shall pay the amount remaining due to those persons forthwith after this amount has been ascertained by the master.

5. AND I FIND AND DECLARE that the following persons have not proved any lien under the *Construction Act*:

..... (names of persons) and are not entitled to a personal judgment against any of the parties to this action.

6. AND I FIND AND DECLARE that the persons whose names are set out in Column 1 of Schedule B to this report, although they have not proven their claims for lien, are entitled to personal judgment for the amounts set opposite their respective names in Column 5 after confirmation of this report and the respective debtors shall forthwith after confirmation of this report pay to their respective judgment creditors the amount found due.

.....

(signature of master)

Schedule A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Names of persons entitled to construction lien	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
	$	$	$	

.....

Schedule B

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....

Form 28 — Report Under Section 62 of the Act if Lien Attaches to Premises (Under $25,000) [Heading amended O. Reg. 111/19, s. 2(3).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....
Court File No.

SUPERIOR COURT OF JUSTICE

.....
(day and date)

BETWEEN ..... Plaintiff(s)

and

(court seal) ..... Defendant(s)

Appendix I

Report

In accordance with a judgment of reference dated ....., trial of this action was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or as the case may be),

(Use the appropriate paragraphs)

1. I FIND AND DECLARE THAT the persons named in Column 1 of Schedule A to this report are respectively entitled to a lien under the *Construction Act*, upon the interest of the owner, ... (name of owner), in the premises described in Schedule B of this report for the amounts set opposite their respective names in Column 5 in Schedule A, and the primary debtors of those persons respectively are as set out in Column 6 in Schedule A.

2. I FIND AND DECLARE THAT the persons mentioned in Column 1 of Schedule C to this report are entitled to some charge or encumbrance other than a lien under this Act on the interest of the owner in the premises for the amounts set opposite their respective names in Column 4 of Schedule C.

3. AND I FIND AND DIRECT THAT the personal liability of the owner ..... to the persons named in Column 1 of Schedule E in respect of the holdbacks the owner was required to retain is $ ....., and writs of execution may be issued forthwith after confirmation of this order for the amounts set out opposite their respective names in Column 2 of Schedule E.

4. AND I DIRECT that upon the defendant ..... (the owner) paying into court to the credit of this action the amount of $ ..... on or before the day of ....., 20....., the liens mentioned in Schedule A are discharged and the registration of those liens and the certificates of action in relation to those liens are vacated and the money paid into court is to be paid in payment of the persons entitled to a lien.

5. AND I DIRECT that if the defendant ..... (owner) makes default in payment of the money into court that the owner's interest in the premises be sold under the supervision of a master of the Superior Court of Justice and that the purchase money be paid into court to the credit of this action.

6. AND I DIRECT that the purchase money be applied in or towards payment of the claims mentioned in Schedule(s) A (and C) as the master directs, with subsequent interest and subsequent costs to be computed and assessed by the master.

7. AND I DIRECT that if the purchase money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons, as set out in Col-

umn 6 of Schedule A, shall pay the amount remaining due to those persons forthwith after the amount has been ascertained by the master.

8. AND I FIND THAT the persons named in Column 1 of Schedule F have not proved any lien under the *Construction Act*, and I direct that the claims for lien registered by them and the certificates of action related to those claims as set out in Column 2 of Schedule F be vacated against the premises described in Schedule B.

9. AND I FIND THAT that the persons whose names are set out in Column 1 of Schedule D to this report, although they have not proven their claims for lien, are entitled to personal judgment for the amounts set opposite their respective names in Column 4 of Schedule D against their respective debtors as set out in Column 5 opposite their names and the respective debtors shall forthwith after confirmation of this report pay to their respective judgment creditors the amount found due.

10. AND I DIRECT that since the owner's interest in the premises has been sold by ....., a mortgagee, and it has been determined by this court that the lien claimants were entitled to priority over the mortgagee under subsection 78(2) [or subsection 78(5) as the case may be] of the Act, therefore the mortgagee shall pay to the persons named in Schedule E the amount set out opposite each of their respective names on or before the ..... day of ....., 20.....

.....

Signature of Referee

Schedule A

overlapping table text

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6
Names of persons entitled to construction lien	**Registration numbers of claims for lien and certificates of action**	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
		$	$	$	

.....

Schedule B

The premises in respect of which this action is brought is as follows:

..... (set out a description sufficient for registration purposes)

.....

Schedule C

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
Names of persons entitled to encumbrances other than construction liens	**Amount of debt and interest (if any)**	**Costs**	**Total**
	$	$	$

.....

Schedule D

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....

Schedule E

COLUMN 1	COLUMN 2
Names of persons entitled to share in holdback	**Amount to be paid**
	$

.....

Schedule F

COLUMN 1	COLUMN 2
Names of persons not entitled to lien	**Registration numbers of claims for lien and certificates of action**

.....

O. Reg. 111/19, s. 2(3)

Form 29 — Report under Section 62 of the Act if Lien Does Not Attach to Premises (under $25,000) [Heading amended O. Reg. 111/19, s. 2(3).]

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....

Court File No.

SUPERIOR COURT OF JUSTICE

.....

(day and date)

BETWEEN ..... Plaintiff(s)

and

..... Defendant(s)

Report

In accordance with a judgment of reference dated ....., trial of this action was heard on ..... (date), at ..... (place), in the presence of all parties (or the lawyers for identified parties, ... appearing in person, no one appearing for ....., or as the case may be).

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties (or as the case may be),

(Use the appropriate paragraphs)

1. I FIND that the amount for which the defendant-owner ..... (owner), is liable under section 21 [or subsection

17(4)] of the *Construction Act* is $ .....

2. I FIND that the persons named in Column 1 of Schedule A to this report are respectively entitled to a lien under the Construction Act which lien is a charge under section 21 of the Act upon the amount for which the defendant-owner is liable; for the amounts set opposite their respective names in Column 4 and the primary debtors of those persons are set out in Column 5 of Schedule A.

3. AND I DIRECT that upon the defendant-owner ..... (owner) paying into court to the credit of this action the amount of $ ..... for which the owner is liable on or before the ..... (day), ... (date) the liens mentioned in Schedule A are discharged, and that the money paid into court is paid in payment of the persons entitled to a lien.

4. AND I DIRECT that if the money paid into court is insufficient to pay in full the proven claims of the persons mentioned in Column 1 of Schedule A, the primary debtor of each of those persons as set out in Column 5 of Schedule A shall pay the amount remaining due to those persons forthwith after this amount has been ascertained by the Deputy Judge.

5. AND I FIND that the following persons have not proved any lien under the *Construction Act*: ..... (names of persons) and are not entitled to a personal judgment against any of the parties to this action.

6. AND I FIND that the persons whose names are set out in Column 1 of Schedule B to this report, although they have not proven their claims for lien, are entitled to personal judgment for the amounts set opposite their respective names in Column 5 after confirmation of this report and the respective debtors shall forthwith after confirmation of this report pay to their respective judgment creditors the amount found due.

.....

Signature of Referee

Schedule A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Names of persons entitled to construction lien	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of primary debtors**
	$	$	$	

.....

Schedule B

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Judgment creditors not entitled to liens	**Amount of debt and interest (if any)**	**Costs**	**Total**	**Names of debtors**
	$	$	$	

.....

O. Reg. 111/19, s. 2(3)

Form 30 — Financial Guarantee Bond Under Subsection 78(10) of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

The surety of this bond is ....., an insurer licensed under the *Insurance Act* to write surety and fidelity insurance.

The principal of this bond is ....., a mortgagee of the interest of the owner ..... in the premises described in Schedule A to this bond.

The obligees of this bond are all persons having liens whose liens are entitled to priority over the interest of the principal under subsection 78(2) or (5) of the Act.

WHEREAS it is the intention of the principal to sell the interest of the owner under a power of sale.

THEREFORE, subject to the conditions contained in this bond, the surety and the principal bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally to the obligees as follows:

1. The principal shall, on or before the date set out in the judgment or report for payment, pay to each obligee who has proved a lien the amount determined by the court to be owing to that obligee under subsection 78(2) or (5) of the Act by the principal as a mortgagee, unless in the meantime an appeal has been taken from the judgment or report in which case payment is not

required until the final disposition of all appeals.

2. The surety, in default of payment by the principal, shall pay to each obligee the amount owing to him or her by the principal, but the surety is not liable to pay more than a total maximum amount of $ ..... (an amount equal to 20 per cent of the amount stated to be the contract price in the affidavit attached as Schedule B to this bond).

The bond is subject to the following conditions:

1. An obligee shall not make a claim against the surety unless the principal is in default of the principal's obligations under this bond.

2. An obligee shall give the surety thirty days written notice of the claim prior to commencing an action against the surety.

3. The surety is released from its obligation to an obligee unless the obligee has given written notice of the claim to the surety within one year after the default by the principal.

4. The total amount of this bond is reduced by and to the extent of any payment made under the bond.

5. The surety is entitled to an assignment of the rights of an obligee against the principal to the extent of the payment made by the surety.

Signed and sealed by the principal and the surety on the ..... day of ....., 20....., and registration of this bond on the title to the premises constitutes delivery of this bond to each obligee.

SIGNED AND
SEALED
in the presence of: ..... (seal)
(principal)
in the presence of: ..... (seal)
(surety)

NOTE: Where the principal is not a corporation, the principal's signature must be verified by an affidavit of a subscribing witness.

Schedule A

Financial Guarantee Bond

(provide a description of the premises sufficient for registration under the *Land Titles Act* or *Registry Act*, as the case may be)

Schedule B

Financial Guarantee Bond
Affidavit of Good Faith by Mortgagee

I, ..., make oath and say (or affirm) as follows:

1. I am a mortgagee of the interest of ..... (name of

owner) described in Schedule A to the attached bond.

2. Under the terms of the mortgage, or under the *Mortgages Act*, I am entitled to exercise a power of sale with respect to that interest.

3. It is my intention to exercise that power of sale, even though there are claims for lien registered against the interest of the owner under the *Construction Act* that may have priority to the mortgage under the Act.

4. I have inquired of the contractor and the owner with respect to the contract price of the contract to which that improvement relates, and to the best of my information and belief the amount of the contract price (including the price of all services and materials supplied under all amendments to that contract) is .....

5. The attached bond has been obtained by me in good faith, without any intention of depriving any lien claimant of their rights under the *Construction Act*.

Sworn (or affirmed) before me at
the ..... of
.....
in the ..... of .....
.....

(deponent)

this ..... day of
....., 20.....
.....
A Commissioner, etc.

Form 31 — Labour and Material Payment Bond Under Section 85.1 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

No. ..... (the *"Bond"*) . . . . . Bond Amount $ .....

..... (name of the contractor*), as a principal, hereinafter [collectively] called the *"Contractor"*, and ..... (name of the surety company**) ..... a corporation created and existing under the laws of ..... (place of incorporation) as a surety, and duly authorized to transact the business of Suretyship in the Province of Ontario

and hereinafter called the *"Surety"*, are held and firmly bound unto ..... (name of the owner***) as obligee, hereinafter called the *"Owner"*, in the amount of $ ..... (Bond Amount in figures) hereinafter called the *"Bond Amount"*, for the payment of which sum the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the *"Obligation"*).

WHEREAS the Contractor has entered into a written contract with the Owner dated the .....day of ..... (name of month) in the year ..... for ..... (title or description of the contract) (the *"Original Contract"*) and, for the purpose of specifying the conditions of the Obligation, this contract together with amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to collectively as the *"Contract"*;

NOW THEREFORE the condition of this Obligation is such that if the Contractor shall make payment to all Claimants as hereinafter defined in accordance with the terms of their respective subcontracts or sub-subcontracts for all labour and material used or reasonably required for use in the performance of the Contract then this Obligation shall be null and void, otherwise it shall remain in full force and effect subject to the following conditions:

1. Every corporate or natural person, including a union or workers trust fund on behalf of unionized workers, having a direct contract with the Contractor (hereinafter called a "Subcontractor") or with any Subcontractor (hereinafter called a "Sub-subcontractor") for labour, material or both used or reasonably required for use in the performance of the Contract is a "Claimant" under this Bond. The entitlement under this Bond of any Sub-subcontractor, however, is limited to such amounts as the Contractor would have been obligated to pay to the Sub-subcontractor under the *Construction Act* (the "Act"). The entitlement under this Bond of any union or workers trust fund is limited to wages and monetary supplementary benefits, as defined in the Act. The terms "labour" and "material" include that part of water, gas, power, light, heat, oil, gasoline, telephone or digital service or rental equipment directly applicable to the Contract provided that a Claimant who rents equipment to the Contractor or a Subcontractor to be used in the performance of the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Contract. The prevailing industrial rental value of equipment shall be determined, insofar as it is practical to do so, by the prevailing rates in the equipment marketplace in which the work is taking place.

2. The Owner is not obligated to do or take any action or proceeding against the Surety on behalf of the Claimant to enforce the bond.

3. Every Claimant who has not been paid for labour, material or both used

or reasonably required for use in the performance of the Contract, after the date on which payment was due and payable under the terms of its subcontract or sub-subcontract may demand payment under this Bond by giving the Surety, with a copy to the Contractor and the Owner, a written Notice of Claim, substantially in the form prescribed in Schedule A for a Subcontractor or Schedule B for a Sub- subcontractor, hereinafter called the *"Notice of Claim"*.

4. Where the Surety includes two or more companies a Notice of Claim may be delivered to the first listed Surety on behalf of all Sureties. The first listed Surety is hereby authorized to respond to a Notice of Claim on behalf of the Surety, and a Claimant is not required to make separate Notices of Claim to each Surety and is entitled to correspond with the first listed Surety on behalf of all Sureties.

5. It is a condition precedent to the liability of the Surety under this Bond that a Claimant shall have submitted a Notice of Claim

a) in respect of any amount required to be held back from the Claimant by the Contractor, or by a Subcontractor, under either the terms of the Claimant's contract with the Contractor or Subcontractor or under the *Act*, whichever is the greater, hereinafter and for the purposes of this Bond called the "Holdback", within one hundred and twenty (120) calendar days after the Claimant should have been paid in full under its contract with the Contractor or with a Subcontractor; and

b) in respect of any amount other than for Holdback within one hundred and twenty (120) calendar days after the date on which the Claimant last performed labour or provided materials for which the Notice of Claim was given.

6. For each Notice of Claim provided by a *Subcontractor*:

a) No later than three (3) business days after receipt by the Surety of a Notice of Claim the Surety shall acknowledge receipt of the Notice of Claim, substantially in the form prescribed at Schedule C, and request from the Claimant any information and documentation the Surety requires to determine the Claimant's entitlement under this Bond (hereinafter called the "*Information*"); and

b) No later than the earlier of: (a) ten (10) business days after receipt by the Surety of the Information, (b) twenty-five (25) business days after receipt by the Surety of a Notice of Claim, or (c) such longer time as agreed by the Surety and the Subcontractor, the Surety shall provide a position in response to the Notice of Claim, substantially in the form prescribed at Schedule D, hereinafter called the "*Surety's Position*".

7. For each Notice of Claim provided by a *Sub-subcontractor*:

a) No later than three (3) business days after receipt by the Surety of a Notice of Claim the Surety shall acknowledge receipt of the Notice of Claim, substantially in the form prescribed at Schedule C, and request

from the Claimant any information and documentation the Surety requires to determine the Claimant's entitlement under this Bond (hereinafter called the "*Information*"); and

b) No later than the earlier of: (a) fifteen (15) business days after receipt by the Surety of the Information, (b) thirty-five (35) business days after receipt by the Surety of a Notice of Claim, or (c) such longer time as agreed by the Surety and the Sub-subcontractor, the Surety shall provide a position in response to the Notice of Claim, substantially in the form prescribed at Schedule D, hereinafter called the "*Surety's Position*".

8. No later than ten (10) business days after the Surety's Position being provided to any Claimant the Surety shall pay such amounts included in the Notice of Claim that are undisputed by the Surety, except to the extent that the Surety makes an application to the Court with respect to such amounts in accordance with Section 12 below. This payment of undisputed amounts shall be without prejudice to the Surety's position regarding any disputed portions of a Notice of Claim.

9. If the subject matter of a notice of adjudication which is delivered in accordance with the *Act* by the Contractor or a Claimant (the "*Notice of Adjudication*") is substantially the same as that contained in a Notice of Claim, the obligations of the Surety under this Bond shall be stayed until the Surety receives a copy of the adjudicator's determination or there is otherwise a failure to complete or a termination of the adjudication under Section 13.14 of the Act.

10. By submitting a claim under this Bond, a Claimant agrees that, in the event of an adjudication between itself and the Surety pursuant to which the Surety pays the Claimant pursuant to an adjudicator's interim binding determination, the Surety shall be entitled to bring an action against the Claimant to obtain a final and binding decision in respect of the Claimant's entitlement under this Bond.

11. The Surety shall not in any circumstances be liable for a greater sum than the Bond Amount.

12. The Bond Amount shall be reduced by and to the extent of any payment or payments made under this Bond. If the aggregate of all Notices of Claim exceed, or the aggregate of amounts for which Notices of Claim might be given are believed by the Surety to exceed, the Bond Amount then the Surety may apply to the Court for direction in the interest of all Claimants.

13. Upon payment to a Claimant under this Bond in respect of any indebtedness of the Contractor or Subcontractor to the Claimant, the Surety shall be subrogated to all of the rights of the Claimant in respect of any and all claims, causes of action and rights to recovery which the Claimant may have against any person, firm or corporation because of or in connection with or arising out of such indebtedness, and the Claimant undertakes to extend to the Surety or the Surety's designee any warranties and/or guaran-

tees under the Contract in respect of all labour and materials for which the Claimant has been paid.

14. As a condition precedent, any suit or action under this Bond must be commenced within one (1) year after the date on which the Contractor last performed work on the Contract, including work performed under any warranty or guarantees provided in the Contract.

15. The parties to this Bond and a Claimant by providing a Notice of Claim agree that any suit or action is to be made to a court of competent jurisdiction in Ontario and agree to submit to the jurisdiction of such court notwithstanding any terms to the contrary in the Contract.

16. The rights and obligations of the Owner, the Contractor, and the Surety under this Bond are in addition to their respective rights and obligations at common law and in equity.

17. This Bond shall be governed by the laws of the Province of Ontario.

18. All notices ("Notices") under this Bond shall be delivered by registered mail, facsimile, or electronic mail at the addresses set out below, subject to any change of address in accordance with this Section. Any Notice given by facsimile or electronic mail shall be deemed to have been received on the next business day or, if later, on the date actually received if the person to whom the Notice was given establishes that he or she did not, acting in good faith, receive the Notice until that later date. Any Notice given by registered mail shall be deemed to have been received five (5) days after the date on which it was mailed, exclusive of Saturdays and holidays or, if later, on the date actually received if the person to whom the Notice was mailed establishes that he or she did not, acting in good faith, receive the Notice until that later date. A change of address for the Surety shall be publicly available on the Financial Services Regulatory Authority of Ontario website. The address for the Owner or the Contractor may be changed by giving Notice to the other parties setting out the new address in accordance with this Section.

The Surety:
[Surety corporate name]
[address]
[fax]
[email]

The Owner:
[Owner proper name]
[address]
[fax]
[email]

The Contractor:
[Contractor corporate name]
[address]
[fax]
[email]

IN WITNESS WHEREOF, the Contractor and the Surety have Signed and

Sealed this Bond this ..... day of ..... in the year .....

[Contractor proper name]	Witnessed by :
By:	.....
Name:	Name of Witness: .....
Title:	Address of Witness: .....

I have authority to bind the corporation.

[Surety corporate name]

By: .....

.....

Name: .....

Attorney-in-fact

** IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD "COLLECTIVELY" AFTER THE WORD "HEREINAFTER" IN THE FIRST LINE.*

*** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE "[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation]," FOR EACH SURETY, FOLLOWED BY "each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the "Surety"".*

**** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.*

Schedule A

Notice of Claim [Subcontractor]

[date]
[Surety name]
[Surety address]
[Surety address]
[Surety's electronic/email address]
Attention:
Re: .....
Bond No: .....
Contractor: .....
Owner: .....

Contract: .....

Dear Sir/Madam,

We have a subcontract with the Contractor for ..... (title or description of the Contract) (our "Subcontract") related to the Contract between the Owner and the Contractor for ..... in ..... (town/city,province).

We have given notice to the Contractor as required under our Subcontract that an amount is due and payable under the Subcontract and remains unpaid contrary to the terms of the Subcontract.

For Holdback amounts we hereby demand payment of $ ..... under the captioned Bond.

For amounts other than Holdback we hereby demand payment of $ ..... under the captioned Bond for all labour and material used or reasonably required for use in the performance of the Contract.

To assist in your evaluation of this Notice of Claim we invite you to contact our representative as follows:

[Name]
[Title]
[Company address]
[Phone (mobile)]
[Email address]

We also enclose the following documents supporting our Notice of Claim:

[The following is a suggested list of documents to be considered for delivery to the Surety. Please check off the documents (if any) that you are providing with this Notice of Claim.]

❑ Copy of full, executed Subcontract [or Purchase Order or Collective Bargaining Agreement], including approved changes and pending changes relevant to this Notice of Claim

❑ Copy of the prime contract between the Contractor and the Owner

❑ Copy of original schedule and latest approved schedule for the Subcontract

❑ Copies of all invoices submitted to the Contractor

❑ Copies of all payments from the Contractor to the Claimant

❑ Summary reconciliation of all invoices issued under the Subcontract

❑ Summary reconciliation of all payments received under the Subcontract

❑ Confirmation from the Owner or Contractor that the Claimant has completed all of its work including rectification of all identified deficiencies and the delivery of all required close-out documents

❑ Copy of any notice or correspondence to and from the Contractor relevant to this Notice of Claim

❑ Confirmation of the last day the Claimant performed work pursuant to the Subcontract including proof thereof

❑ Copy of any claim for lien, legal proceeding or other documents to en-

force your entitlement to payment

❑ Copy of the executed Labour and Material Payment Bond under which this Notice of Claim is being made

❑ [additional documents]

We look forward to receiving your acknowledgment of this Notice of Claim within three (3) business days of receipt and your request for any additional documentation or information you require to meet your obligations under the Bond.

Yours truly;
[Full corporate title]
By: .....
[Name]
[Title]
[Phone]
[Email address]
CC: *[Contractor]*

Schedule B

Notice of Claim [Sub-subcontractor]

[date]
[Surety name]
[Surety address]
[Surety address]
[Surety's electronic/email address]
Attention:
Re: .....
Bond No: .....
Contractor: .....
Subcontractor .....
Owner: .....
Contract: .....
Dear Sir/Madam,

We have a written subcontract with ..... (name of the subcontractor) (the "Subcontractor") for ..... (title or description of the Sub-subcontract) (our"Subcontract") related to the Contract between the Owner and the Contractor for ..... (title or description of the Contract) in ..... (town/city, province).

We have given notice under our Sub-subcontract to the Subcontractor that an amount is due and payable under the Sub-subcontract and remains unpaid contrary to the terms of the Sub-subcontract. A copy of that notice has also been provided to the Contractor.

We hereby demand payment of $ ..... under the captioned Bond.

To assist in your evaluation of this Notice of Claim we invite you to contact our representative as follows:

[Name]
[Title]
[Company address]
[Phone (mobile)]
[Email address]

We also enclose the following documents supporting our Notice of Claim:

[The following is a suggested list of documents to be considered for delivery to the Surety. Please check off the documents (if any) that you are providing with this Notice of Claim.]

❑ Copy of full, executed Sub-subcontract [or Purchase Order or Collective Bargaining Agreement], including approved changes and pending changes relevant to this Notice of Claim

❑ Copy of the prime contract between the Subcontractor and the Contractor

❑ Copy of original schedule and latest approved schedule for the Sub-subcontract

❑ Copies of all invoices submitted to the Subcontractor

❑ Copies of all payments from the Subcontractor to the Claimant

❑ Summary reconciliation of all invoices issued under the Sub-subcontract

❑ Summary reconciliation of all payments received under the Sub-subcontract

❑ Confirmation from the [Owner, Contractor or Subcontractor] that the Claimant has completed all of its work including rectification of all identified deficiencies and the delivery of all required close-out documents

❑ Copy of any notice or correspondence to and from the Subcontractor or Contractor relevant to this Notice of Claim

❑ Confirmation of the last day the Claimant performed work pursuant to the Sub-subcontract including proof thereof

❑ Copy of any claim for lien, legal proceeding or other documents to enforce your entitlement to payment

❑ Copy of the executed Labour and Material Payment Bond under which this Notice of Claim is being made

❑ [additional documents]

We look forward to receiving your acknowledgment of this Notice of Claim under the Bond and your request for any additional documentation or information you require to meet your obligations under the Bond.

Yours truly;
[Full corporate title]
By: .....
[Name]
[Title]
[Phone]

[Email address]
CC: *[Contractor and Subcontractor]*

Schedule C

Acknowledgement of Notice of Claim

[date]
[Name/corporate title of the Subcontractor or Sub-subcontractor]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]
Attention:
Re: .....
Bond No: .....
Contractor: .....
Owner: .....
Contract: .....
Dear Sir/Madam,

We acknowledge receipt on ..... (date of receipt) of your Notice of Claim dated .....

Subject to a full reservation of all of our rights pursuant to the Bond and at law and to assist us in evaluating your Notice of Claim we ask that you provide the following information and/or documentation promptly:

This request for information is not an acknowledgement of the validity of your claim. We look forward to hearing from you.

Yours truly;
[Corporate name of the Surety]
By: .....

[Name]

[Title]

[Phone]

[Email address]
CC: *[Contractor]*

Schedule D

Surety's Position

[date]
[Name/corporate title of the Subcontractor or Sub-subcontractor]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]
Attention:
Re: .....
Bond No: .....
Contractor: .....

Owner: .....
Contract: .....
Dear Sir/Madam,

Having reviewed the information and documentation provided to us in support of your Claim, we can advise as follows:

A — Disputed Amount(s)

The following amounts in your Claim are disputed at the present time for the reasons indicated:

With respect to any disputed amounts we invite you to contact us promptly with further information or documentation in support of your Claim.

B — Undisputed Amount(s)

The following amounts in your Claim are not disputed at the present time, however we reserve the right to dispute any amount should an ultimate determination find that amounts included in your Claim were not payable by the Contractor:

We continue to reserve all of our rights pursuant to the Bond and at law.

If you have any questions or concerns, please do not hesitate to contact us.

Yours truly;

[Corporate name of the Surety]

By: .....

[Name]

[Title]

[Phone]

[Email address]

CC: *[Contractor]*

O. Reg. 111/19, s. 2(2); 324/19, s. 1

Form 32 — Performance Bond Under Section 85.1 of the Act

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through*

www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]

No. ..... (the *"Bond"*) . . . . . Bond Amount $ .....

..... (name of the contractor*), as a principal, hereinafter [collectively] called the *"Contractor"*, and ..... (name of the surety company**) ..... a corporation created and existing under the laws of ..... (place of incorporation) as a surety, and duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter called the *"Surety"*, are held and firmly bound unto ..... (name of the owner***) as obligee, hereinafter called the *"Owner"*, in the amount of $ ..... (Bond Amount in figures) hereinafter called the *"Bond Amount"*, for the payment of which sum the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the *"Obligation"*).

WHEREAS the Contractor has entered into a written contract with the Owner dated the ..... day of ..... (name of month) in the year ..... for ..... (title or description of the contract) (the *"Original Contract"*) and, for the purpose of specifying the conditions of the Obligation, this contract together with amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to collectively as the *"Contract"*;

NOW THEREFORE the condition of this Obligation is such that if the Contractor shall promptly and faithfully perform the Contract then this Obligation shall be null and void; otherwise it shall remain in full force and effect, subject to the following terms and conditions:

1. Written Notice

1.1 The Owner may make a written demand on the Surety in accordance with this Bond, by giving notice to the Surety substantially in the form attached as Schedule A (the "*Notice*"). Except for a Pre-Notice Meeting in accordance with Section 2.1, the Surety shall have no obligation under this Bond until it receives a Notice.

1.2 Where the Surety includes two or more companies, the Notice may be delivered to the first listed Surety on behalf of all Sureties. The first listed Surety is hereby authorized to respond to the Notice on behalf of the Sureties, and the Owner is not required to give separate Notice to each Surety and is entitled to correspond with the first listed Surety on behalf of all Sureties.

2. Pre-Notice Meeting

2.1 The Owner may, at its sole discretion and acting reasonably, request a pre-Notice conference by notifying the Surety and the Contractor in writing that it is considering declaring the Contractor to be in default under the

Contract (the "Pre-Notice Meeting"). This notice and request for a Pre-Notice Meeting by the Owner does not constitute a Notice under this Bond, nor under the Contract, nor is it a precondition to the giving of a Notice. Upon receipt of such request the Surety shall propose a face-to-face meeting, a telephone conference call or a meeting by any other form of electronic media between the Contractor, the Owner and the Surety to take place at a time and place mutually convenient for all parties within seven (7) business days (or such longer time as agreed by all parties) after the Surety's receipt of the Owner's request for a Pre-Notice Meeting in accordance with this Section. The Owner, the Contractor and the Surety shall make reasonable efforts to arrange and attend the Pre-Notice Meeting. In the event that the Owner delivers a Notice prior to the Pre-Notice Meeting, then the Pre-Notice is deemed to be retracted.

2.2 The purpose of a Pre-Notice Meeting is to allow the Owner, prior to exercising its other rights under this Bond, to express any concerns about the Contractor's performance pursuant to the Contract and to allow the Contractor to respond to such concerns. The participation of the parties in one or more Pre-Notice Meetings shall be without prejudice to their respective rights and obligations under the Contract, this Bond or applicable law, and neither the participation by any party in any Pre-Notice Meeting, nor any statement or position taken or information provided by any party during any Pre-Notice Meeting, may be relied on by any other party as a waiver or compromise of the rights or obligations of the Owner, the Surety or the Contractor under the Contract, this Bond or applicable law; including, but not limited to the Owner's right to declare the Contractor in default under the Contract and give Notice under this Bond.

3. Surety's Investigation and Response

3.1 Upon receipt of a Notice from the Owner, the Surety shall promptly initiate an investigation of the Notice (the "*Investigation*"), using its best efforts, to determine if the Conditions Precedent have been satisfied and to determine its liability, if any, under the Bond.

3.2 Within the four (4) business days following receipt of the Notice, the Surety shall provide the Owner with an acknowledgement, substantially in the form set out as Schedule B (the "*Acknowledgement*"), identifying the date on which the Notice was received and requesting from the Owner the information and documentation (the "*Information*") the Surety requires to continue the Investigation and, if necessary, request access to personnel who are knowledgeable about the circumstances of the Notice and to the Contract work site(s) where the work is being performed. Upon receipt of the Surety's Acknowledgement, the Owner shall promptly, and in accordance with terms of the Contract, provide the Surety with the requested Information and access to personnel and the work site(s) within its possession or control.

3.3 The Surety shall within a reasonable time conduct the Investigation, but

in any event no later than twenty (20) business days after receipt by the Surety of a Notice (or such longer period as may be agreed between the Surety and Owner), the Surety shall provide the Owner with its written response to the Notice, substantially in the form set out at Schedule C (the "*Surety's Position*"), advising either that:

a) The Surety accepts liability under the Bond and proposes to satisfy its Obligation by performing one of the options set out in Section 6.1; or

b) The Surety does not accept liability, providing its specific reasons; or

c) The Surety is unable to determine whether or not one or more of the Conditions Precedent has been satisfied and, in the Surety's sole discretion, the Surety may propose a process for collaborating with the Owner in the advancement of the completion of the work so as to attempt to mitigate the Owner's cost to complete the Contract.

3.4 The Surety shall also, if requested by the Owner to do so, meet with the Owner to discuss the status of the Investigation within five days following receipt of the request. This meeting may take place via a face-to-face meeting, a telephone conference call or a meeting by any other form of electronic media as may be mutually agreed to by the Owner and Surety.

4. Necessary Interim Work

4.1 Prior to and during the Investigation, if the Owner must take action which is necessary to:

a) ensure public or worker safety,

b) preserve or protect the work under the Contract from deterioration or damage, or

c) comply with applicable law,

(the "*Necessary Interim Work*")

the Owner may, acting with due diligence and provided written notice is subsequently provided to the Surety within three (3) Business Days of the commencement of such Necessary Interim Work, undertake such Necessary Interim Work provided that:

i. Owner shall allow the Surety and/or its consultant(s) reasonable access to the Contract work site(s) during the course of the Necessary Interim Work for the purpose of monitoring the progress of the Necessary Interim Work;

ii. any such Necessary Interim Work shall be undertaken without prejudice to the rights of the Owner, the Contractor or the Surety under the Contract, this Bond or applicable law; and

iii. the reasonable costs incurred by the Owner in undertaking such Necessary Interim Work (to the extent they are not deducted in the calculation of the Balance of Contract Price in Section 9.1) shall be

reimbursed by the Surety, subject to the Surety's liability being subsequently established and subject to such expenses being covered by this Bond. Any payments made by the Surety in respect of the Necessary Interim Work shall reduce the Bond Amount by the amount of any such payments.

4.2 Nothing in this section is intended to limit the ability of an Owner to take whatever steps are reasonably necessary in the public interest.

4.3 Subject to the foregoing provisions in Section 4.1, the Surety shall not raise the mere fact that the Necessary Interim Work proceeded as a defence to any claim by the Owner hereunder.

5. Post-Notice Conference

5.1 Upon receipt of a Notice, the Surety shall propose a face-to-face meeting, telephone conference call or a meeting by any other form of electronic media (a "*Post-Notice Conference*") with the Owner at a mutually convenient time and place within five (5) business days (or such longer period as may be agreed between the Surety and Owner). The Contractor may participate in a Post-Notice Conference at the invitation of the Surety.

5.2 The purpose of the Post-Notice Conference shall be to determine what actions or work, if any, the Owner believes must be done while the Surety is conducting the Investigation in order to effectively mitigate the costs for which the Owner is seeking recovery under this Bond (the "*Mitigation Work*"). Mitigation Work may be performed after Necessary Interim Work and throughout the period of investigation by the Surety.

5.3 Provided the Owner provides reasonable evidence to the Surety that Mitigation Work is necessary during the Investigation and that the anticipated costs are reasonable, the Owner may proceed with the Mitigation Work subject to the following conditions:

a) Owner shall pay the reasonable costs of the Mitigation Work;

b) Owner shall keep separate records of all amounts related to the Mitigation Work for which it intends to seek recovery under this Bond, including amounts to be set off against the Balance of Contract Price;

c) Owner shall allow the Surety and/or its consultant(s) reasonable access to the Contract work site(s) during the course of the Mitigation Work for the purpose of monitoring the progress of the Mitigation Work; and

d) the Mitigation Work shall be without prejudice to the rights or obligations of the Owner, the Contractor or the Surety under the Contract, this Bond or applicable law.

5.4 If the Surety objects to any part of the Mitigation Work, including without limitation the Owner's proposed Mitigation Work contractor(s), scope of work, cost or method of work, it shall immediately advise the Owner in writing of its objections and the reasons therefor. The Owner may still proceed with the Mitigation Work and the Surety's objections will be ad-

dressed through negotiation with the Owner or at the trial of any action brought pursuant to this Bond.

5.5 The reasonable costs incurred by the Owner in undertaking the Mitigation Work shall be reimbursed by the Surety, subject to the Surety's liability being subsequently established. Any payments made by the Surety in respect of the Mitigation Work shall form part of its Obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.

5.6 For greater clarity, any Necessary Interim Work being performed by the Owner pursuant to Section 4 may continue to be performed pending an agreement, if any, as to the Mitigation Work.

5.7 Subject to the foregoing provisions in this Section 5, the Surety shall not raise the mere fact that the Mitigation Work proceeded as a defence to any claim by the Owner hereunder.

6. Surety's Options

6.1 If the Surety has accepted liability pursuant to this Bond, the Surety shall promptly select and commence one of the following options:

a) remedy the default; or

b) complete the Contract in accordance with its terms and conditions; or

c) obtain a bid or bids for submission to the Owner for completing the Contract in accordance with its terms and conditions and, upon determination by the Owner and the Surety of the lowest responsible bidder:

i. arrange for a contract between such bidder and the Owner; and

ii. make available as work progresses (even if there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Contractor's obligations in accordance with the terms and condition of the Contract including any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price; or

d) pay the Owner the lesser of: (1) the Bond Amount, or (2) without duplication, the Owner's Direct Expenses plus the Owner's proposed cost of completion of the Contract and any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price.

6.2 The option selected by the Surety is referred to in this Bond and the Schedules as the "*Surety Option*".

7. Owner's Direct Expenses

7.1 Where the Surety is liable under this Bond, then the Surety shall be liable for the following fees and expenses, without duplication (the

"*Owner's Direct Expenses*"):

a) reasonable professional fees incurred by the Owner to complete the Contract which are a direct result of the Contractor's default and which would not have been incurred but for the default of the Contractor;

b) reasonable external legal fees incurred by the Owner to complete the Contract, which are a direct result of the Contractor's default and which would not have been incurred but for the default of the Contractor, with the exception of legal fees incurred by the Owner in defending a claim or action by the Contractor, or incurred by the Owner in pursuing an action against the Contractor;

c) reasonable, miscellaneous and out-of-pocket expenses incurred by the Owner to complete the Contract which are a direct result of the default of the Contractor and which would not have been incurred but for the default of the Contractor;

d) direct costs incurred as a result of an extension of the duration of the supply of services or materials used or reasonably required for use in the performance of the Contract, which are a direct result of the default of the Contractor and which would not have been incurred but for the default of the Contractor;

e) reasonable costs of the Necessary Interim Work;

f) reasonable costs of the Mitigation Work; and

g) any additional fees and expenses agreed to by the Obligee, the Principal and the Surety.

7.2 For the purpose of Section 7.1(d), the "direct costs" incurred are the reasonable costs of performing the Contract during the extended period of time, including costs related to the additional supply of services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred.

7.3 Subject to any agreement to the contrary, between the Owner, the Principal and the Surety, the Surety shall not be liable under this Bond for:

a) any liquidated damages under the Contract;

b) if no liquidated damages are specified in the Contract, any damages caused by delayed performance or non-performance of the Contractor, except as provided in Section 7.1(d); or

c) any indirect or consequential damages, including but not limited to costs of financing, extended financing, hedging arrangements, loss of or deferral of profit, productivity or opportunity, or head office overhead costs.

7.4 If the Surety is liable under this Bond then, at the Owner's option, Owner's Direct Expenses may be deducted by the Owner from the Balance of the Contract Price as defined hereinafter or will be promptly reimbursed

by the Surety subject to the other terms, conditions and limitations of this Bond and will reduce the Bond Amount.

8. Conditions Precedent

8.1 The Surety shall have no liability or Obligations under this Bond unless all of the following conditions precedent (the "*Conditions Precedent*") have been satisfied:

a) The Contractor is, and is declared by the Owner to be, in default under the Contract;

b) The Owner has given such notice to the Contractor of a default of the Contractor, as may be required under the terms of the Contract;

c) The Owner has performed the Owner's obligations under the Contract; and

d) The Owner has agreed to pay the Balance of Contract Price to the Surety or as directed by the Surety.

9. Balance of Contract Price

9.1 The term "*Balance of Contract Price*" means the total amount payable by the Owner to the Contractor under the Contract, including any adjustments to the price in accordance with the terms and conditions of the Contract, or other amounts to which the Contractor is entitled, reduced by any amounts deducted by the Owner for the Owner's Direct Expenses under Section 7.4 and all valid and proper payments made to or on behalf of the Contractor under the Contract.

9.2 The Balance of Contract Price shall be used by the Owner to first mitigate against any potential loss to the Surety under this Bond and then under the Labour & Material Payment Bond, and the Owner shall assert all rights and remedies available to the Owner to the Balance of Contract Price and make payment of the Balance of Contract Price as directed by the Surety.

10. Limitations on the Surety's Liability

10.1 Notwithstanding anything to the contrary contained in this Bond or in the Contract, the Surety shall not be liable for a greater sum than the Bond Amount under any circumstances.

10.2 The Surety's responsibility to the Owner under this Bond in respect of any Surety Option or Owner's Direct Expenses shall not be greater than that of the Contractor under the Contract.

11. Right of Action

11.1 No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Owner named herein, or the heirs, executors, administrators or successors of the Owner.

12. Commencement of Action

12.1 It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of: (a) the

date of substantial performance of the Contract as defined under the *Construction Act* (the "*Act*"); or (b) the date on which a Notice in respect of the default that is the subject of such suit or action is received by the Surety under this Bond.

12.2 The Owner, the Contractor and the Surety agree that any suit or action is to be made to a court of competent jurisdiction in Ontario and agree to submit to the jurisdiction of such court notwithstanding any terms to the contrary in the Contract.

13. Common Law Rights

13.1 The rights and obligations of the Owner, the Contractor, and the Surety under this Bond are in addition to their respective rights and obligations at common law and in equity.

14. Applicable Law

14.1 This Bond is governed by the laws of the Province of Ontario.

15.1 All notices under this Bond shall be delivered by registered mail, facsimile, or electronic mail at the addresses set out below, subject to any change of address in accordance with this Section. Any notice given by facsimile or electronic mail shall be deemed to have been received on the next business day or, if later, on the date actually received if the person to whom the notice was given establishes that he or she did not, acting in good faith, receive the notice until that later date. Any notice given by registered mail shall be deemed to have been received five (5) days after the date on which it was mailed, exclusive of Saturdays and holidays or, if later, on the date actually received if the person to whom the notice was mailed establishes that he or she did not, acting in good faith, receive the notice until that later date. A change of address for the Surety is publicly available on the Financial Services Regulatory Authority of Ontario website. The address for the Owner or the Contractor may be changed by giving notice to the other parties setting out the new address in accordance with this Section.

The Surety:
[Surety corporate name]
[address]
[fax]
[email]

The Owner:
[Owner proper name]
[address]
[fax]
[email]

The Contractor:
[Contractor corporate name]
[address]
[fax]
[email]

16. Headings for Reference Only

16.1 The headings and references to them in this Bond are for convenience

only, shall not constitute a part of this Bond, and shall not be taken into consideration in the interpretation of this Bond.

IN WITNESS WHEREOF, the Contractor and the Surety have Signed and Sealed this Bond this ..... day of ..... in the year .....

[Contractor proper name]	Witnessed by:
By:	.....
Name:	Name of Witness: .....
Title:	Address of Witness: .....

I have authority to bind the corporation.

[Surety corporate name]

By: .....

Name: .....

Attorney-in-fact

** IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD "COLLECTIVELY" AFTER THE WORD "HEREINAFTER" IN THE FIRST LINE.*

*** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE "[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation]," FOR EACH SURETY, FOLLOWED BY "each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the "Surety"".*

**** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.*

Schedule A

Form of Notice

[date]
[Surety name]
[Surety address]
[Surety address]
[Surety's electronic/email address]
Attention:
Re: .....
Bond No: .....
Contractor: .....

Owner: .....
Contract: .....
Dear Sir/Madam,

We hereby notify you that the Contractor is in default of the captioned Contract. In general terms the details of the default are as follows:

[insert description of the Contractor Default]

We have given such notice of this default to the Contractor as is required under the Contract and enclose a copy for your records, and confirm that we have honoured our obligations under the Contract.

We call on you as Surety to honour your obligations under the Bond. We represent and warrant that we have in our possession the original, executed Performance Bond and herein enclose a copy.

Please provide us with potential dates and times to conduct the Post-Notice Conference under Section 5.1 of the Bond.

OPTIONAL: In the circumstances we plan to proceed with work and incur expenses necessary in the circumstances to ensure public safety or to preserve or protect the work under the Contract from deterioration or damage, referred to as the Necessary Interim Work under Section 4.1 of the Bond, and will provide you with information and access to discuss and observe this work. In the interim the following is a general description of the anticipated Necessary Interim Work:

OPTIONAL: To assist you in your Investigation we enclose with this Notice the documents and information indicated in Appendix A to this Notice. *[In addition to Appendix A, the Owner is encouraged to provide any information or material that may expedite the Investigation.]*

We look forward to receiving your acknowledgment of this Notice no later than four (4) business days of receipt and your request for any additional documentation or information you require to meet your obligations under the Bond.

Your truly,

[Full corporate title]

By: .....

[Name]

[Title]

[Phone]

[Email address]

CC: *[Contractor]*

Appendix A to Form of Notice

The following checked documents and information are enclosed with this Notice:

❑ Copy of full, executed Contract (with letter of award), including approved changes and pending changes relevant to this Notice (along with a copy of the Change Order log)

❑ Copy of original schedule and latest approved schedule for the Contract including actual progress and the order to commence work

❑ Specifications and drawings, including tender and post tender addenda, if any, applicable to the Contractor's scope of work

❑ Copies of and summary reconciliation of all invoices received under the Contract

❑ Copies of and summary reconciliation of all payments made and holdback of any kind retained under the Contract

❑ Copy of the most recent approved or certified payment application including the applicable Schedule of Values and copies of all unpaid payment applications

❑ A detailed list of all outstanding work in the Contractor's scope of work (including any deficiencies identified to date)

❑ Any issued or pending backcharges from the Owner to the Contractor

❑ Copy of any notice or correspondence to and from the Contractor related to the Contract and relevant to this Notice

❑ Copy of any claim for lien, legal proceeding or other documents received on the Contract

❑ Copy of any correspondence from subcontractors, suppliers or others indicating claims for unpaid amounts related to the Contract

❑ Copy of the executed and delivered Performance Bond

❑ *[Additional documents or information]*

Schedule B

Surety's Acknowledgement of a Notice

[date]
[Name/corporate title of the Owner]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]
Attention:
Re: .....
Bond No: .....
Contractor: .....
Owner: .....
Contract: .....
Dear Sir/Madam,

On behalf of the Surety defined in the captioned Bond we acknowledge receipt on ..... (date of receipt) of your Notice under the captioned Performance Bond.

Please advise as soon as possible which of the following proposed dates and times and logistics are convenient to conduct the Post-Notice Conference:

Proposed Date	Proposed Time	Meeting or conference/video conference logistics

To enable our Investigation of the Notice please provide us promptly with the information and/or documentation identified in Appendix A to this Acknowledgement (and as necessary with access for our staff or appointed representatives to attend the place where the Contract is being performed to inspect the condition and progress of the work), hereinafter the Information.

We will provide you with the Surety's Position to the Notice no later than twenty (20) business days of our receipt of the Notice based on the information, documentation and access you have provided.

We continue to reserve all of our rights pursuant to the Bond and at law.

Yours truly;

[Corporate name of the Surety]

By: .....

[Name]

[Title]

[Phone]

[Email address]

CC: *[Contractor]*

Appendix A to Surety's Acknowledgement

Surety's Request for Information

Please identify and provide contact information for a person who is knowledgeable about the circumstances of the Notice and any Necessary Interim Work and Mitigation Work, and who can speak for the Owner.

Please identify and provide contact information for a person with whom arrangements can be made for access to the site where the work under the Contract is being performed.

Please provide copies of the following documentation in digital or hard copy format:

❑ Copy of full, executed Contract (with letter of award), including approved changes and pending changes relevant to this Notice (along with a copy of the Change Order log)

❑ Copy of original schedule and latest approved schedule for the Contract including actual progress and the order to commence work

❑ Specifications and drawings, including tender and post tender addenda, if any, applicable to the Contractor's scope of work

❑ Copies of and summary reconciliation of all invoices received under the Contract

❑ Copies of and summary reconciliation of all payments made and holdback of any kind retained under the Contract

❑ Copy of the most recent approved or certified payment application including the applicable Schedule of Values and copies of all unpaid payment applications

❑ A detailed list of all outstanding work in the Contractor's scope of work (including any deficiencies identified to date)

❑ Any issued or pending backcharges from the Owner to the Contractor

❑ Copy of any notice or correspondence to and from the Contractor related to the Contract and relevant to this Notice

❑ Copy of any Notice of Non-payment issued under the Act

❑ Copy of any Notice of Adjudication issued under the Act

❑ Copy of any claim for lien, legal proceeding or other documents received on the Contract

❑ Copy of any correspondence from subcontractors, suppliers or others indicating claims for unpaid amounts related to the Contract

❑ Copy of the executed and delivered Performance Bond

❑ *[Additional documents or information]*

Schedule C

Surety's Position

[date]
[Name/corporate title of the Owner]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]
Attention:
Re: .....
Bond No: .....
Contractor: .....
Owner: .....
Contract: .....
Dear Sir/Madam,

Based on the Information you have provided and given the current status of our Investigation, we can advise that [use only one of these Options]:

OPTION A

The Surety accepts liability under the Bond. To satisfy our Obligation we propose, under Section 6.1 of the Bond, to:

[Select 1 and delete the others]

a) Promptly remedy the Contractor Default. *[Describe proposal and timelines.]*

or

b) Complete the Contract in accordance with its terms but only on the condition that the Owner undertakes to pay or to make available to the Surety the Balance of the Contract Price. *[Describe proposal and timelines.]*

or

c) Obtain a bid or bids for submission to the Owner for completing the Contract in accordance with its terms and conditions and, upon determination by the Owner and the Surety of the lowest responsible bidder:

i. arrange for a contract between such bidder and the Owner; and

ii. make available as work progresses (even if there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Contractor's obligations in accordance with the terms and conditions of the Contract including any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price. *[Describe proposal and timelines.]*

or

d) pay the Owner the lesser of: (1) the Bond Amount, or (2) without duplication, the Owner's Direct Expenses plus the Owner's proposed cost of completion of the Contract and any applicable value-added taxes for which the Surety may be liable; less the Balance of Contract Price. *[Describe proposal and timelines.]*

OPTION B

The Surety disputes the Notice. The reasons are as follows:

OPTION C

Based on the Information you have provided and the time available for our Investigation

[if applicable] and taking into account genuine disputed issues as between the Owner and the Contractor that have not been resolved according to the terms of the Contract as outlined generally below,

the Surety is unable to determine whether or not one or more of the Conditions Precedent has been satisfied and, therefore, is not able to accept liability under the Bond.

In particular we have been unable to determine that
[delete those that do not apply]

a) the Contractor is, in fact, in default of its obligations under the Contract. *[Provide further explanation as appropriate.]*

and/or

b) the Owner has performed its obligations under the Contract. *[Provide further explanation as appropriate.]*

and/or

c) the Owner has given the notice to the Contractor of a Contractor Default as required under the terms of the Contract. *[Provide further explanation as*

appropriate.]

and/or

d) the Owner has agreed to apply the Balance of Contract Price as necessary to enable the Surety to exercise the Surety Option under the Bond. *[Provide further explanation as appropriate.]*

With your agreement and assistance we are willing to extend our Investigation in an effort to resolve outstanding issues. Should this extended Investigation allow us to provide you with an alternative Surety's Position we will do so promptly.

[If applicable] Under a full reservation of all of our rights under the Bond and the applicable law, and without prejudice to the rights and obligations of the Owner, the Contractor or the Surety under the Bond we propose to proceed as follows:

We continue to reserve all of our rights pursuant to the Bond and at law.

If you have any questions or concerns, please do not hesitate to contact us.

Yours truly;

[Corporate name of the Surety]

By:

[Name]

[Title]

[Phone]

[Email address]

CC: *[Contractor]*

O. Reg. 111/19, s. 2(2); 324/19, s. 1

Form 33 — Notice of Trial

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....

Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN ..... Plaintiff(s)

and

..... Defendant(s)

Notice

(Use A or B, whichever is applicable)

A. The Superior Court of Justice has directed that this action shall be tried on ..... (day), ... (date), at ..... (time), at ..... (place)

B. This action has been set down for trial by the Superior Court of Justice, at the non-jury sittings commencing on ..... (day), ... (date), at ..... (time), at ..... (place)

If you do not appear at the trial, proceedings may be taken in your absence and you may be deprived of all benefit of the action and your rights may be disposed of in your absence.

All parties are required to be prepared to proceed with the trial, and to bring with them on the trial day all evidence and witnesses necessary to prove their respective claims or defences. If any person fails to comply with these directions, the costs of the day may be given against that party should it be necessary to adjourn the trial of this action.

This is an action to enforce a construction lien arising from an improvement of the following premises:

..... (concise description sufficient to identify premises)

This notice is served by .....

Date: .....

To: .....

Form 34 — Notice of Settlement Meeting

Construction Act

[Editor's Note: Pursuant to Forms*, O. Reg. 303/18, s. 1, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and which is available on the Internet through www.ontariocourtforms.on.ca. For your convenience, the government form as published on this website is reproduced below.]*

.....
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN ..... Plaintiff(s)

and

..... Defendant(s)

Appendix I

Notice

The Superior Court of Justice has directed that the settlement meeting in respect to the above action shall be held on ..... (day), ... (date), at ..... (time), at ..... (place).

(Use A or B, whichever is applicable)

A. The Superior Court of Justice has also directed that this action shall be tried on ..... (day), ... (date), at ..... (time), at ..... (place).

B. In addition, this action has been set down for trial by the Superior Court of Justice, at the non-jury sittings commencing on ..... (day), ... (date), at ..... (time), at ..... (place).

Any settlement reached at a settlement meeting is binding upon every person served with notice of the settlement meeting, regardless of whether the person attends the settlement meeting, and orders may be made by the court affecting your rights.

(Use where applicable)

If you do not appear at the trial, proceedings may be taken in your absence and you may be deprived of all benefit of the action and your rights may be disposed of in your absence.

All parties are required to be prepared to proceed with the trial, and to bring with them on the trial day all evidence and witnesses necessary to prove their respective claims or defences. If any person fails to comply with these directions, the costs of the day may be given against that party should it be necessary to adjourn the trial of this action.

This is an action to enforce a construction lien arising from an improvement of the following premises:

..... (concise description sufficient to identify premises)

This notice is served by .....

Date: .....

To: .....

Ont. Reg. 304/18 — General

made under the *Construction Lien Act*

O. Reg. 304/18, as am. O. Reg. 112/19

INTERPRETATION

1. Definition — In this Regulation,

"construction trade newspaper" means a newspaper,

(a) that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario,

(b) that is published at least daily on all days other than Saturdays and holidays,

(c) in which calls for tender on construction contracts are customarily published, and

(d) that is primarily devoted to the publication of matters of concern to the construction industry.

2. Forms — In this Regulation, when a form is referred to by number, the reference is to the form as prescribed by Ontario Regulation 303/18 (*Forms*) made under the Act.

ALTERNATIVE FINANCING AND PROCUREMENT ARRANGEMENTS

3. Surety bonds, minimum coverage — For the purposes of paragraph 2 of subsection 1.1(4) of the Act, the minimum coverage limit is,

(a) 50 per cent of the contract price, if the contract price is $100,000,000 or less; or

(b) $50,000,000, if the contract price is more than $100,000,000.

PROMPT PAYMENT

4. Notices of non-payment — Notices of non-payment under Part I.1 of the Act (Forms 1.1 to 1.5) may be provided in electronic or paper format.

HOLDBACKS

5. Payment of holdback on annual basis — For the purposes of clause 26.1(2)(c) of the Act, the contract price must be $10,000,000 or more.

6. Payment of holdback on phased basis — For the purposes of clause 26.2(2)(b) of the Act, the contract price must be $10,000,000 or more.

7. Non-payment of holdback — (1) An owner shall publish a notice of non-payment of a holdback under subsection 27.1(1) of the Act (Form 6) in a construction trade newspaper.

(2) For the purposes of subsection 27.1(1) of the Act, the owner shall, no later than three days after publication of the notice of non-payment, notify the contractor of its publication.

(2.1) If the owner provides notice to the contractor in accordance with subsection (2), then notice for the purposes of clause 27.1(2)(c) of the Act shall be provided no later than three days after receipt of the notice from the owner, and shall be accompanied by a copy of the notice from the owner.

(2.2) If the contractor provides notice to a subcontractor in accordance with subsection (2.1), then notice for the purposes of clause 27.1(3)(c) of the Act shall be provided no later than three days after receipt of the notice from the contractor, and shall be accompanied by a copy of the notice from the contractor.

(2.3) If a subcontractor provides notice to another subcontractor in accordance with subsection (2.2), then notice for the purposes of subsection 27.1(4) of the Act shall be provided no later than three days after receipt of the notice from the subcontractor, and shall be accompanied by a copy of the notice from the subcontractor.

(3) If the owner provides notice to the contractor or subcontractor in accordance with subsection (2), then notice for the purposes of subsection 27.1(2) of the Act shall be provided no later than three days after receipt of the notice from the owner, and shall be accompanied by a copy of the notice from the owner.

(4) If the contractor provides notice to a subcontractor in accordance with subsection (3), then notice for the purposes of subsection 27.1(3) of the Act shall be provided no later than three days after receipt of the notice from the contractor, and shall be accompanied by a copy of the notice from the contractor.

(5) Subsection (4) applies with necessary modifications if a subcontractor provides notice to another subcontractor in accordance with that subsection.

(6) Notice to a contractor or subcontractor under section 27.1 of the Act shall be provided in writing, and may be provided in electronic or paper format.

O. Reg. 304/18, s. 14; 112/19, s. 1

EXPIRY, PRESERVATION AND PERFECTION OF LIENS

8. Notice of contract termination — A notice of termination under subsection 31(6) of the Act (Form 8) shall be published in a construction trade newspaper.

9. Certificate, declaration of substantial performance — A certificate of substantial performance (Form 9) or declaration of substantial performance under section 32 of the Act shall be published in a construction trade newspaper.

10. Notice of intention to register condominium — A notice of intention

to register land described in a description in accordance with the *Condominium Act, 1998* under section 33.1 of the Act (Form 11) shall be published in a construction trade newspaper at least five and not more than 15 days, excluding Saturdays and holidays, before the description is submitted for approval under subsection 9(3) of the *Condominium Act, 1998*.

O. Reg. 112/19, s. 2

11. Claim for lien copy given to Crown office — The office of the Crown to which a copy of a claim for lien (Form 12) must be given under subsection 34(3) of the Act is as follows:

1. If the contract is with a ministry of the Crown, the office of the Director of Legal Services of that ministry.

2. If the contract is with the Ontario Mortgage and Housing Corporation, the office of the Director of Legal Services of the Ministry of the Minister responsible for the administration of the *Ontario Mortgage and Housing Corporation Act*.

3. If the contract is with a college of applied arts and technology, the office of the president of the college.

4. If the contract is with any other office of the Crown, the office of the chief executive officer of that office.

O. Reg. 112/19, s. 3

11.1 Claim for lien copy given to municipal clerk — (1) A municipality may provide for the giving of a copy of a claim for lien (Form 12) to the clerk of the municipality under subsection 34(3.1) of the Act through one or both of the following methods by publishing on its website a statement to that effect that details the method or methods:

1. Sending a copy of the claim for lien by email to a specified email address.

2. Completing and submitting the claim for lien through a specified web portal.

(2) If a municipality details a method in accordance with subsection (1), a copy of a claim for lien shall be given to the clerk of the municipality in accordance with that method.

(3) A copy of a claim for lien that is given in accordance with subsection (2) after 5 p.m. local time is deemed to have been given on the following business day.

O. Reg. 112/19, s. 4

SURETY BONDS

12. Application of s. 85.1 of the Act — Section 85.1 of the Act applies to a public contract if the contract price is $500,000 or more.

Appendix I

NUCLEAR FACILITIES

13. Non-application of Parts I.1 and II.1 — Parts I.1 and II.1 of the Act do not apply to contracts for improvements to land used in connection with a Class I nuclear facility as defined in SOR/2000-204 (*Class I Nuclear Facilities Regulation*) made under the *Nuclear Safety and Control Act* (Canada), or to subcontracts made under such contracts.

AMENDMENTS TO THIS REGULATION

14. [Repealed O. Reg. 112/19, s. 5.]

REVOCATION AND COMMENCEMENT

15. Regulation 175 of the Revised Regulations of Ontario, 1990 is revoked.

16. Commencement —

(1) Subject to subsections (2) and (3), this Regulation comes into force on the later of the day subsection 2(2) of the *Construction Lien Amendment Act, 2017* comes into force and the day this Regulation is filed.

(2) Section 4 comes into force on the later of the day section 7 of the *Construction Lien Amendment Act, 2017* comes into force and the day this Regulation is filed.

(3) Section 14 comes into force on the later of the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* comes into force and the day this Regulation is filed.

Ont. Reg. 306/18 — Adjudications Under Part II.1 of the Act

made under the *Construction Lien Act*

O. Reg. 306/18, as am. O. Reg. 109/19

DEFINITIONS AND DESIGNATION

1. Definitions — In this Regulation,

"adjudicator registry" means the registry established by the Authority under clause 13.3(1)(c) of the Act;

"code of conduct" means the code of conduct established by the Authority under section 7;

"Minister" means the Minister responsible for the administration of the Act.

2. Designation — (1) To be eligible to be designated to act as Authorized Nominating Authority, an entity must,

(a) submit an application to the Minister in the time and manner specified by the Minister; and

(b) agree in writing to abide by any conditions of designation specified by the Minister, including any conditions respecting the term or termination of any such designation.

(2) A designation may be terminated at the Minister's discretion.

ADJUDICATORS

3. Certificate of qualification to adjudicate — (1) The Authority may issue a certificate of qualification to adjudicate to an individual who meets the requirements and qualifications set out in subsection (2) and who applies to the Authority in accordance with its procedures.

(2) An individual who meets the following requirements and qualifications is eligible to hold a certificate of qualification to adjudicate:

1. The individual has, in the Authority's view, at least 10 years of relevant working experience in the construction industry.

2. The individual has successfully completed the training programs provided under clause 8(a), subject to subsection (4) of this section.

3. The individual is not an undischarged bankrupt.

4. The individual has not been convicted of an indictable offence in Canada or of a comparable offence outside Canada.

5. The individual pays to the Authority the required fees, costs or charges for training and qualification as an adjudicator.

6. The individual agrees in writing to abide by the requirements for

holders of certificates set out in section 4.

(3) For the purposes of paragraph 1 of subsection (2), examples of relevant working experience in the construction industry may include experience working in the industry as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator or lawyer.

(4) In the case of an application made to the Authority on or before the first anniversary of the coming into force of this Regulation, the Authority may waive the requirement in paragraph 2 of subsection (2) if, in the Authority's view, the applicant has experience or education qualifications that are at least equivalent to the successful completion of the training programs referred to in that paragraph.

(5) A certificate of qualification to adjudicate is valid for the period specified for it by the Authority, but the Authority may renew it for one or more further periods if the holder continues to be eligible to hold the certificate.

(6) Subsection (5) is subject to the suspension or cancellation of the holder's certificate by the Authority under section 5.

(7) The holder of a certificate of qualification to adjudicate is an adjudicator for the purposes of Part II.1 of the Act.

O. Reg. 109/19, s. 1

4. Requirements for holders of certificates — Every holder of a certificate of qualification to adjudicate shall,

(a) successfully complete the continuing training programs provided under clause 8(b);

(b) comply with the code of conduct;

(c) on its request, provide to the Authority proof, in the time and manner specified by the Authority, of the holder's eligibility to hold the certificate;

(d) immediately notify the Authority in writing if he or she ceases to be eligible to hold the certificate;

(e) maintain records as required by the Authority and report information respecting the records to the Authority on its request;

(f) pay to the Authority the required fees, costs or charges for training and qualification as an adjudicator; and

(g) comply with the Act and this Regulation, and with any further directions or requirements of the Authority.

O. Reg. 109/19, s. 2

5. Suspension, cancellation of certificate — (1) The Authority may suspend or cancel a holder's certificate of qualification to adjudicate if it is reasonably satisfied that,

(a) the holder has ceased to be eligible to hold the certificate under section 3, or has failed to comply with the code of conduct or to meet

any other requirement of section 4;

(b) the holder is incompetent or unsuitable to conduct adjudications; or

(c) the certificate was issued or renewed on the basis of a false or misleading representation or declaration.

(2) The Authority may lift the suspension of a certificate of qualification to adjudicate if the Authority is reasonably satisfied that the circumstances giving rise to the suspension no longer exist and the holder is eligible to hold the certificate.

(3) The Authority may re-issue a cancelled certificate of qualification to adjudicate if the Authority is reasonably satisfied that the circumstances giving rise to the cancellation no longer exist and the holder is eligible to hold the certificate.

(4) A holder whose certificate of qualification is suspended or cancelled ceases, for the duration of the suspension or cancellation, to be authorized to conduct adjudications or to continue to conduct any ongoing adjudication.

OTHER DUTIES OF AUTHORITY AND POWERS

[Heading amended O. Reg. 109/19, s. 3.]

6. Adjudicator registry — (1) The Authority shall make the adjudicator registry publicly available on its website.

(2) The Authority shall ensure that the adjudicator registry includes every holder of a certificate of qualification to adjudicate and, in relation to each listed holder, includes,

(a) the holder's contact information;

(b) the period of validity of the holder's certificate;

(c) the holder's areas of expertise for the purposes of adjudication, number of years of relevant working experience in the construction industry and every professional body of which the holder is a member in good standing;

(d) the geographical areas in which the adjudicator conducts adjudications; and

(e) any other information that the Minister directs be included in order to assist persons in selecting an adjudicator.

7. Code of conduct — (1) The Authority shall, establish and maintain a code of conduct for adjudicators, and shall make the code of conduct publicly available on its website.

(2) The code of conduct shall address, at a minimum, the following matters:

1. Conflicts of interest and related procedural matters.

2. Principles of proportionality in the conduct of an adjudication, and the need to avoid excess expense.

3. Principles of civility, procedural fairness, competence and integrity in the conduct of an adjudication.

4. The confidentiality of information disclosed in relation to an adjudication.

5. Procedures for ensuring the accuracy and completeness of information in the adjudicator registry.

(3) [Repealed O. Reg. 109/19, s. 4(2).]

(4) [Repealed O. Reg. 109/19, s. 4(2).]

(5) The Authority shall indicate on its website the effective date of every change it makes to the code of conduct, other than changes of a typographical or similar nature.

(6) [Repealed O. Reg. 109/19, s. 4(3).]

(7) The Authority shall maintain an archive of all previous versions of the code of conduct, indicating the period during which each version applied, and shall ensure that the versions are publicly accessible.

O. Reg. 109/19, s. 4

8. Training programs — In developing and overseeing training programs for the purposes of clause 13.3(1)(a) of the Act, the Authority shall ensure that training programs are provided,

(a) to individuals who apply for the issuance of a certificate of qualification to adjudicate; and

(b) to holders of a certificate, on a continuing basis.

9. Fee schedule — (1) The Authority shall, subject to the approval of the Minister, establish and maintain a schedule of fees listing the following items, and shall make the schedule publicly available on its website:

1. Fees, costs or other charges set by the Authority under clause 13.3(2)(a) of the Act.

2. Amounts or rates determined by the Authority for the purposes of clause 13.10(2)(b) of the Act with respect to the fee payable to an adjudicator.

(2) Subject to clause 24(4)(b), the Authority shall not require the payment of a fee, cost or other charge under clause 13.3(2)(a) of the Act or authorize the payment of a fee under clause 13.10(2)(b) of the Act unless it is included in and accords with the schedule of fees.

(2.1) Subsections (1) and (2) do not apply with respect to fees, costs or charges for the training of persons as adjudicators.

(3) The Authority may not make changes to the schedule of fees, except with the prior written approval of the Minister.

(4) The Authority shall indicate on its website the effective date of every change made to the schedule of fees.

(5) Subsections (3) and (4) do not apply with respect to changes of a typographical or similar nature.

(6) The Authority shall maintain an archive of all previous versions of the schedule of fees, indicating the period during which each version applied, and shall ensure that the versions are publicly accessible.

O. Reg. 109/19, s. 5

10. Complaints re adjudicators — The Authority shall establish a complaints process for accepting and dealing with complaints against adjudicators from persons involved in adjudications, and shall make the complaints process publicly available on its website.

11. Province-wide availability — The Authority shall develop procedures and take other reasonable steps to ensure that adjudication is available to parties throughout Ontario.

12. Breadth of adjudicator expertise — The Authority shall develop procedures and take other reasonable steps to ensure that the aggregate breadth of expertise and working experience of the holders of certificates of qualification to adjudicate is sufficient to account for the industry sectors in which parties refer matters to adjudication and the nature of the matters in dispute.

13. Educational materials — The Authority shall develop and make publicly available on its website educational materials respecting the adjudication process.

14. Annual report — (1) The Authority shall, no later than 90 days after the end of each of its fiscal years, issue and make publicly available on its website an annual report for the fiscal year, containing aggregated information respecting adjudication in Ontario, including, at a minimum, information respecting,

(a) the number of adjudications completed during the fiscal year, and the geographical area in which the adjudications were completed;

(b) the number of adjudications completed during the fiscal year, broken down by each matter listed under paragraphs 1 to 7 of subsection 13.5(1) of the Act;

(c) the total amount claimed in all notices of adjudication given during the fiscal year, and the average of the amounts claimed during that year;

(d) the total amount and the average amount required to be paid under determinations made during the fiscal year;

(e) the percentage of adjudications completed during the fiscal year in which the adjudicator made a determination within the timeline specified in subsection 13.13(1) of the Act;

(f) the total number of adjudications that were terminated under section 13.14 of the Act during the fiscal year;

(g) the total amount of fees, costs or other charges paid during the fiscal year to the Authority; and

(h) the total amount of fees paid during the fiscal year to adjudicators.

(2) Information under each of clauses (1)(a),(c) and (d) shall be reported for Ontario as a whole and in respect of each of the following industry sectors:

1. Residential.
2. Commercial.
3. Industrial.
4. Public buildings.
5. Transportation and infrastructure.
6. Any other industry sectors the Authority considers to be relevant.

(3) The Authority shall collect from holders of a certificate of qualification to adjudicate such information as may be reasonably required to meet the reporting requirements of this section.

O. Reg. 109/19, s. 6

15. Public availability — The Authority shall, on the request of any person, provide information that is published on the Authority's website to the person in a format accessible to that person.

15.1 Administrative support — The Authority may provide administrative support services for the purpose of facilitating the conduct of adjudications.

O. Reg. 109/19, s. 7

ADJUDICATION

16. Notice of adjudication, copy to Authority — A party to a contract or subcontract who gives a notice of adjudication under subsection 13.7(1) of the Act shall, on the same day, provide a copy of the notice in electronic format to the Authority.

16.1 Documents to adjudicator, party under s. 13.11 of the Act — (1) Unless the adjudicator directs otherwise, the documents required to be provided to the adjudicator or a party under section 13.11 of the Act shall be served on the adjudicator or party in a manner permitted under the rules of court for service of a document other than an originating process.

(2) The provision of documents by a party under clause 13.11(b) of the Act is subject to the following requirements:

1. The documents shall be provided to the adjudicator together with the copy of the notice under clause 13.11(a) of the Act.
2. The documents shall be provided to the other party or, in the case of a consolidated adjudication, to every other party, on the same day as they are provided to the adjudicator.

(3) As soon as possible after receiving all of the documents required to be

provided to the adjudicator under section 13.11 of the Act, the adjudicator shall provide written confirmation to the parties of the date on which they were received.

O. Reg. 109/19, s. 8

17. Response — (1) A party responding to a notice of adjudication shall provide copies of the response to the adjudicator, to the party who gave the notice of adjudication and, in the case of a consolidated adjudication, to every other party.

(2) Unless the adjudicator directs otherwise, the copies required to be provided to the adjudicator or a party under subsection (1) shall be served on the adjudicator or party in a manner permitted under the rules of court for service of a document other than an originating process.

(3) The response shall be provided no later than such day as the adjudicator may specify, but must be provided to the adjudicator and every other party on the same day.

O. Reg. 109/19, s. 9

18. Consolidation of adjudications, if required by contractor — (1) A contractor who wishes to require the consolidation of two or more adjudications under subsection 13.8(2) of the Act shall give to the parties to each of the adjudications to be consolidated and to the adjudicator, if any, of each such adjudication, a written notice of consolidation that includes,

(a) with respect to each adjudication,

(i) the names and addresses of the parties,

(ii) the nature and a brief description of the dispute that is the subject of the adjudication, including details respecting how and when the dispute arose,

(iii) the nature of the redress sought, and

(iv) a copy of the notice of adjudication; and

(b) the name of a proposed adjudicator to conduct the consolidated adjudication.

(2) The contractor shall, as soon as possible after giving the last of the notices of consolidation under subsection (1), provide a copy of the notice in electronic format to the Authority.

(3) Notice under subsection (1) in respect of an adjudication may not be given later than the fifth day after the adjudicator in the adjudication receives the documents required by section 13.11 of the Act.

O. Reg. 109/19, s. 10

19. Application of Part to consolidated adjudications — (1) This section applies for the purposes of subsection 13.8(3) of the Act with respect to adjudications consolidated under subsection 13.8(1) or (2) of the Act.

(2) An adjudicator of an adjudication that is consolidated under subsection

13.8(1) or (2) of the Act is deemed to have resigned from the adjudication,

(a) on the day on which the adjudicator receives notice that the parties to the adjudication have agreed to consolidation under subsection 13.8(1) of the Act; or

(b) on the day on which the adjudicator receives a notice of consolidation in accordance with subsection 18(1) of this Regulation.

(3) An adjudicator who is deemed to have resigned under subsection (2) may be selected or appointed under section 13.9 of the Act to conduct the consolidated adjudication, subject to the requirements of that section.

(4) For the purposes of subsection 13.9(4) of the Act, the reference to the day on which the notice of adjudication was given shall be read as a reference to,

(a) the day on which the parties to each of the adjudications agreed to the consolidation of the adjudications; or

(b) the last day of receipt by a party of a notice of consolidation given by the contractor under subsection 18(1) of this Regulation.

(5) The requirement under section 13.11 of the Act, as modified by subsection 13.8(3) of the Act, to provide documents to the adjudicator and to every other party applies with respect to each of the parties who gave the notice of adjudication in each adjudication being consolidated.

(6) For the purposes of subsections 13.13(1) and 34(10) of the Act, the day on which the documents required under section 13.11 of the Act are received by the adjudicator is the last day on which the adjudicator receives any such documents, as confirmed by the adjudicator in accordance with subsection 16.1(3) of this Regulation.

O. Reg. 109/19, s. 11

20. Disclosure of documents — (1) An adjudicator may issue directions respecting the disclosure of documents on which a party intends to rely in an adjudication.

(2) An adjudicator shall exercise the power to issue directions under subsection (1) to the extent and in a manner that ensures that each party to the adjudication has an opportunity to review any documents on which a party to the adjudication intends to rely.

21. Powers of adjudicator — An adjudicator may exercise a power under subsection 13.12(1) of the Act despite any failure of a party to the adjudication to comply with a direction or other requirement of the adjudicator.

22. Determinations — (1) An adjudicator who makes a determination shall,

(a) communicate the determination to the parties to the adjudication by providing each of them with an electronic copy of the determination on the day it is made; and

(b) give a certified copy of the determination to the parties to the adjudication no later than seven days following the making of a determination.

(2) An adjudicator who makes a determination may, on the written request of a party or on his or her own initiative, make such changes to the determination during the period referred to in clause (1)(b) as may be necessary to correct an error that is of a typographical or similar nature.

(3) An adjudicator who changes a determination under subsection (2) shall,

(a) provide to the parties an electronic copy of the corrected determination on the day the change is made; and

(b) give a certified copy of the corrected determination to the parties no later than five days following the making of the change.

O. Reg. 109/19, s. 12

23. Adjudicator unable to conduct adjudication — (1) An adjudicator may at any time resign from an adjudication of a matter if the adjudicator determines that,

(a) the matter is not eligible for adjudication under section 13.5 of the Act; or

(b) he or she is not able or competent to conduct the adjudication.

(2) The adjudicator shall promptly give written notice of the resignation to the parties.

24. Failure of adjudicator to complete adjudication — (1) If an adjudicator fails to complete an adjudication, the party who gave the notice of adjudication may give to the other party a fresh notice of adjudication under section 13.7 of the Act.

(2) For greater certainty, subsection (1) does not permit a matter to be adjudicated that could not otherwise be adjudicated under Part II.1 of the Act.

(3) If a fresh notice of adjudication is given, the parties shall, if requested by the adjudicator in the new adjudication and to the extent that it is reasonably practicable to do so, provide to the adjudicator copies of any documents that they made available to the adjudicator in the adjudication that was not completed.

(4) If an adjudicator fails to complete an adjudication, other than in the circumstances set out in section 13.14 of the Act, the adjudicator's entitlement to be paid a fee under section 13.10 of the Act and the amount of any such fee shall be determined,

(a) by agreement between the parties to the adjudication and the adjudicator; or

(b) if no agreement is reached, by the Authority, on the adjudicator's request.

(5) In determining the amount of a fee under clause (4)(b), the Authority

shall determine an amount that is, in the Authority's view, appropriate given the work completed by the adjudicator and the circumstances in which the adjudicator failed to complete the adjudication.

(6) For the purposes of clause (4)(b), a party to the adjudication shall provide to the Authority, on its request, any information in the party's possession relating to the adjudication that is reasonably required by the Authority to assist it in making a determination under that clause.

(7) This section, other than subsections (1) and (2), applies with respect to a failure of an adjudicator to complete an adjudication because it is consolidated under section 13.8 of the Act.

O. Reg. 109/19, s. 13

25. Application of Part II.1 to labour and material payment bonds — (1) A person to whom payment is guaranteed under a labour and material payment bond required under subsection 85.1(4) of the Act may refer to adjudication under Part II.1 of the Act any dispute with the principal and the surety in relation to the payment guaranteed under the bond.

(2) For the purposes of subsection (1), Part II.1 of the Act and this Regulation apply with the following and any other necessary modifications:

1. Subsection (1) applies instead of subsections 13.5(1) and (2) of the Act.

2. Except as otherwise provided by this subsection, a reference in Part II.1 of the Act and this Regulation to a contract shall be read as a reference to the public contract in relation to which the labour and material payment bond was furnished.

3. In section 13.6 of the Act, a reference to adjudication procedures that are or may be set out in the contract shall be read as a reference to adjudication procedures that are or may be set out in the subcontract with respect to which the dispute relates. Any such adjudication procedures, if applicable under section 13.6 of the Act, apply with necessary modifications.

4. In section 13.7 of the Act, a reference to a contract shall be read as a reference to the labour and material payment bond, and a reference to the parties to a contract shall be read as a reference to the person to whom payment is guaranteed under the bond, the principal and the surety.

5. The reference in subsection 13.12(1) of the Act to any other power of an adjudicator that may be specified in the contract shall be read as a reference to any other power of an adjudicator that may be specified in the subcontract with respect to which the dispute relates.

6. Subsections 13.8(2) and 13.19(1), (5) and (6) of the Act do not apply.

26. Commencement — This Regulation comes into force on the later of

the day subsection 62(2) of the *Construction Lien Amendment Act, 2017* comes into force and the day this Regulation is filed.

APPENDIX II
PRECEDENTS

II

1. Order for Motion to Vacate — Cash Security

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c. C.30, as amended
AND IN THE MATTER OF AN INTENDED LIEN ACTION

MASTER	)	**....., THE .....th DAY**
	)	
	)	**OF ....., 20.....**

BETWEEN:

XXX

Lien Claimant

— and —

YYY

Contractor

Order

THIS MOTION made by the Contractor, ..., without notice,

pursuant to Section 44(1) and 47(1) of the *Construction Act*, R.S.O. 1990, c. C.30, as amended, for an Order vacating the registration of the Claim for Lien of ..... in the amount of $..... registered on ..... as Instrument No. ..... in the Land Registry Office for Land Titles Division No. ....., against the lands and premises described in Schedule "A" attached hereto, upon ..... posting cash security into court in the form of a certified cheque, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of ....., sworn ....., and Exhibits attached thereto, filed, upon hearing submissions of the lawyers for the Contractor, and upon it appearing that the Contractor has posted cash security in the form of a certified cheque in the amount of $....., filed with the Accountant of the Superior Court of Justice as Accountant's Account number .....,

1. **THIS COURT ORDERS** that the amount of the security to be posted with the Accountant of the Superior Court of Justice by ..... to vacate the registration of the Claim for Lien of ..... described in paragraph 2 herein, be the amount of $....., which amount is comprised of the principal amount of $..... together with the amount of $..... as security for costs.

2. **THIS COURT ORDERS** that the registration of the Claim for Lien of ....., in the amount of $..... registered on ..... as Instrument No. ..... in the Land Registry Office for Land Titles Division No. ....., be vacated.

3. **THIS COURT ORDERS** that a copy of this Order shall be served on the lawyers for the Lien Claimant forthwith after entry.

.....

Schedule "A"

Legal Description:
PIN: .....

2. Order for Motion to Vacate

Court File No. .....

ONTARIO
SUPERIOR COURT OF JUSTICE

Appendix II

IN THE MATTER OF THE *Construction Lien Act*, **R.S.O. 1990, c. C.30, as amended**

MASTER	)	**.....DAY, THE .....th DAY**
	)	
	)	**OF .....**

BETWEEN:

XXX

Plaintiff

— and —

YYY

Defendant

Order

THIS MOTION made by the Defendant, ..., without notice, pursuant to Section 44(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, for an Order granting leave for this motion to be heard in Toronto and vacating the registrations of the Claim for Lien and Certificate of Action of ....., registered as Instrument Nos. .....and .....in the Land Registry Office for Land Titles Division No. ....., against the lands and premises described in Schedule "A" attached hereto, upon .....posting security into court in the form of a Letter of Credit, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of ....., sworn ....., and Exhibits attached thereto, filed, upon hearing submissions of the lawyers for ....., and upon it appearing that .....has posted security in the form of a Letter of Credit no. .....issued by ..... on ..... in the amount of $....., filed with the Accountant of the Ontario Superior Court of Justice as Accountant's Account number .....,

1. **THIS COURT ORDERS** that leave is granted for this motion

to be heard in Toronto.

2. **THIS COURT ORDERS** that the amount of security to be posted with the Accountant of the *Ontario* Superior Court of Justice by the Defendant, ..., to vacate the registrations of the Claim for Lien of .....described in paragraph 3 herein, and the Certificate of Action of .....described in paragraph 4 herein, be the sum of $....., which amount is comprised of the principal amount of $..... claimed by the Plaintiff together with the amount of $..... as security for costs.

3. **THIS COURT ORDERS** that the registration of the Claim for Lien of .....registered on .....in the amount of $..... as Instrument No. ..... against the lands and premises described in Schedule "A" attached hereto be vacated.

4**. THIS COURT ORDERS** that the registration of the Certificate of Action of .....registered on ..... as Instrument No. ..... against the lands and premises described in Schedule "A" attached hereto, be vacated.

6. **THIS COURT ORDERS** that a copy of this Order shall be served on all parties to the within action forthwith after entry.

.....

Schedule "A"

Legal Description:
PIN: .....

3. Irrevocable Letter of Credit Draft

Standby Letter of Credit No.: [INSERT NUMBER]
Date Issued: **[INSERT DATE]**
Beneficiary:

Accountant,
Ontario Superior Court of Justice
595 Bay Street
Toronto, ON M5G 2N3

Applicant:

.....

..... Canadian Dollars (CAD.....)
Date of Expiry: **[INSERT DATE]**

Pursuant to the request of ..... (hereinafter called the "Customer"), we, **[INSERT FINANCIAL INSTITUTION]**, hereby establish and give to you an irrevocable letter of credit in your favour in the total amount of CAD..... (Canadian Dollars .....) which may be drawn on you by you at any time, from time to time, upon written demand for payment made upon us by you, which demand we shall honour without enquiring whether you have a right as between yourself and our said Customer to make such demand, and without recognizing any claim of our said customer, or objection by it to payment by us.

Your drawing by sight draft must bear reference to this letter of credit number **[INSERT NUMBER]** dated **[INSERT DATE]** and must be accompanied by a certified copy of an Order, or a Judgment, or Report of the Ontario Superior Court of Justice directing that an amount up to CAD..... (Canadian Dollars .....) to be paid to the Accountant, Superior Court of Justice.

This letter of credit has been established for delivery to the Accountant, Ontario Superior Court of Justice as security in lieu of and in place of the lands and premises set out in the claim for lien registered by ..... lien on ..... as Instrument No. ..... in the Registry Office for Land Titles Division No. ..... and for the purpose of vacating the claim for lien of ..... in the amount of CAD..... against the said lands and vacating the related Certificate of Action.

Partial drawings are permitted under this Letter of Credit.

This Letter of Credit expires at our counters on the above-mentioned expiry date, subject to the following condition:

This Letter of Credit shall be deemed to be automatically extended without amendment for successive once year periods from the present or any future expiration date unless we give you written notification of the immediate cancellation of this Letter of Credit and at the same time forward to you together with such notification a bank draft, in the amount of CAD..... less any amount previously paid under this Letter of Credit, payable to the Accountant, Ontario Superior Court of Justice at Toronto, Ontario or upon our receipt of this original Letter of Credit accompanied by your written authorization to us to cancel same.

Yours truly,

.....

4. Order for Motion to Vacate Lien — Lien Bond

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended
AND IN THE MATTER OF AN INTENDED LIEN ACTION

.....	)	**.....DAY, THE .....DAY**
	)	
	)	**OF ....., 20.....**

BETWEEN:

XXX

Lien Claimant

— and —

YYZ

Contractor

Order

THIS MOTION made by the Contractor, ... without notice, pursuant to Section 44(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, for an Order vacating the registration of the Claim for Lien of ..... registered as Instrument No. ..... in the Land Registry Office for Land Titles Division No. 80 (Toronto) against the title to the lands and premises described in Schedule "A" attached hereto, upon the Contractor posting security in the form of a lien bond, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of

....., sworn May 20, 20....., and Exhibits attached thereto, filed, upon hearing submissions of the lawyers for ....., and upon it appearing that Contractor has posted security in the form of Lien Bond, No. .....issued by ..... on ..... in the amount of $....., filed with the Accountant of the Superior Court of Justice as Accountant's account number ..... (LEAVE THE ACCOUNT # SECTION EMPTY: WILL GET # IN COURT),

1. **THIS COURT ORDERS** that the amount of the security to be posted with the Accountant of the Superior Court of Justice by the Contractor to vacate the registration of the Claim for Lien of ..... described in paragraph 2 herein, be the sum of $....., comprised of the principal amount of $.....together with the amount of $..... as security for costs.

2. **THIS COURT ORDERS** that the registration of the Claim for Lien of ..... in the amount of $..... registered on ....., as Instrument No. AT....., in the Land Registry Office for Land Titles Division No. 80 (Toronto) against the title to the lands and premises described in Schedule "A" attached hereto, be vacated.

3. **THIS COURT ORDERS** that a copy of this Order shall be served on the lawyer for the Lien Claimant forthwith after entry.

.....

5. Order — Motion to Reduce Security

Court File No.: CV-15-0184-00

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *CONSTRUCTION ACT*, R.S.O. 1990, c. C30, as amended

MASTER) **....., THE .....th**
)
)
) **DAY OF .....,**
20.....

Appendix II

BETWEEN:

XXX

Plaintiff

— and —

YYY

Defendant

Order

THIS MOTION, made by the Plaintiff, ..., on consent of the Defendant, ..., pursuant to section 44(5) of the *Construction Act*, R.S.O. 1990, c. C30, as amended, for an Order granting leave for this motion to be heard in Toronto, reducing the amount of security posted with this Honourable Court by paying out the amount of $..... from the cash security now held by the Accountant of the Superior Court of Justice bearing Accountant's Account No. ..... to the Plaintiff, ..., and dispensing with the provisions of Rule 72.03(2)(c)(ii), was heard this day, at the Court House, 393 University Ave., Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of ....., sworn ....., and the Exhibits attached thereto, filed, and the Consent of the parties, filed, and on hearing the submissions of the lawyer for .....,

1. **THIS COURT ORDERS** that leave for this motion to be heard in Toronto is hereby granted.

2. **THIS COURT ORDERS** that the Order of Master ..... made ....., in Court File No.: ....., be and the same is hereby amended so as to reduce the amount of the cash security paid into court from $..... to $.....

3. **THIS COURT ORDERS** that the cash security paid into court to vacate the registration of the claim for lien of ..... registered as ....., in the Land Registry Office No. ....., in the City of ....., against the lands and premises described in Schedule A attached hereto, pursuant to the Order of Master ..... made Monday, ..., in Court File No.: ....., and held

by the Accountant of the Superior Court of Justice in Accountant's account no. ....., be dealt with as follows:

(a) The sum of $..... be paid to ....., and,

(b) The sum of $....., together with the sum of $50,000.00 for security for costs, for a total sum of $....., plus any accrued interest, be retained by the Accountant of the Ontario Superior Court of Justice in Accountant's account number ..... as security for aforesaid claim for lien

and the Accountant of the Superior Court of Justice is hereby so directed.

4. **THIS COURT ORDERS** that as this Order is made on consent, the provisions of Rule 72.03(2)(c)(ii) be, and the same are, hereby dispensed with.

.....

Schedule A
LEGAL DESCRIPTION OF LANDS AND PREMISES:
PIN: .....
DESCRIPTION: .....
ADDRESS: .....

6. Order Declaring Lien Expired

Court File No.: .....

ONTARIO
SUPERIOR COURT OF JUSTICE

In the Matter of the *Construction Act*, R.S.O. 1990, c. C.30, as amended

MASTER	)	..... DAY THE .....
	)	DAY OF .....
	)	
	)	

BETWEEN:

Appendix II

XXX

Plaintiff

— and —

YYY

Defendants

Order

THIS MOTION, made by the Defendants, without notice, for an order declaring the claim for lien of the plaintiff expired, vacating the registration of the plaintiff's claim for lien and certificates of action from title to the lands and premises set out in Schedule "A" attached hereto, declaring the claims for lien of the lien claimants, ... and ..... expired, vacating the registration of said lien claimants' claims for lien from title to the lands and premises set out in Schedule "A" attached hereto, and reserving all of the defendants' rights to have the within action dismissed pursuant to sections 46 and 47 of the *Construction Act*, was heard this ..... day of ....., at 393 University Avenue, Toronto, Ontario.

ON READING the Affidavit of ..... sworn ..... and exhibits attached thereto, filed, and on hearing the submissions of the lawyer(s) for the defendants,

1. **THIS COURT DECLARES** that the claim for lien of the plaintiff, ..., in the amount of $....., registered on ..... as Instrument No. ....., in the Toronto Land Registry Office No. ..... against the title to the lands and premises described in Schedule "A" attached hereto, has expired.

2. **THIS COURT ORDERS** that the registration of said claim for lien of ..... described in paragraph 1 above, be vacated.

3. **THIS COURT ORDERS** that the registration of the certificates of action of ....., both registered on ..... as Instrument Nos. ..... and ..... in the Toronto Land Registry Office No. ..... against the title to the lands and premises described in Schedule "A" attached hereto, be vacated.

4. **THIS COURT DECLARES** that the claim for lien of ....., in the amount of $....., registered on ..... as Instrument No.

....., in the Toronto Land Registry Office No. ..... against the title to the lands and premises described in Schedule "A" attached hereto, has expired.

5. **THIS COURT ORDERS** that the registration of said claim for lien of ..... described in paragraph 4 above, be vacated.

6. **THIS COURT DECLARES** that the claim for lien of ....., in the amount of $....., registered on ..... as Instrument No. ....., in the Toronto Land Registry Office No. ..... against the title to the lands and premises described in Schedule "A" attached hereto, has expired.

7. **THIS COURT ORDERS** that the registration of said claim for lien of ..... described in paragraph 6 above, be vacated.

8. **THIS COURT ORDERS** that the procedure under which this action shall proceed shall be the subject of a further court order without prejudice to the defendants' right to have this action dismissed pursuant to sections 46 and 47 of the Ontario *Construction Act*.

.....

Schedule "A"

Legal description:
PIN .....

7. Order to Discharge Return Dismiss

Court File No.: .....

ONTARIO
SUPERIOR COURT OF JUSTICE
In the Matter of the *Construction Act*, R.S.O. 1990, c. C.30

MASTER	)	..... **DAY, THE** ..... **DAY**
	)	
	)	**OF** .....

BETWEEN:

Appendix II

XXX

Plaintiff

— and —

YYY

Defendant

Order

THIS MOTION made by the Defendant, ..., on the consent of the parties, for an order discharging the Claim for Lien of the Plaintiff registered as Instrument No. ....., delivering up Lien Bond No. ..... issued by ..... on ..... in the amount of $....., filed with the Accountant of the Superior Court of Justice as Accountant's Account Number ....., to Glaholt LLP, lawyers for ....., for cancellation, dispensing with the provisions for an Affidavit pursuant to Rule 72.03(2)(c)(ii), and dismissing the within action, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of ....., sworn ..... and exhibits attached thereto, and the Consent of the parties to the within action, filed, upon noting that the registration of the Plaintiff's Claim for Lien was vacated by the Order of Master ..... dated ..... in court action no. ....., and upon hearing the submissions of counsel for .....,

1. **THIS COURT ORDERS** that the Claim for Lien of the Plaintiff, in the amount of $..... registered on ..... as Instrument No. ....., in the Registry Office for Toronto Land Titles Division (No. .....) against title to the lands and premises described in Schedule "A" attached hereto be, and the same is, hereby discharged.

2. **THIS COURT ORDERS** that Lien Bond No. ..... issued by ..... on ..... in the amount of $....., filed with the Accountant of the Superior Court of Justice as Accountant's Account Number ....., which was posted by ..... pursuant to the

Order of Master ..... dated ..... in court action no. ....., be delivered up to Glaholt LLP, for cancellation, and the Accountant of the Superior Court of Justice is so directed.

3. **THIS COURT ORDERS** that as this Order is on consent, the provisions for an Affidavit pursuant to Rule 72.03(2)(c)(ii) be, and the same are, hereby dispensed with.

4. **THIS COURT ORDERS** that the within action be and the same is hereby dismissed without costs.

.....

Schedule "A"

Legal description:
PIN .....

8. Draft Order — Day, Time and Place of Trial

Court File No. .....

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Lien Act*, R.S.O. 1990, c. C.30 as amended

MASTER	}	..... **DAY, THE** ..... **DAY**
	}	
	}	**OF** .....

BETWEEN:

XXX

Plaintiff

— and —

YYY and ZZZ

Defendants

Appendix II

Order

THIS MOTION made by the plaintiffs, ..., to the court, without notice, for an Order fixing a date, time and place for the trial of this action pursuant to Subsection 9(1) of O. Reg 302/18, as amended, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

UPON READING the Notice of Motion, the Affidavit of ..... sworn on ....., and Exhibits thereto, the Judgment of The Honourable Justice ..... dated ....., and the pleadings in this action, upon being advised that the within action has been discontinued as against the Defendants, ..., and on hearing the submissions of the counsel for the Plaintiffs,

1. **THIS COURT ORDERS** that the trial of this action shall take place by way of first pre-trial at ..... a.m. on ..... day, the ..... day of ....., ..., at the Superior Court of Justice, 393 University Avenue, 6th floor, in the City of Toronto, Province of Ontario.

2. **THIS COURT ORDERS** that the Plaintiffs shall serve a copy of this Order and the Notice of Trial, on all persons required by s. 9(1) of O. Reg 302/18 to be served.

.....

9. Vesting Order

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF

The *Construction Act*, R.S.O. 1990 c. C.30, and amendments thereto

JUSTICE) ...., THE ..... DAY

) OF ....., 20.....

)

(Title of Proceeding)

Order

THIS MOTION made by ....., in its capacity as Trustee and Receiver and Manager of the Respondents pursuant to Section 68 of the *Construction Act*, and not in its personal capacity (the "Construction Lien Trustee") for Vesting Orders pursuant to Section 113 of the *Courts of Justice Act*, was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING Report No. 1 of the Construction Lien Trustee, and on hearing the submissions of counsel for the Construction Lien Trustee and the sale of the real and personal property hereby vested having been authorized by Order of the Honourable Mr./ Madame Justice ..... dated ..... (the "Appointment Order") and the sale thereof having been approved by this Court this day:

1. **THIS COURT ORDERS** that the following real and personal property be and is hereby vested in ..... and his, her, its or their heirs, executors, administrators, successors and assigns:

a) the lands and premises described in Schedule 1 hereto, with all appurtenances thereto and including all buildings,

fixed improvements, fixed installations and fixtures therein or thereon, but excluding:

(i) fixtures and improvements to the extent, if any, of the right, title and interest that any tenant of premises therein has in fixtures and improvements;

(ii) any rented equipment or installations affixed thereto; and

(iii) any equipment or installations belonging to any utility;

b) any and all right, title and interest of each of the parties to this action and of Construction Lien Trustee in and to all tenants, leases, yearly and other rents, additional rents, issues and profits of the said lands and premises and of every part and parcel thereof, together with all reversions and remainders;

c) any and all right, title and interest of the parties to this action and of the Receiver and Manager in and to all appliances, chattels and equipment located on the said lands and premises, free and clear of and from all estate, right, title and interest of all of the parties to this action and each and every one of them and their heirs, executors, administrators, successors and assigns, as the case may be, and all the said estate, right, title and interest of such persons in the said real and personal property is hereby expunged.

2. **THIS COURT ORDERS** that upon the closing of the sale transaction in respect of which this Order is made, the real and personal property referred to in paragraph 1 hereof shall cease to be subject to the appointment of the Construction Lien Trustee pursuant to the Appointment Order.

3. **THIS COURT ORDERS** that the encumbrances listed in Schedule 2 hereto be deleted or expunged from the register in the Land Registry Offices for the lands and premises described in Schedule 1 hereto.

4. **THIS COURT ORDERS** that the proceeds of the sale transaction shall be received by the Construction Lien Trustee subject to the terms of the Appointment Order and the claims of all persons in or to the proceeds of the sale transaction will continue in

the same priority as in the lands conveyed.

.....
Local Registrar

10. Requisition for Accountant's Office

Court File No. CV-13-480805

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c. C.30 as amended

BETWEEN:

XXX

Plaintiff

— and —

YYY

Defendant

Requisition

TO THE ACCOUNTANT of the ONTARIO SUPERIOR COURT OF JUSTICE

WE REQUIRE, in accordance with the Order of ..... dated ....., the original of which is attached, that the lien Bond No. .....issued by ....., posted pursuant to the Order of ..... dated ..... in ..... Court File No. ..... and filed with the Accountant of the Superior Court of Justice as Accountant's Account number ..... be delivered up to ....., lawyers for the Defendant, for the express purpose of cancellation.

As provided in the Order of ..... dated ....., the original of which is attached, the provision of Rule 72.03(2)(c)(ii) requiring an

affidavit for payment out of court is dispensed with.

Date: ....

Barristers and Solicitors

11. Order Granting Leave for Oral Discoveries and Exchange of Productions

THIS MOTION, made by the Plaintiff for an order granting leave for the delivery of affidavits of documents and for examinations for discovery, in accordance with the Rules of Civil Procedure, was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the consent of the Plaintiff and the Defendant, and upon hearing submissions of counsel for the Plaintiff,

1. **THIS COURT ORDERS THAT** leave be granted for the delivery of affidavits of documents in accordance with the Rules of Civil Procedure;

2. **THIS COURT ORDERS THAT** leave be granted for the conduct of examinations for discovery in accordance with the Rules of Civil Procedure.

12. Order Appointing Trustee / Receiver / Manager Under s. 68

THIS APPLICATION made by the Applicant, ... for an order pursuant to s.68 of the *Construction Lien Act* ("CLA") appointing ..... as trustee, to act as receiver and manager of the assets, property and undertaking of the Respondents, ... (the Respondents collectively and individually shall hereinafter be referred to as the "Company") was heard this day at 393 University Avenue, Toronto, Ontario.

UPON READING the Notice of Application, the Affidavit of ..... sworn February 7, 2001, and upon hearing the submissions of counsel for the Applicant, ...

1. **THIS COURT ORDERS** that the time for service of the Notice of Application all supporting materials be and is hereby abridged and that this application is properly returnable today.

2. **THIS COURT ORDERS** that ..... (the "Trustee") be and it is hereby appointed trustee pursuant to s.68 of the CLA to act as

receiver and manager without security of all the present and future undertaking, property and assets of whatsoever nature and kind and wheresoever situate of the Company (collectively, the "Property") including the real property registered in the name of the Company or which is legally or beneficially owned by the Company, including the real property more particularly described in Schedule "1" hereto, with authority to act at once to take possession, receive, preserve, protect and realize upon the Property, or any part or parts thereof, until further Order of this Court.

3. **THIS COURT ORDERS** that the Company, its present and former officers, directors, solicitors, agents, managers, employees, servants, shareholders, members, any persons acting on their instructions and on their behalf and all other persons having notice of this Order, shall forthwith deliver to the Trustee without charge all the Property within their possession or control (including, without limiting the foregoing, all cash on hand, post-dated cheques or remittances of any kind relating to the Property) and, upon the request of the Trustee, all books, accounting records, documents, contracts, tenancy agreements, deeds, papers, records, computer records and accounts of every kind relating thereto, and all of the aforesaid persons are hereby restrained and enjoined from disturbing or interfering with the Trustee and with the exercise by the Trustee of its powers and the performance by the Trustee of its duties hereunder.

4. **THIS COURT ORDERS** that if any records relating to the Property are stored in a computer (which term shall include any electronic data processing system) accessible to any of the persons referred to in paragraph 3 of this Order, such persons shall, at the request of the Trustee, give the Trustee, access to and assistance in retrieving such information in such manner as the Trustee in its discretion considers reasonable and expedient.

5. **THIS COURT ORDERS** that the Trustee be and it is hereby authorized and empowered to perform or do any or all acts or things that in its opinion are necessary or desirable for the purposes of receiving, preserving, protecting or realizing on the Property, or any part or parts thereof, and that, without limiting the generality of the foregoing, the Trustee be and it is hereby authorized and empowered, but not obligated, to do the following

until further Order of the Court:

(i) complete the construction of the residential and commercial condominiums located at ..... Toronto, Ontario;

(ii) to do all things necessary, in the opinion of the Trustee to complete the sale of all *bona fide* arm's length agreements of purchase and sale entered into by the Company in respect of the condominium units;

(iii) to do all things necessary to market and sell the remaining unsold units or any other parts of the Property;

(iv) apply for a vesting order or orders for all or any part of the condominium units to the extent deemed necessary or advisable by the Trustee;

(v) to obtain possession and control of all funds held in trust for or on behalf of the Company including any such trust funds as may be held in any solicitor's trust account;

(vi) to execute in the name of and on behalf of the Company all necessary bills of sale, conveyances, deeds and documents of whatsoever nature which the Trustee considers to be necessary or incidental to the exercise of the powers granted hereunder;

(vii) to invoice, receive and collect all monies now or hereinafter due or owing to the Company, and to get in and receive all of the property and assets to which the Company is now or hereafter may be entitled;

(viii) to apply for any permits, licences, approvals or permissions or any renewals thereof on behalf of the Company or as may be required by any governmental or regulatory authority;

(ix) to execute such powers of attorney or documents in the name of and on behalf of the Company. Any such powers of attorney or documents so executed by the Trustee shall have the same force and effect as if executed by the Company;

(x) to review the books and records of the Company to determine if those books and records establish that monies or other property and assets of the Company are properly accounted for, and whether there are any claims or potential claims against the Company or any other person who may

have received such monies, property or assets, and, if so, to determine the nature and extent of such claims or potential claims and report with respect thereto to this Court and to the Creditors' Committee;

(xi) to obtain any necessary appraisals of the Property or any part or parts thereof;

(xii) to take steps for the preservation and protection of the Property, including without restricting the generality of the foregoing (i) the right to make repairs and improvements to the Property or any parts thereof; and (ii) the right to make payments for ongoing services in respect of the Property;

(xiii) to purchase or lease such machinery, equipment, premises or other assets or supplies as may be necessary or desirable in the opinion of the Trustee to receive, preserve, protect or realize upon the Property or any part or parts thereof;

(xiv) to take such steps as in the opinion of the Trustee are necessary or appropriate to establish and maintain control over the Property or any part or parts thereof including, but not limited to, the changing of locks and security codes, the relocating of the Property, to dispose or safeguard them, the engaging of independent security personnel, the taking of physical inventories and the placement *of* adequate insurance coverage as required;

(xv) to register notice of this Order against title to the Property in the appropriate registry office;

(xvi) to terminate or consent to the termination of any contracts or agreements to which the Company is a party or in respect of the Property;

(xvii) to file an assignment in bankruptcy on behalf of the Company, pursuant to the provisions of the *Bankruptcy and Insolvency Act* (Canada); and

(xviii) to take any steps, enter into any agreements or incur any obligations necessary or reasonably incidental to the exercise of the powers granted to the Trustee pursuant to this Order, whether in the name of the Company or otherwise, including, without limitation, entering into banking arrangements and to join in and execute, assign, issue, endorse and

negotiate cheques, drafts, bills *of* exchange and other instruments.

6. **THIS COURT ORDERS** that all persons having notice of this Order be and are hereby enjoined from disturbing or interfering with the possession, control or use by the Trustee of the Property, or any part or parts thereof, and with the exercise of the powers and authority of the Trustee conferred hereunder. No suits, actions, applications nor any legal, administrative or other proceedings, nor any self-help remedy, or any other acts, proceedings or remedies, whether private or otherwise, including without limitation, the exercise of any right of set-off, the exercise of any tier, including any solicitor's lien, and the commencement or continuation of any proceedings or actions shall be taken or continued against the Company, the Trustee or against the Property, or any part or parts thereof, except with the prior written consent of the Trustee or by order of this Court first being obtained, upon at least seven days' notice to the Trustee. Nothing herein shall prevent any action, application, or other proceeding against the Company for a declaration of breach of trust or to preserve and perfect any construction lien claims in respect of the Property, provided however that no further steps shall be taken in respect of such construction lien claims without leave of the Court.

7. **THIS COURT ORDERS** that without limiting the generality of any of the provisions hereof, no one claiming an interest in the Property, or any part or parts thereof, shall be at liberty to exercise any rights in respect of such interest, including, without limitation, any right to possession of such Property, or any part or parts thereof, except with the prior written consent of the Trustee or an order of this Court first being obtained on at least, seven days' notice to the Trustee.

8. **THIS COURT ORDERS** that without limiting the generality of any of the provisions hereof, all persons, firms and corporations, including utilities, suppliers of raw materials and goods, suppliers of services, contractors and equipment lessors (collectively, the "Suppliers"), be and are hereby restrained and enjoined from varying, amending, terminating, cancelling, breaching or altering any agreements or arrangements with the

Company whether or not reduced to writing. In addition, without limiting the generality of the foregoing, the Suppliers are enjoined from disturbing, discontinuing, cutting-off or interfering with any source of supply or utilities or services, Including but not limited to the furnishing of construction and building supplies, fuel, gas, oil, heat, electricity and water to the Company and are hereby restrained and enjoined from terminating or cancelling any agreements with, or cutting-off, discontinuing or altering any such utilities or services to the Trustee, subject to the obligation of the Trustee to pay for such utilities or services provided to the Trustee subsequent to the use of the Property by the Trustee, and to pay for goods supplied at the request of *the* Trustee subsequent to the date of this order, except with the prior written consent of the Trustee or an order of this Court first being obtained on at least seven days' notice to the Trustee.

9. **THIS COURT ORDERS** that effective immediately, all landlords and sublandlords (the "Landlords") whatsoever of the Company be and are hereby enjoined from terminating any lease or sublease with the Company and are hereby enjoined from exercising any right of distraint against the Property except with the prior written consent of the Trustee or an order of this Court first being obtained on at least seven days' notice to the Trustee. Notwithstanding any other provision of this order, the Trustee shall be deemed not to be in possession or occupation of any leased premises, the Trustee shall have no liability for rent or any other charges associated with leased premises, unless the Trustee is in actual possession or occupation of same.

10. **THIS COURT ORDERS** that all suppliers and landlords shall continue to perform and observe any terms, conditions and provisions contained in any agreement or arrangement with the Company in respect of the Property, including, without limitation, agreements for insurance, subject to the obligation of the Trustee to pay for goods and services requested by the Trustee to be supplied to the Trustee for the period commencing with the date of this order, and all suppliers and landlords are hereby restrained from disturbing or otherwise interfering with the occupation by the Trustee of any leased property, subject to the obligation of the Trustee to pay occupation rent as the case may be, for

the period commencing with the date of this order, but not arrears, at the rent presently payable by the Company.

11. **THIS COURT ORDERS** that the Trustee shall be at liberty to appoint, employ or retain such agents, employees, experts: auditors, accountants, managers, solicitors and counsel, including legal counsel, and such other persons to provide to it assistance from time to time, as it may consider necessary or desirable for purposes of receiving, preserving, protecting or realizing on the Property, or any part or parts thereof, or generally exercising the powers and duties conferred upon the Trustee by this Order. Any expenditure which shall be properly made or incurred by the Trustee in the performance of its duties or the exercise of its powers or authority granted by this Order, including the fees of the Trustee and the fees and disbursements of its legal counsel on a solicitor and his own client basis, shall be allowed and shall form a first charge on the Property, in priority to any charges, mortgages, liens, construction liens, security interests, or other encumbrances or in the Property, whether or not registered, held by ..... or anyone else.

12. **THIS COURT ORDERS** that the Trustee shall pass its accounts from time to time and shall pay the balances in its hands as this Court may direct. The Trustee shall be at liberty monthly or from time to time to apply reasonable amounts from monies received or borrowed by it against its reasonable fees and disbursements, including reasonable solicitors fees and disbursements, and such amounts so applied against its fees shall constitute advances against its remuneration when determined by this Court.

13. **THIS COURT ORDERS** that the Trustee be at liberty and it is hereby empowered to borrow, by way of revolving credit or otherwise and by giving security or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000 at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of exercising the powers and duties conferred by this Order, including Interim expenditures. The whole of the Property and all monies and proceeds of realization received in respect thereof or

relating thereto shall be secured by way of a fixed and specific charge as security for the payment of monies borrowed, together with interest and charges thereon, which shall rank in priority to all security interests, mortgages, liens, construction liens, charges and other encumbrances held by any person, firm or corporation on, in or to the same, whether or not registered, but subject to the right of the Trustee and its legal counsel to be indemnified from the Property and all monies and proceeds of realization received in respect thereof for their fees, disbursements, liabilities and expenses properly incurred.

14. **THIS COURT ORDERS** that any security granted by the Trustee in connection with borrowings under this Order shall not be enforced without leave of this Court.

15. **THIS COURT ORDERS** that the Trustee is at liberty and authorized to issue certificates substantially in the form annexed hereto as Schedule "A" (the "Trustee's Certificates") for any amounts borrowed by it pursuant to this Order.

16. **THIS COURT ORDERS** that the monies from time to time borrowed by the Trustee pursuant to this Order or any further Order of this Court and any and all Trustee's Certificates evidencing the same or any part thereof shall rank on a pari passu basis.

17. **THIS COURT ORDERS** that the Trustee may from time to time apply to this Court for direction and guidance in the discharge of its powers and duties hereunder or for the determination of the Court on any matter affecting the Property or the determination of relative claims or interests in and to the Property.

18. **THIS COURT ORDERS** that any interested person may apply to this Court to vary, alter or amend this Order or any further Order in respect of the trusteeship as may be appropriate upon giving at least three clear days' notice to the Trustee.

19. **THIS COURT ORDERS** that the Trustee be and is hereby indemnified out of the Property from and against all liabilities arising out of the due and proper performance of its duties as Trustee pursuant to the terms of this Order, save and except for any gross negligence or wilful misconduct on the part of the Trustee with respect to such duties and the Trustee shall have a charge or, the Property for such indemnity in priority to all secur-

ity, charges and encumbrances affecting the Property.

20. **THIS COURT ORDERS AND DECLARES** that the Trustee is hereby declared not to be and shall not be deemed to be the employer of any of the employees of the Company and shall not be liable to any of the employees of the Company or any other person, corporation, governmental authority or regulatory agency for any wages, which term includes severance pay, termination pay and vacation pay, pension obligations or any other obligations whatsoever owing by the Company to or in respect of its employees or to others except such wages or other obligations arising subsequent to this order that the Trustee may specifically agree in writing to pay. Further, by the granting of this order, the business of the Company has not been sold or otherwise disposed of and will continue to be the business of the Company until sold in whole or in part by the Trustee.

21. **THIS COURT ORDERS** that the Company shall be the employer of all employees hired by the Trustee and that as a result of this order and anything herein contained, the Trustee shall not be and shall not be deemed to be the employer or the successor employer of the employees of the Company or of any former employees, under the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), any collective agreement or other contract between the Company and any of the employees, or under any other provincial or federal legislation applicable to employees or otherwise.

22. **THIS COURT ORDERS** that:

(a) the Trustee is not an owner of any of the Property for any purpose including, without limitation, for purposes of Environmental Legislation;

(b) the Trustee shall not be liable under Environmental Legislation in respect of any Adverse Environmental Condition with respect to the Property or any part thereof, for any Adverse Environmental Condition that arose or occurred before the later of the time of appointment of the Trustee or the date the Trustee goes into possession of the Property, if applicable;

(c) the Trustee shall not be liable under Environmental Legislation in relation to its position as Trustee, in respect of any

Adverse Environmental Condition, at the Property or any part thereof that arose, occurred or continued after the time of appointment of the Trustee unless such Adverse Environmental Condition has been caused by the gross negligence or wilful misconduct of the Trustee;

(d) notwithstanding paragraph (c), the Trustee shall not be liable to beyond the Net Realized Value (as defined in paragraph 25 herein) under Environmental Legislation in respect of any Adverse Environmental Condition with respect to the Property or any part thereof except that which has been caused by the gross negligence or wilful misconduct of the Trustee;

(e) for purposes of this Order, the term "Environmental Legislation" shall mean any federal, provincial or other jurisdictional legislation, statute, regulation or rule of law or equity (whether in effect in Canada, the United States of America or any other jurisdiction) respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment relating to the disposal of waste or other contamination including, without limitation, the *Environmental Protection Act* (Ontario), the *Canadian Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Occupational Health and Safety Act*, and regulations thereunder; and

(f) for purposes of this Order, the term "Adverse Environmental Condition" shall include, without limitation, any injury, harm, damage, impairment or adverse effect of the environmental condition of the Property and the unlawful storage or disposal of waste or other contamination on or from the Property.

23. **THIS COURT ORDERS** that nothing in this order shall vest in the Trustee the ownership, control, possession or management of, nor require the Trustee to take possession, control or manage, any Property which may have located thereon a pollutant or contaminant or cause or contribute to a discharge, release or deposit of a substance contrary to the *Environmental Protection Act* (Ontario), the *Canadian Environmental Protection Act*, the *Ontario Water Resources Act*, the *Occupational Health and Safety Act* (Ontario) the regulations thereunder, or any similar legislation

which may have application in any jurisdiction in which any of the Property is situated.

24. **THIS COURT ORDERS** that a Creditors' Committee shall be established of up to three creditors, which Creditors' Committee shall include a representative of ....., a representative of the general contractor, ..., and a representative of one of the subcontractors. The role of the Creditors' Committee shall be to act as a consultant to the Trustee. The Trustee is hereby directed to report to the Creditors' Committee on a regular basis with respect to its activities. The Creditors' Committee shall incur no liability or obligations as a result of its constitution.

25. **THIS COURT ORDERS** that no person shall commence any proceedings against the Trustee without first obtaining leave of this Court.

26. **THIS COURT ORDERS** that no distribution of proceeds shall be made to any secured creditor, construction lien claimant, trust claimant, mortgagee, unsecured creditor or shareholder of the Company without approval of this Honourable Court.

27. **THIS COURT ORDERS** that the costs of the Applicant of and incidental to this application be assessed as between a solicitor and his own client and be paid by the Trustee as part of its expenses.

Schedule "A"

Amount $

Trustee Certificate No.:

1. THIS IS TO CERTIFY that ..... (the "Trustee"), the Trustee and Receiver and Manger of the assets, property and undertaking of ..... (the "Property"), pursuant to the Order of the Superior Court of Justice (Commercial List) dated ..... (the "Order"), acknowledges that as Trustee it has received from and it Is Indebted to ..... (the "Lender") on account of this Certificate in the maximum principal sum of $ .....

2. The principal sum which may from time to time be outstanding on account of this Certificate is payable on thirty (30) days written notice from the Lender to the Trustee with interest thereon (both after as well as before maturity) to the date of payment.

3. While any amount of principal remains outstanding on account

of this Certificate, the Trustee shall pay interest thereon at the Lender's prime rate in effect from time to time plus .....% per annum calculated daily and payable monthly in arrears on the last business day of each month.

4. Until the Lender delivers written notice to the Trustee pursuant to paragraph 2 above, the Trustee may borrow, repay and reborrow, and the Lender may advance on account of this Certificate such principal sum as the Trustee may require, provided that the principal outstanding shall at no time exceed $ .....

5. From time to time and at any time the Trustee may make such payments on account of the principal sum outstanding as it considers appropriate or desirable.

6. The principal sum outstanding from time to time together with interest thereon as aforesaid, together with the principal sums and interest thereon of all other Trustee's Certificates issued by the Trustee pursuant to the Order, small constitute, and the Trustee hereby grants to the Lender a charge upon the whole of the Property, including, without limitation, any additions, accretions thereto or substitutions therefor and any monies or proceeds or realizations relating thereto, such charge in priority to the interests of the parties hereto in or to the Property.

7. Notwithstanding any other provisions hereof, the charge created hereby shall not cease to operate or be deemed to be void by reason of the principal sum outstanding hereunder becoming or being zero at any time or from time to time.

8. All sums in respect of principal and interest upon this Certificate are payable at the office of the Lender at

9. In case default shall be made in payment of interest on this Certificate and thirty (30) days written notice is given as aforesaid, the principal of this Certificate shall be Immediately due and payable to the holder thereof.

10. All liability in respect of the whole of the principal sum for which this Certificate is issued and for further interest thereon shall be terminable by the Trustee tendering to the Lender the whole of the principal sum then outstanding with interest accrued thereon as aforesaid to the date of such tender together with written notice by the Trustee to the Lender of its intention to terminate this Certificate.

11. Until all liability in respect of this Certificate shall be Terminated, no Trustee's Certificates ranking or purporting to rank prior to

or pari passu with this Certificate shall be issued by the Trustee to any person other than The Lender without the prior consent in writing of the Lender.

12. The said charge on the assets of the Company shall operate so as to permit the Trustee to deal with the Property as authorized by the Order or any further Order of the Court.

13. The Trustee acts solely in its capacity as Court-appointed Trustee and Receiver and Manager of the Company and as such the Trustee does not undertake and it is not under any personal or corporate liability to pay any sum in respect of which it may issue Certificates under the terms of the Order.

DATED at Toronto this .....day of ....., 20.....

13. Consent of Trustee

....., Trustee in Bankruptcy of the Estate of ....., hereby consents to an order in the form annexed hereto.

Date:.....

.....

14. Order Granting Leave to Commence Against Bankrupt

THIS MOTION made by the creditors, ... for an order granting leave to commence and prosecute an action in the Ontario Superior Court of Justice, against ..... and the Receiver and Manager of the assets, property and undertaking of ....., was heard this day at Toronto, Ontario.

ON READING the affidavit of ....., filed,

AND ON HEARING the submissions by counsel for ..... and counsel for ....., receiver and manager of all of the assets, property and undertaking of .....

1. THIS COURT ORDERS that the time for service of the notice of motion and all supporting materials be and is hereby abridged and that this motion is properly returnable today.

2. THIS COURT ORDERS that leave be and the same is hereby granted to ..... to commence and prosecute an action in the Ontario Superior Court of Justice against ..... for, *inter alia*, a declaration of breach of trust, breach of fiduciary duty, knowing receipt of trust funds, knowing assistance in the improper distribution of trust funds, negligent misrepresentation,

fraudulent preference and fraudulent conveyance.

3. THIS COURT ORDERS that ..... are hereby granted leave to add ....., in its capacity of receiver and manager of the assets, property *and undertaking of* ....., as a defendant in an action to be commenced in the Ontario Superior Court of Justice.

4. THIS COURT ORDERS that if ....., in its capacity of receiver and manager of the assets, property and undertaking of ..... does not defend the action, it as receiver and manager, is not required to deliver pleadings, attend for examinations for discovery, or to make discovery of documents, but shall make all documents in its possession relating to the action commenced, available for inspection.

5. THIS COURT ORDERS that, subject to further order of this court, ..., receiver and manager of the assets, property and undertaking of ..... shall not be liable for any costs in the action commenced in the Ontario Superior Court of Justice by .....

15. Order Granting Leave to Continue Lien Action Against Bankrupt

THIS MOTION made by the creditor, ... for an order granting leave to continue its actions in the Ontario Court (General Division) under the *Construction Act* against the Trustee of the property of the said ..... to enforce the claims for lien of ..... made without notice, was heard this day at Toronto, Ontario.

ON READING the consent of ....., Trustee in Bankruptcy of the .....;

1. **THIS COURT ORDERS** that leave be and the same is hereby granted to ..... to continue and prosecute its actions in the Ontario Superior Court of Justice under the *Construction Lien Act* against the Trustee of the property of the said ..... to enforce the claims for lien of ..... against the properties hereinafter described in Schedules A, B and C attached hereto.

2. **THIS COURT ORDERS** that the said ..... right to prosecute its actions under the *Construction Lien Act* pursuant to this order, shall be for the purpose only of establishing in those actions the amount for which it is entitled to prove in the bank-

ruptcy of ..... after realization under its liens. No production of documents or examination shall be sought against the Trustee and no order for costs shall be made against it in the said actions.

3. **THIS COURT ORDERS** that the time for filing a declaration under subsection I of s.128 of the *Bankruptcy Act, R.S.C.* 1985, c. B-3, shall be extended until after the expiration of thirty days from the judgment of the Court adjudicating upon the applicant's claims for lien for whatever amount may be found owing thereunder as against the said Trustee and co-defendant.

4. **THIS COURT ORDERS** that the time for filing any claims which may have as an unsecured creditor after realization under its liens as required by s. 128, subsection 1 of the *Bankruptcy Act* shall be extended until it shall have been ascertained what amount shall receive under its liens.

5. **THIS COURT ORDERS** and authorizes all other persons who may be entitled to enforce construction liens against the within mentioned properties to take such proceedings as may be necessary to protect their rights thereunder and the provisions of paragraphs 2, 3 and 4 of this order shall apply to all such lien holders in the bankruptcy proceeding.

..... REGISTRAR

16. Construction Lien Motion Request Form

TO: Masters Construction Lien and Reference Office
Attention: .....
Fax No: (416) 326-5416

Construction Lien Motion Request Form (Before a Lien Master)

Court File No.: .....
Short Title: .....
Location of Land/Property: .....
***Motion Date: .....: *Start Time: 2:30 P.M.**
** (Motion Date & Start time must be obtained from Construction Lien Office)*
Total Time Required (moving/responding): .....
Moving Party: .....

Lawyer/Other — Name: .....
Phone No: .....; Fax No: .....
Client: .....
Relief Sought: .....
NOTE: Property must be located in the Toronto jurisdiction
Filing: 6th. Floor, 393 University Ave., Toronto — 7 days before hearing excluding holidays, Rule 37.10(1)
Fax No: 416-327-6405 for confirmation — 3 business days

Contacts:

Registrar David Backes — Tel: (416) 212-9783, E-Mail: david.backes@ontario.ca
Judicial Secretary Rita Nielsen — Tel: (416) 327-0506, E-Mail: rita.nielsen@ontario.ca
Masters Construction Lien and Reference Office Fax: (416) 326-5416

17. Procedure for Filing Letter of Credit or Lien Bond

Attend at Master's office with three (3) copies of the draft order, along with the completed following fiat (see attached), the security to be posted, and the motion materials;

Superior Court of Justice
COURT FILE NUMBER:.....

In the Matter of the *Construction Act* and In the Matter of a claim for lien

Registered by:

.....
Claimant/Plaintiff

— and —

.....
Owner/Defendant

Let ..... (Name of Person Paying in) pay into Court the sum of: $

..... by way of:[1]

[ ] Lien Bond

[ ] Letter of Credit or

[ ] Certified Cheque

which sum includes the amount of $..... for lien, and $ ..... for costs, all to stand to the credit of this matter until further order of the Court.

Dated:.....

.....

Master

An original of the motion materials, the security to be posted, the fiat, and two copies of the draft order are passed to the registrar, who provides them to the master.

The master reviews the materials, signs two copies of the order, and the fiat. The Master passes all of these back to the registrar.

You get from the registrar the signed fiat and your security back. The registrar retains the two copies of the order.

You attend at the accountant's office with the signed fiat, the security, and the draft order you kept. You provide these to the accountant, who provides you with an acknowledgment and receipt, bearing an account number.

Take the acknowledgement and receipt back to the registrar. The registrar will write the account number onto both copies of the signed order, and provide one copy to you.

Issue and enter the order.

18. Vetting Committee Report

Court File No.

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

---

[1] Check off applicable method of payment

Appendix II

Plaintiff

— and —

Defendants

Report of the Vetting Committee

dated the ..... day of ....., 2003

Background

Pursuant to the Order of Master ..... made the ..... day of ....., 20..... and his subsequent Orders, the undersigned, ... were appointed a committee to scrutinize and report to the lien claimants referred to in Schedule "A", the labour and material surety of ....., and to this Honourable Court on the issues of timeliness and quantum of the Claims for Lien of the aforesaid lien claimants. ..... was appointed the chairperson of the committee.

Investigations Concerning the Lien Claims

So as to avoid any conflicts of interest, the committee members allotted the various Claims for Lien among themselves for the purposes of review as follows:

> ..... undertook the review of the claims for lien of ..... undertook the review of the liens of ..... undertook the review of the lien claims of .....

The lien claimants in question were requested to provide the committee members with documentation in support of their lien, including their Claim for Lien, Certificate of Action, pleadings, contract, approved change orders, details of changes ordered verbally with supporting documents, invoices rendered, ledger accounts, proof of last work or supply, completion contract and details of any work included in the completion contract which was also included in the lien and respective values of each.

The committee members then undertook a review of the documentation submitted and communications with the lien claimants' solici-

tors as to initial findings and questions and requesting further documentation or information as was necessary. Additionally, the committee members requested input and comment from ..... as to its position concerning the liens. The committee held ..... meetings and minutes of each of these meetings are attached to and form part of this Vetting Committee Report.

In some cases, the committee's requests were either not answered, as in the case of ....., or not answered satisfactorily despite the passage of time and request(s) for information and documentation.

The delay occasioned in submitting its Report arises essentially because of the dispute between ..... and..... as to whether sufficient particulars of deficiency, incomplete work, and delay claim was provided by ..... to ..... in order to allow ..... to assign the claims to its particular subtrades.

On the ..... day of ....., 20....., Master ..... ordered that ..... provide particulars of any claim over it intended to make against its subtrades respecting ..... claims against ..... for delay, deficiencies and costs to complete. Subsequent Orders were made by Master ..... respecting the delivery by ..... of the particulars ordered and Scott Schedules outlining its claims known to date relating to deficient and incomplete work and delay. The committee received ..... Scott Schedules. Although ordered by Master ....., the lien claimants have not provided ..... nor this committee, with Scott Schedules relating to their extra claims. The committee has been advised that some of the liens have been assigned and have noted same in its Report.

The committee has prepared a summary of its review of the lien claims as at the date hereof, which is appended to this Report (see pages 41 to 42). The committee members review of the individual liens, any direct responses from ..... and Scott Schedules provided by ..... have not been appended to the Report because of their volume. They have been filed with the Court and copies are available from .....

Liens Recommended for Immediate Pro-Rata Payment in Whole or in Part

The following claims for lien are recommended for immediate pro-rata payment to be based upon the amount set opposite their respec-

tive name, less their share of costs or net, the same to be without prejudice to the lien claimant's rights to further pro-rata distributions as its interests may appear:

Lien Claimant	Amount	Sub of:
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

The committee is of the view that an interim distribution should be made to the aforementioned lien claims, and that such distribution can be accomplished by using the face value of the liens as registered by the subtrades of ..... ($ .....) and dividing it into the admitted minimum statutory liability of ..... ($ .....) to obtain a pro-rata distribution of 0.171639841, which is the lowest pro-rata percentage distribution possible assuming all subtrade liens of ..... were found to be valid as claimed. In respect of the liens of the sub-subtrades of ..... and ....., a further pro-rata calculation was obtained by taking the face value of the liens of their subtrades and dividing it into the pro-rata entitlement of ..... and ..... respectively.

The committee has received confirmation from the Accountant of the Ontario Superior Court of Justice that as at ....., 20....., $..... stands to the credit of this action, inclusive of interest. Since entitlement to accrued interest may be in issue, the committee has used the principal sum of ..... in its pro-rata calculation. The calculations to determine the percentage for interim distribution are found at pages ..... to ..... and the calculations to determine the pro-rata distribution and pro-rata responsibility for vetting and salvage costs are found at pages ..... to .....

Summary Comments in Respect of the Various Liens Reviewed

..... Subtrade of ..... Lien Amount: $.....

No documents were received from ..... although requested. The claim is therefore denied on all issues save that the committee obtained a photocopy of the Claim for Lien which indicates that the

form and content of the lien comply with the *Construction Lien Act*, R.S.O. 1990 c. C-30 (hereinafter referred to as the "Act").

..... position concerning ..... claim as presented to the committee by direct response, or through its Scott Schedules, is summarized as follows:

1. It concurs with the committee's comment that the form and content of the Claim for Lien comply with the Act.

2. It disputes the quantum of ..... claim.

3. It claims a set-off and counterclaim for deficient and incomplete work in the present amount of $..... as set out in its Scott Schedule.

4. It claims a set-off and counterclaim for damages it incurred due to winter works and delay in the present amount of $..... as set out in its Scott Schedule.

5. It claims over against ..... in respect ..... of delay claim against ..... in the amount of $..... as set out in its Scott Schedule.

In addition, the committee's review indicates a further set-off or counterclaim in an amount to be determined relating to extras claimed or paid to ..... allegedly to repair or repaint drywall damage due to poor workmanship or otherwise by ..... and its subtrades.

The committee accordingly recommends as follows with respect to ..... claim:

1. This Court find that the form and content of the lien claim of ..... comply with the requirements of the Act.

2. That the issues relating to the timeliness and quantum of the Claim for Lien and the aforementioned set-off and counterclaims be set down for trial with an estimated trial time of six (6) weeks.

3. Consideration should be given to setting aside a certain trial time to deal with the extra claims by ..... which may relate to, or be the responsibility of ..... such that counsel for all relevant parties involved can participate.

19. Construction Lien Claims Process Order

THIS MOTION, made by ..... in its capacity as Court-appointed receiver and manager pursuant to section 101 of the *Courts of Justice*

Act (the *"CJA"*) and trustee and receiver and manager under the *Construction Lien Act* (Ontario) (the "CLA"), and ..... in its capacity as interim receiver (the "Interim Receiver") pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, (jointly and collectively, the "Receiver") of the undertaking, property and assets, including the Property (as defined below) of ..... for, *inter alia*, approval of a construction lien claims process, was heard this day at 330 University Avenue, Toronto, Ontario.

WHEREAS pursuant to the Order of the Honourable ..... dated ....., ... was appointed as trustee pursuant to section 68(1) of the CLA and ..... was appointed Interim Receiver;

AND WHEREAS pursuant to the Amended and Restated Appointment Order of the Honourable ....., ... was appointed receiver and manager pursuant to section 101 of the CJA and the CLA;

i.

ii.

AND WHEREAS the Receiver has not adopted or affirmed any contracts or agreements of ..... including any contracts with any party (each, a "Lien Claimant") who is entitled to assert a claim for lien under the CLA in respect of the lands and premises legally described in Schedule "A" hereto and the condominium project under construction thereon (the "Property") for services and materials provided prior to ..... (each, a "Claim");

AND WHEREAS the Receiver has entered into new contracts for the provision of services and materials with respect to the Property after .....;

AND WHEREAS the Receiver seeks the approval of the process described in the Second Report of the Receiver dated ..... (the "Second Report") and described herein for the administration of any such Claims (the "Construction Lien Claims Process");

ON READING the Second Report; filed; and on hearing the submissions of counsel for ..... and the Receiver, ...; counsel for the Debtor; independent counsel for the Receiver; counsel for no one else appearing.

Service

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Mo-

tion is properly returnable today and hereby dispenses with further service thereof.

Claims Process

2. THIS COURT ORDERS AND DECLARES that the Construction Lien Claims Process is hereby approved and is the exclusive process by which all Claims shall be determined, and all Claims shall attorn to the Construction Lien Claims Process.

3. THIS COURT ORDERS that the Receiver is hereby authorized and directed to implement and administer the Construction Lien Claims Process, including the acceptance, revision, disallowance and/or settlement of any Claims by any Lien Claimant, and the Receiver may take any steps which it believes are incidental or necessary for the implementation of the Construction Lien Claims Process.

4. THIS COURT ORDERS AND DIRECTS that all Claims shall be determined and administered by the Receiver under the supervision of this Court pursuant to the Construction Lien Claims Process and any such determination or disposition of any Claim shall have the same force and effect as if made by a court of competent jurisdiction pursuant to the CLA. The Receiver may retain any consultant or assistant as it may require to assist in the review and determination of any Claim.

5. THIS COURT ORDERS AND DECLARES that. for the purposes of the CLA, all contracts and subcontracts for the provision of services and materials with respect to the Property prior to ..... are deemed to have been substantially performed, completed or abandoned (as the case may be) on the earlier of date(s) so determined pursuant to the provisions of the CLA and .....

6. THIS COURT ORDERS AND DIRECTS that in order to be properly filed with the Receiver for purposes of the Construction Lien Claims Process, a Claim, including any sheltered claim for lien must have been preserved and perfected in accordance with the provisions of the CLA (a "Lien Action") and shall have been served upon the Receiver and all named defendants to such Lien Action.

7. THIS COURT ORDERS AND DIRECTS that in filing a Claim with the Receiver, all Lien Claimants shall include:

a) a copy of the contract or subcontract including any change orders, amendments, purchase orders, or other related documents on which such Claim is asserted;

b) the names of the parties to the contract or subcontract;

c) the contract price and a statement of account, including the dates and amounts of payments received;

d) a copy of any labour and material payment bond posted by a subcontractor with a contractor or by a subcontractor with a subcontractor; and

e) any other documents or information as the Receiver may reasonably request for the purpose of assessing and determining any Claims in accordance with paragraph 3 of this Order.

No Default Proceedings or Defences

8. THIS COURT ORDERS that no default or enforcement proceedings shall be commenced against any defendant in any Lien Action unless authorized by further Order of this Court.

9. THIS COURT ORDERS that the requirement for the Receiver, ..., or any defendant in any Lien Action to file a statement of defence is hereby dispensed with subject to any further Order of this Court.

Determination of Claims

10. THIS COURT ORDERS that the Receiver shall accept, revise and/or disallow a Claim as set out in a Lien Claimant's Statement of Claim by delivering a notice of determination including the reasons for such determination (a "Notice of Determination"), and all documentation, if any, referred to in the notice of determination to such Lien Claimant on or before....., and the Receiver shall post each Notice of Determination only, without any supporting documentation, on its website immediately after delivery to such Lien Claimant and in any event on or before..... Any Lien Claimant who files a Notice of Dispute with respect to a Notice of Determination of the Claim of another Lien Claimant may request, and the Receiver shall provide, any documentation referred to in such Notice of Determination.

Dispute Notice and Appeals

11. THIS COURT ORDERS that a Lien Claimant may appeal the acceptance, revision and/or disallowance (as the case may be) of any Claim as set out in a Notice of Determination by delivering a Dispute

Notice to the Receiver substantially in the form attached to this Order as Schedule "B" ("Dispute Notice"), within 30 days of the posting of such Notice of Determination by the Receiver on its website. Any Lien Claimant who does not deliver a Dispute Notice within 30 days of such posting shall be deemed to have accepted the Receiver's determination as set out in the Notice of Determination, which shall be final and binding, and that portion, or the whole, of the Claim so disallowed (as the case may be), shall be forever barred and extinguished pursuant to this Order.

12. THIS COURT ORDERS AND DIRECTS that any appeal of a Notice of Determination as set out in a Dispute Notice shall be referred to a claims officer (with construction lien expertise), as appointed by further order of this Court or by reference by order of this Court to a Construction Lien Master or Case Management Master. Any appeal of a Notice of Determination shall be conducted as a hearing *de novo* and any appeal (or motion to oppose confirmation of a report). of a claims officer, Construction Lien Master or Case Management Master, shall be heard by this Court on a timetable agreed to by the parties to that proceeding and approved by this Court and shall be final and binding on all parties with no further appeal thereof.

Claims Bar Provisions

13. THIS COURT ORDERS that any Claim:

i. which is not preserved and perfected pursuant to the provisions of the CLA and served in accordance with paragraph 6 of this Order with all accompanying documentation as required by paragraph 7 hereof; or

ii. for which a Dispute Notice is not delivered by a Lien Claimant disputing a Notice of Determination with respect to its Claim to the Receiver within 30 days of the posting of a Notice of Determination by the Receiver;

shall be forever barred and extinguished and such Lien Claimant shall be forever estopped and enjoined from asserting or enforcing any further Claims against the Property, ... or the Receiver, and such Lien Claimant shall not be entitled to receive further notice of these proceedings, and in any event, all claims of any nature against the Receiver, ... and ..... are hereby forever barred and

extinguished.

14. THIS COURT ORDERS that nothing in this Order shall bar or extinguish:

i. trust claims under the CLA, against any party other than the Receiver, ... and ..... or against the Property or proceeds of sale of the Property subsequent in priority to the Receiver, ... and ..... and ..... as permitted by further Order of this Court;

ii. any claims in contract against any party, other than the Receiver, ... and ..... and subject to further Order of this Court,..... and

iii. any Claim in its entirety or part thereof which has been accepted by the Receiver.

Notices and Communication

15. THIS COURT ORDERS that, except as otherwise provided herein, the Receiver may deliver any notice or other communication to be given under this Order to Lien Claimants or other interested parties by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or e-mail to such Lien Claimants or parties at the address last shown on the books and records of the Debtor, and that any such service or notice by ordinary mail, courier, personal delivery, facsimile or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail on the third business day after mailing within Ontario, the fifth business day after mailing within Canada, and the tenth business day after mailing internationally.

16. THIS COURT ORDERS that any notice or other communication to be given under this Order by a Lien Claimant to the Receiver shall be in writing in substantially the form, if any, provided for in this Order and will be effective only if delivered by registered mail, courier, personal delivery, e-mail or facsimile transmission addressed to:

.....

— with a copy to:

.....

Aid and Assistance of Other Courts

17. THIS COURT HEREBY REQUESTS the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, any party may apply to this Court from time to time for direction with respect to the Construction Lien Claims Process andlor such further order or orders as this Court may consider necessary or desirable to amend. supplement or replace this Order, including, but not limited to. any order for the delivery of information pursuant to section 39 of the CLA and the process for determination of holdback and priorities in distribution of any proceeds of sale.

Schedule "A" Legal Description of the Lands and Premises

Schedule "B"

Dispute Notice of .....

Defined terms not defined within this Dispute Notice form have the meaning ascribed thereto in the Construction Lien Claims Process Order dated ..... Pursuant to paragraph 12 of the Construction Lien Claims Process Order, we hereby you notice of our intention to dispute the Notice of Determination bearing Reference Number and dated ..... issued by as Receiver of ..... in respect of our Claim.

Name a/Creditor: ....

Reasons for Dispute (attach additional sheet and copies of all supporting documentation, if necessary):

Signature of Individual/Authortzed Signing Officer: ....

Date:

(please print name) ....

Telephone Number: (.....)

Facsimile Number: (.....)

Full Mailing Address: ....

Appendix II

THIS FORM AND SUPPORTING DOCUMENTATION TO BE RETURNED BY REGISTERED MAIL, PERSONAL SERVICE, E-MAIL, FACSIJIIIILE OR COURIER TO THE ADDRESS INDICATED HEREIN AND TO BE RECEIVED NO LATER THAN 30 DAYS AFTER RECEIPT OF THE NOTICE OF DETERMINATION TO:

APPENDIX III
HOLDBACK DISTRIBUTION

III

Scenario 1: Owner / Contractor

All Amounts Proven

Before Judgment / Report:

Owner
Contract Price: $1,000,000
Amount previously paid: $900,000
Holdback: $100,000
(s. 22(1))

General Contractor
Claim: $250,000

After Judgment / Report:

Owner
Contract Price: $1,000,000
Amount previously paid: 1,000,000
Holdback: $Ø

General Contractor
Personal Judgment against Owner: $250,000
(s. 63)

"Lien Judgment": $250,000
(not limited to 10% due to privity with owner)

(full amount of lien secured by land or security)
Share in Holdback: $100,000
(s. 14)

Scenario 2: Owner / Contractor / Subcontractor

All Amounts Proven

Before Judgment / Report:

Owner
Contract Price: $1,000,000
Disputed Work $50,000
Amount previously paid: $900,000
Holdback: $100,000
(s. 22(1))

General Contractor
Claim: $150,000

Subcontractor
Claim: $150,000

After Judgment / Report:

Owner
Contract Price: $1,050,000
Holdback: $105,000

General Contractor
Claim: $150,000
Personal Judgment against Owner: $150,000
(s. 63)
"Lien Judgment": $150,000
(s. 14)

Appendix III

Share in Owner / GC Holdback: $105,000

Appendix III

Subcontractor

— Claim: $150,000

Personal Judgment against GC: $150,000 **(s. 63, paragraphs 3, 4, 5 and 9, Forms 19, 21; paragraphs 1, 3, 4 and 6, Forms 20, 22)**

Proven Lien Judgment: $150,000

Owner liable for $105,000

(s. 14, paragraph 1, Forms 19, 21; paragraph 2, Forms 20, 22)

Share in Owner / GC Holdback: $105,000

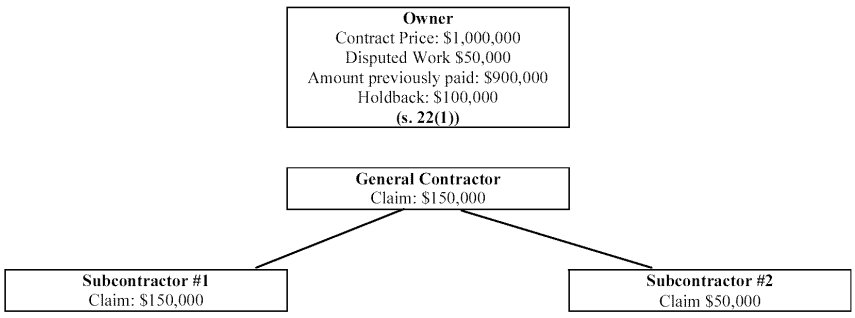
(s. 21, s. 23)

Appendix III

Scenario 3: Owner / Contractor / Multiple Subcontractors

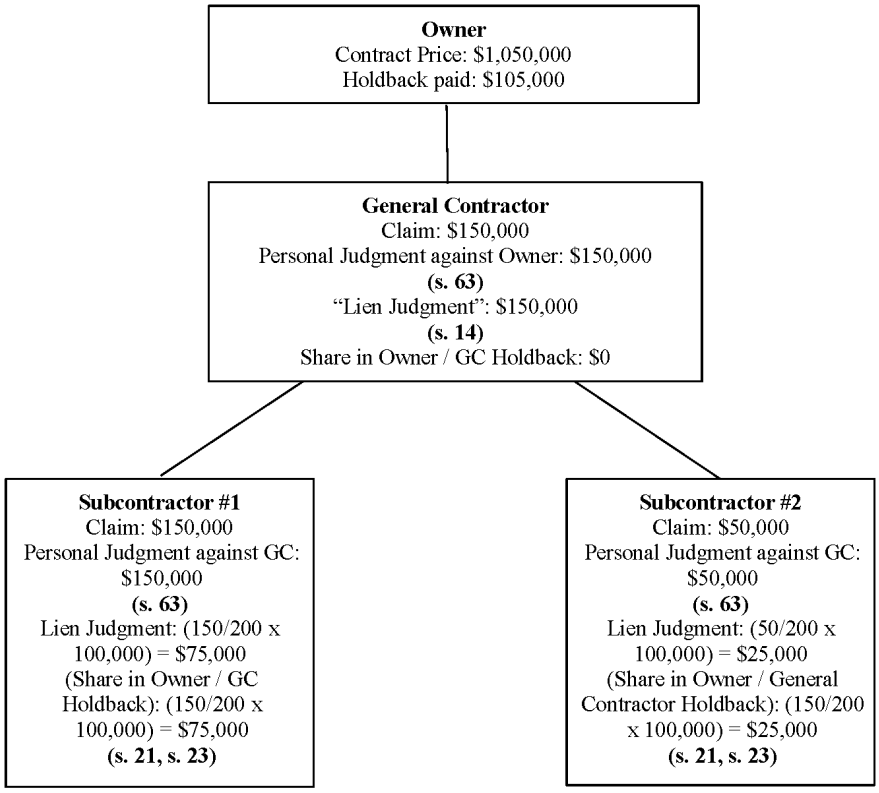
All Amounts Proven

Before Judgment / Report:



Appendix III

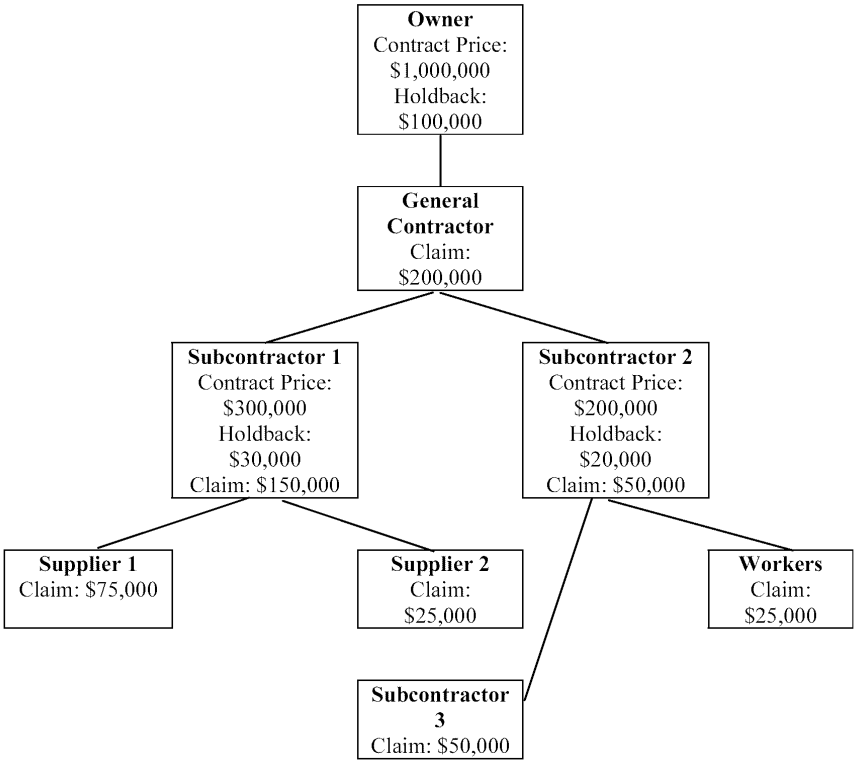
After Judgment / Report:



Scenario 4: Owner / Contractor / Subcontractor / Suppliers & Workers

All Amounts Proven

Before Judgment / Report:

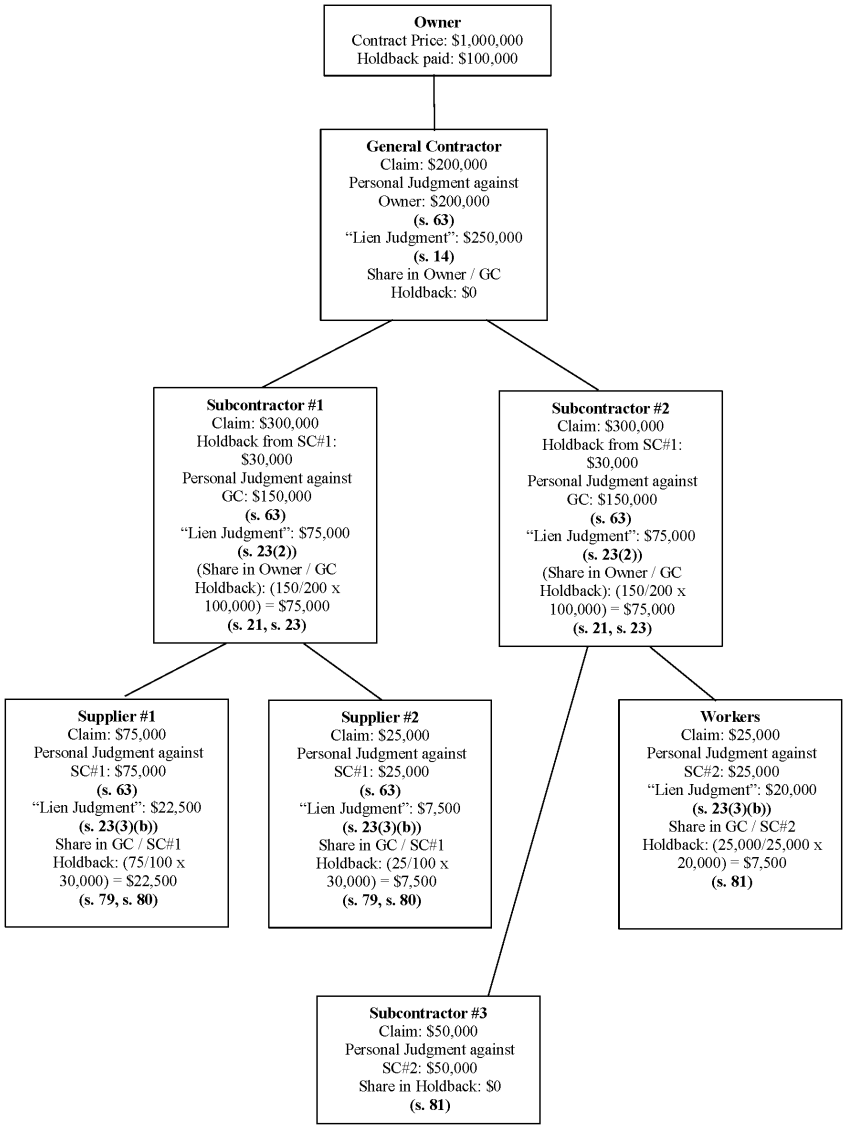


NOTE: The owner's personal liability for holdback to contractors and subcontractors depends on which party defaults in payment. If the general contractor defaults, the owner's liability is capped at the full amount of the holdback to be retained by the owner, i.e., $100,000 in this case. If the subcontractor defaults, liability is capped at the lesser of the full amount of the holdback to be retained by the owner and the holdbacks required to be maintained by the general

contractor, i.e., $50,000 in this case.

Appendix III

After Judgment / Report:



APPENDIX IV
COURTHOUSE PRACTICE DIRECTIONS

IV

Toronto

General Provisions

1. All Masters and Judges motions/applications brought on notice shall be booked by contacting 416-327-5535 or by email at jus.g.mag.csd.civilmotionsscheduling@ontario.ca

2. To confirm a motion, moving party must, by 2:00 p.m. three days prior to the return, date fax at 416-327-5484 or email at jus.g.mag.csd.civilmotionconfirmation@ontario.ca. If the motion is not so confirmed, it will be removed from the list.

3. Motions (other than special appointments) may be adjourned on consent by use of Form 37B and must be received by the court office by 2:00 p.m., three business days prior to the returnable date. parties are encouraged to adjourn by fax.

Motions Without Notice (ex parte)

1. Ex Parte Motions are heard between 10:00 a.m. to 11:30 a.m., on Tuesday, Thursday and Friday, until further notice. (The schedules change every so often).

Special Appointments

1. May be arranged by contacting 416-327-5535 or by email at civilpracticecourt@ontario.ca.

2. For appointments that require a full day for a Master, contact the Managing Master, Master McAfee, through her registrar at 416-326-7791.

3. Judges' special appointments are booked through Civil Practice Court by emailing civilpracticecourt@ontario.ca.

Construction Lien Motions

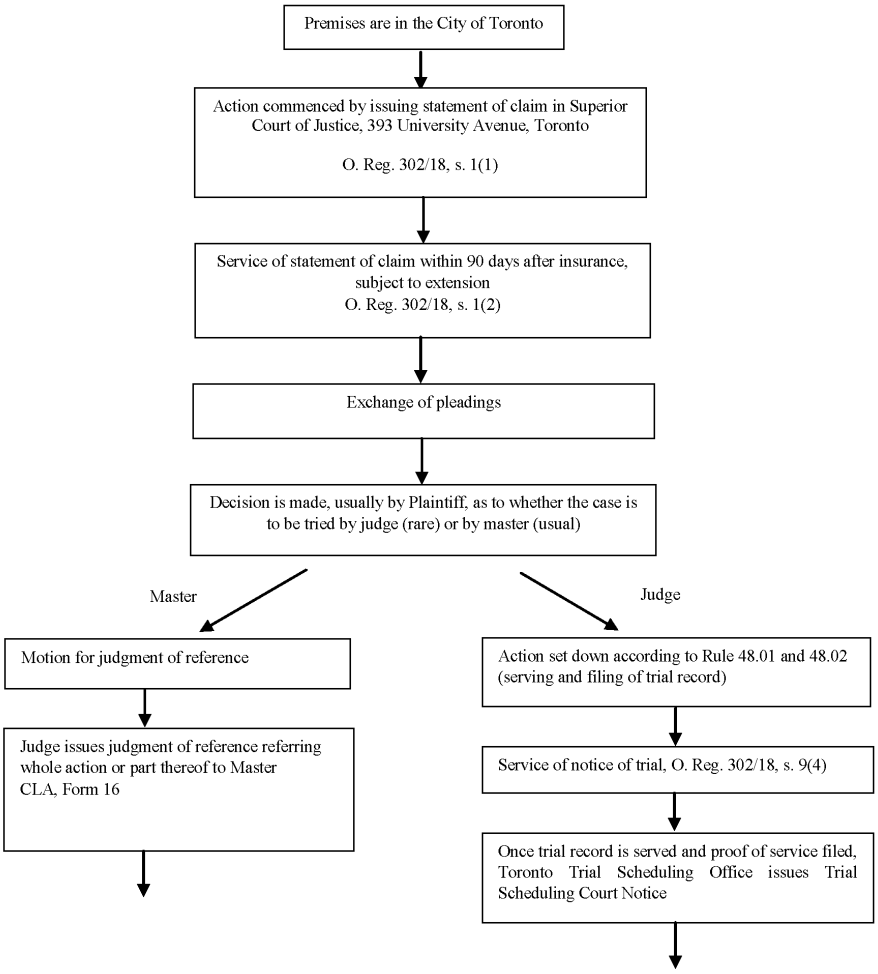
1. Ex parte motions are heard from 9:30 a.m. to 10:00 a.m. every day, except statutory holidays. The courtroom location is posted on the 6th floor at 393 University Avenue.

2. Motions brought on notice may be scheduled by contacting David Backes at 416-326-1083 or Al Noronha at 416-327-9404.

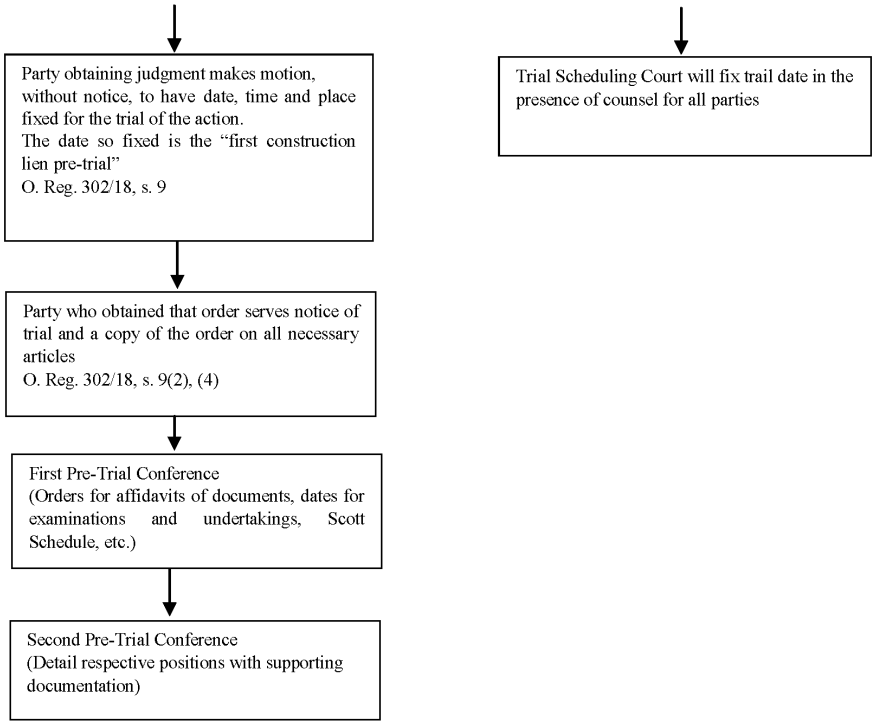
3. All materials to be used on a construction lien motion or trial shall be filed the appropriate registrar on the 6th floor at 393 University Avenue.

Appendix IV

Procedure to Set Down a Construction Lien Action for Trial in Toronto



Appendix IV


Party obtaining judgment makes motion, without notice, to have date, time and place fixed for the trial of the action.
The date so fixed is the "first construction lien pre-trial"
O. Reg. 302/18, s. 9
Party who obtained that order serves notice of trial and a copy of the order on all necessary articles
O. Reg. 302/18, s. 9(2), (4)
First Pre-Trial Conference
(Orders for affidavits of documents, dates for examinations and undertakings, Scott Schedule, etc.)
Second Pre-Trial Conference
(Detail respective positions with supporting documentation)
Trial Scheduling Court will fix trail date in the presence of counsel for all parties

Notes:

1. Section 37(1) provides that a perfected lien expires two years after the commencement of the action that perfected the lien unless (a) an order is made for the trial of an action in which the lien may be enforced, or (b) and action in which the lien may be enforced is set down for trial. A judgment of reference under s. 58(1) is **NOT** an order fixing a trial date under s. 37(1). An order under O. Reg. 302/18, s. 9 is required to stop the time from running.

2. Toronto construction lien masters do not order settlement meetings to take place because the first lien pre-trial is considered more effective than an unsupervised settlement meeting under s. 61.

3. Even if the parties decide to have the case tried by a judge, the judge can, on his or her own motion, at trial (read Trial Scheduling Court) refer the case to a Toronto master or case management master (s. 58(3))

Central East Region

*Barrie***:** General line 705-739-6111; Trial Coordinator 705-739-6153; Fax 705-739-6099.

A. There are no construction lien masters.

B. Motions are generally held on Tuesdays at 9:30 a.m. Contact the Trial Coordinator for specific dates. If your motion is lengthy, (i.e., an hour or more) a motion date will have to be obtained from the Trial Coordinator.

C. To set down for trial, file a Trial Record, requisition and Affidavit of Service. The trial coordinator will then set a pre-trial date and the action will then be set down for trial if necessary.

*Bracebridge***:** General line 705-645-8793; Trial Coordinator 705-

739-6153; Fax 705-739-6099.

A. There are no construction lien masters.

B. Motion dates (whether regular or lengthy, i.e., an hour or more) are scheduled by contacting the trial coordinator. All motions commence at 9:30 a.m.

C. To set an action down for trial, file a Trial Record along with a requisition, affidavit of service and a Case Information Sheet. The trial coordinator will set a pre-trial date and the action will then be set down for trial if necessary.

Cobourg: General line 905-372-3751; Trial Coordinator 1-800-788-0977; Fax 705-745-3526.

A. There are no construction lien masters.

B. Motion dates are generally held every alternate Wednesday at 9:30 A.M. Contact the Trial Coordinator for a list of available upcoming dates. If the motion is long, i.e., an hour or more, a written request detailing the nature of the motion must be sent to the Trial Coordinator. This can be sent by fax.

C. To set an action down for trial, file a trial record along with a requisition and affidavit of service. The Trial Coordinator will provide the parties with a case information sheet that must be filled out to be placed on the assignment list. A pre-trial will be set by the Trial Coordinator upon the request by the parties. The matter will then be set down for trial at the pre-trial or, absent a pre-trial, the matter will be placed on the assignment list and will then be set down for trial.

Lindsay: General line 705-324-1400; Trial Coordinator 1-800-788-0977; Fax 705-745-3526.

A. There are no construction lien masters.

B. Motions begin at 9:30 a.m. on scattered dates, scheduled up to two months in advance. Contact the Trial Coordinator for a list of available upcoming dates. If the motion is long, i.e., an hour or more, a written request detailing the nature of the motion must be sent to the Trial Coordinator. This can be sent by fax.

C. To set an action down for trial, file a trial record along with a requisition and affidavit of service. A pre-trial will be set by the trial coordination upon request of the parties. The matter will then be set down for trial at the pre-trial or absent a pre-trial will

be placed on the assignment list and will then be set down for trial.

Newmarket: General line 905-853-4809; Trial Coordinator 905-853-4823, ext. 1; Fax 905-853-4863.

A. There are no construction lien masters.

B. Motion dates are held every Tuesday or Thursday at 9:30 a.m. Motions are scheduled with the trial coordinator's office.

C. To set an action down for trial, file a trial record along with a requisition and affidavit of service. A pre-trial will be set by the Trial Coordinator and two pre-trials will be held; the first one is held only to establish a timeline, i.e., deadline to file affidavit of documents, etc. The second pre-trial will be scheduled at the first one. The action will then be set down for trial if necessary.

Oshawa: General line 905-743-2800; Trial Coordinator 905-743-2639; Fax 905-743-2652.

A. There are no construction lien masters.

B. Motion dates are held every Tuesday and Friday at 9:30 a.m. If the motion is lengthy (i.e., an hour or more), a motion date must be obtained through the trial coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service and a Pre-Trial will be set by the trial coordinator and if necessary, the matter will then be set down for trial.

Peterborough: General line 705-876-3816; Trial Coordinator 1-800-788-0977; Fax 705-745-3526.

A. There are no construction lien masters.

B. Motions are on scattered Fridays throughout the year. Contact the Trial Coordinator for a list of available upcoming dates. If you are scheduling a regular motion date, it will be for 11:30 a.m. on the given date on which it falls. If the motion is long (i.e., an hour or more), a written request detailing the nature of the motion must be sent to the Trial Coordinator. This can be sent by fax.

C. To set an action down for trial, you must request a date for pre-trial with the trial coordinator and if necessary, the judge will set a date for trial at the pre-trial with a requisition and trial record to be filed before the trial.

Central South Region

Brantford: General line 519-752-7828; Trial Coordinator 519-752-7753; Fax 519-752-7159.

A. There are no construction lien masters.

B. Short motions are held on certain Fridays at 10:00 a.m. Contact the Trial Coordinator to confirm motion dates. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then be placed on the assignment court list and the action will then be set down for trial. Please note, a settlement conference or pre-trial is not required but suggested.

Cayuga: General line 905-772-3335; Trial Coordinator 905-772-3361; Fax 905-772-0210.

A. There are no construction lien masters.

B. There is no regular schedule for motions. Contact the Trial Coordinator for specific dates.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then be placed on the assignment court list and the action will then be set down for trial. Please note, at the moment a pre-trial hearing is not required, but will be granted if requested by the parties.

Hamilton: General line 905-645-5252; Trial Coordinator 905-645-5252, ext. 3629; Fax 905-645-5394.

A. There are no construction lien masters.

B. Motions of one hour or less are held every Tuesday or Thursday at 10:00 a.m. Hamilton requires a confirmation form to be faxed to the Trial Coordinator at least three days prior to the hearing date, by 2:00 p.m. at the latest. Long motions must be adjourned on consent to a running list for any week of counsel's choice by confirmation, to be called on short notice.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then be placed on the assignment court list and the action will then be set down for trial. Pre-trials are required and must be booked with the trial date.

Kitchener: General line 519-741-3200; Trial Coordinator 519-741-3240; Fax 519-741-3213.

A. There are no construction lien masters.

B. There is no regular schedule for motions. Contact the Trial Coordinator for specific dates.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then be placed on the assignment court list and the action will then be set down for trial. Please note, at the moment a pre-trial hearing is not required, but will be granted if requested by the parties.

Simcoe: General line 519-426-6550; Trial Coordinator 519-426-4406; Fax 519-426-4933.

A. There are no construction lien masters.

B. Short motions are held on Thursdays at 10:00 a.m, but these dates are not at regular intervals. Contact the Trial Coordinator for specific dates.

C. To set an action down for trial, file a trial record, requisition and affidavit of service and an assignment court date will be given and then the matter will then be set down for trial. Pre-trials are required.

St. Catharines: General line 905-988-6200; Trial Coordinator 905-988-6200, ext. 446; Fax 905-988-5531.

A. There are no construction lien masters.

B. Short motions are held every Thursday at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, a settlement conference must be arranged and held by the parties. if unsuccessful, file a trial record, along with a requisition and affidavit of services and a pre-trial will then be scheduled. if to no avail, the matter will be placed on the assignment court list and will then be set down for trial.

Welland: General line 905-735-0010; Trial Coordinator 905-735-0010, ext. 251; Fax 905-732-1700.

A. There are no construction lien masters.

B. Motions are held every Wednesday at 10:00 a.m. Long mo-

tions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, file your trial record along with the requisition and affidavit of service and the action will then be placed on the assignment court list to be set down for trial. Please note that a pre-trial is not required but it will be granted if requested by the parties.

Central West Region

Brampton: General line 905-456-4700; Trial Coordinator 905-456-4878; Fax 905-456-4879.

A. There are no construction lien masters.

B. Short motions are held every Tuesday, Thursday and Friday at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator, and are held every Wednesday at 10:00 a.m. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge, to be filed seven days prior. Facta for regular motions are encouraged.

C. To set an action down for trial, it is requested that a settlement meeting be arranged and held between the parties. If unsuccessful, file a trial record (indicating the settlement conference was unsuccessful), requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then be placed on an assignment court list and will then be set down for trial, if necessary.

Guelph: General line 519-824-4100; Trial Coordinator 519-824-7647; Fax 519-824-4435.

A. There are no construction lien masters.

B. Short motions are held every Tuesday at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator, and are usually held the second and fourth Monday of each month at 10:00 a.m. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge, to be filed seven days prior. Facta for regular motions are encouraged.

C. To set an action down for trial, it is requested that a settlement meeting be arranged and held between the parties. If unsuccess-

ful, file a trial record (indicating the settlement conference was unsuccessful), requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then be placed on an assignment court list and will then be set down for trial, if necessary.

Milton: General line 905-878-4165; Trial Coordinator 905-693-3082; Fax 905-864-4211.

A. There are no construction lien masters.

B. Short motions are held every Wednesday and Thursday at 10:00 a.m. Long motions (i.e., more than an hour) are scheduled by contacting the Trial Coordinator, and are usually held on Mondays and Tuesdays at 10:00 a.m. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge, to be filed seven days prior. Facta for regular motions are encouraged. A confirmation sheet must be sent via fax 905-864-4211 to the Trial Coordinator at least three days before the hearing date, by 2:00 p.m. at the latest.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then be placed on the assignment court list. A pre-trial and trial date will be scheduled at assignment court.

Orangeville: General line 519-941-5802; Trial Coordinator 519-941-2991; Fax 519-941-5724.

A. There are no construction lien masters.

B. Short motions are held on Mondays at 10:00 a.m., three times per month. Long motions (i.e., over an hour) are scheduled by contacting the Trial Coordinator and are usually held the first Monday of every month at 10:00 a.m. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge. All motion materials are to be filed three weeks prior to the motion date. Facta for regular motions are encouraged.

C. To set an action down for trial, a settlement meeting will have to be arranged and held by the parties. If this is to no avail, file a trial record (indicating that the settlement conference was unsuccessful), requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then be placed on the assignment court list to be set down for trial, if

necessary.

*Owen Sound***:** General line 519-370-2430; Trial Coordinator 519-370-2445; Fax 519-370-2454.

A. There are no construction lien masters.

B. Short motions are held every Friday at 10:00 a.m. Long motions (i.e., more than an hour) are scheduled by contacting the Trial Coordinator, and are usually held on Thursdays at 10:00 a.m. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge, to be filed five weeks, and confirmed three weeks prior. Facta for regular motions are encouraged.

C. To set an action down for trial, a settlement conference will have to be arranged and held by the parties. If unsuccessful, file a trial record, requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then go on a trial list and be set down for trial, if necessary.

*Walkerton***:** General line 519-881-1052; Trial Coordinator (in Owen Sound) 519-370-2445; Fax 519-881-0347.

A. There are no construction lien masters.

B. Short motions are held on Wednesday at 10:00 a.m., except on the first Wednesday of each month. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator and are usually assigned on Thursdays and the first Wednesday of each month. Facta, not exceeding 20 pages, are required for all long civil motions, unless otherwise directed by a judge, to be filed seven days prior. Facta for regular motions are encouraged.

C. To set an action down for trial, a settlement conference will have to be arranged and held by the parties. If unsuccessful, file a trial record, requisition and affidavit of service. The action will then be placed on a trial list to be set down for trial. A pre-trial will be held at the request of the parties.

East Region

*Belleville***:** General line 613-962-9106; Trial Coordinator 613-771-8967; Fax 613-962-3582.

A. There are no construction lien masters.

B. Short motions are held on alternate Tuesdays at 10:00 a.m.

Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, a trial record, requisition and affidavit of service must be filed. The Trial Coordinator's office will schedule a trial date and send out notice to the parties.

*Brockville***:** General line 613-341-2800; Trial Coordinator 613-341-2821; Fax 613-341-2818.

A. There are no construction lien masters.

B. Short motions are held on alternate Tuesdays at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator at 613-341-2821, ext. 2221.

C. To set an action down for trial, serve and file a trial record, requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then be placed on an assignment court list and be set down for trial, if necessary. Please note that pre-trial dates are scheduled well in advance (those scheduling in August 2016 will have a pre-trial date in 2017 at the earliest).

*Cornwall***:** General line 613-933-7500; Trial Coordinator 613-930-4539; Fax 613-933-9030.

A. There are no construction lien masters.

B. Short motions are generally held on Fridays, once or twice per month, at 10:00 a.m. Contact the Trial Coordinator for specific dates. Long motions (i.e., over two hours) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, serve and file a trial record, requisition and affidavit of service. A pre-trial date will then be set by the Trial Coordinator. The matter will then be placed on an assignment court list and be set down for trial, if necessary.

*Kingston***:** General line 613-548-6811; Trial Coordinator 613-548-6827; Fax 613-548-6818.

A. There are no construction lien masters.

B. For short motions, contact the court at the above number for a date; generally motions are scheduled once every two weeks. For long motions, contact the Trial Coordinator.

C. After serving and filing a Trial Record, the Trial Coordinator will set the next available pre-trial date (any time after 60 days of

filing the record, usually within 70 days) and send out a notice of pre-trial. At the conclusion of the pre-trial, the judge will schedule an assignment court date while counsel are there. A trial date will be set at assignment court.

*L'Orignal***:** General line 613-675-4567; Trial Coordinator 613-675-4567, ext. 240; Fax 613-675-4507.

A. There are no construction lien masters.

B. Short motions are held on certain designated Fridays at 10:00 a.m. in the motions courtroom (blended list with family motions). Long motions (i.e., hour or more) are scheduled by contracting the Trial Coordinator at 613-675-4567, ext. 234, and are usually held on Fridays. If the motion is to be over an hour, a factum must be filed at the same time as the rest of the motion material.

C. To set an action down for trial, serve and file a trial record, requisition and affidavit of service. A pre-trial date must then be set by contacting 613-675-4567, ext. 234. The matter will then be set down for trial, if necessary.

*Napanee***:** General line 613-354-3845; Trial Coordinator 613-548-3845, ext. 325; Fax 613-354-0380.

A. There are no construction lien masters.

B. Short motions are held once a month on Fridays at 10:00 a.m. Contact the Trial Coordinator for specific dates. Long motions (i.e., two hours or more) are scheduled by contacting the Trial Coordinator. Motions are held at 97 Thomas Street with administration and filing at 41 Dundas Street West.

C. To set an action down for trial, serve and file a trial record, requisition and affidavit of service. A pre-trial will then be held and if to no avail, the action will then be placed on a trial list to be set down for trial.

*Pembroke***:** General line 613-732-8581; Trial Coordinator 613-732-2233, ext. 402; Fax 613-732-9549.

A. There are no construction lien masters.

B. Short motions are held on alternate Fridays at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. A

pre-trial date will then be diarized approximately 60 days after the filing of the record. At the conclusion of the pre-trial, the parties will schedule an assignment court date.

*Perth***:** General 613-267-2021; Trial Coordinator 613-267-2021, ext. 238; Fax 613-267-7055.

A. There are no construction lien masters.

B. Motions are held every Friday at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, serve and file a trial record, requisition and affidavit of service. The Trial Coordinator will then schedule a pre-trial. The matter will then go on to an assignment list and the action will then be set down for trial.

*Picton***:** General line 613-476-6236; Trial Coordinator 613-771-8967; Fax 613-962-3582.

A. There are no construction lien masters.

B. Short motions are held on alternate Mondays at 10:00 a.m. Long motions (i.e., an hour or more) are scheduled by contacting the Trial Coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The Trial Coordinator's office will schedule a trial date and send out notice to the parties.

*Ottawa***:** General line 613-239-1560; Trial Coordinator 613-239-1585; Fax 613-239-1324.

A. Construction masters and judges.

B. Short Motions (under one hour) are held on Tuesdays and Fridays at 10:00 a.m. To schedule a motion between one and two hours, contact the Motions Coordinator at 613-239-1180 to hear a list of specific dates. In Ottawa all long motions and applications (more than two hours) require a special appointment and are arranged through the master's office. Parties scheduling a long motion must complete a request for a long motion or application date, and a pre-confirmation form, available online at http://www.ccla-abcc.ca/. The form may be emailed to mastersofficeottawa@ontario.ca or faxed to 613-239-1310.

C. To set an action down for trial, file a trial record, requisition, affidavit of service and a pretrial certification and request form

indicating when counsel can be available for the pretrial and trial. A pretrial will then be held, and if to no avail, the predetermined trial date will be set.

West Region

Chatham: General line 519-355-2200; Trial Coordinator 519-355-2220; Fax 519-355-2221.

A. There are no construction lien masters.

B. Short motions are held on every other Tuesday at 10:00 a.m. Long motions (i.e., over half an hour) are scheduled on additional rota days by contacting the Trial Coordinator. At the time of scheduling long motions, counsel must complete a Certificate of Readiness confirming they are ready to proceed, the time required for the motion and whether a court reporter is required.

C. To set an action down for trial, file a trial record, requisition and affidavit of service; a pre-trial will then be scheduled. The action will then be placed on to the assignment court and the action will then be set down for trial.

Goderich: General line 519-524-2519; Trial Coordinator 519-524-7581; Fax 519-524-5670.

A. There are no construction lien masters.

B. Short motions are generally held on every other Wednesday at 10 a.m. Long motions (i.e., over half an hour) are scheduled on additional days by contacting the Trial Coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. A pre-trial must then be scheduled with the Trial Coordinator and the matter will then be set down for trial, if necessary.

London: General line 519-660-3000; Trial Coordinator 519-660-3052; Fax 519-660-3053.

A. There are no construction lien masters.

B. Short motions are held every Thursday at 10:00 a.m. Long motions (i.e., over half an hour) are scheduled by attending court on Tuesdays during a regular motion to obtain a future date. Long motions are usually scheduled on Mondays, Wednesdays or Fridays at 10:00 a.m. At the time of scheduling long motions counsel must complete a Certificate of Readiness confirming

they are ready to proceed, the time required for the motion and whether a court reporter is required.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. The matter will then go to assignment court list and then the action will be set down for trial.

Sarnia: General line 519-333-2950; Trial Coordinator 519-333-2950, ext. 2304; 519-333-2962.

A. There are no construction lien masters.

B. Motions are held every Thursday at 10:00 a.m. If the motion is lengthy (i.e., over two hours) a motion date must be obtained from the Trial Coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. A pre-trial will then be scheduled by the Trial Coordinator and the action will then be set down for trial.

St. Thomas: General line 519-633-1720; Trial Coordinator 519-631-4810, ext. 1318; Fax 519-637-3036.

A. There are no construction lien masters.

B. Short motions are held every other Monday at 10:00 a.m. Long motions (i.e., over half an hour) are scheduled on additional days by contacting the Trial Coordinator.

C. To set an action down for trial, file a trial record, requisition and affidavit of service. A pre-trial and trial date will then be set by the Trial Coordinator and the action will then be set down for trial.

Stratford: General line 519-271-1850; Trial Coordinator 519-271-1850, ext. 342; Fax 519-271-8080.

A. There are no construction lien masters.

B. Short motions are usually held every other Tuesday at 10:00 a.m. Long motions (i.e., over half an hour) are scheduled on additional rota days by contacting the Trial Coordinator. At the time of scheduling long motions counsel must complete a Certificate of Readiness confirming they are ready to proceed, the time required for the motion and whether a court reporter is required.

C. To set an action down for trial, a settlement meeting will have to be arranged and held by the parties. If this to no avail, a trial record, requisition and affidavit of service must be filed with the Trial Coordinator and a trial date will then be scheduled.

Woodstock: General line 519-539-6187; Trial Coordinator 519-537-5811, ext. 231; Fax 519-539-5312.

A. There are no construction lien masters.

B. Short motions are generally held on Fridays at 10:00 a.m. Long motions (i.e., over one hour) are scheduled on additional days by contacting the Trial Coordinator. At the time of scheduling long motions, counsel must complete a Certificate of Readiness confirming they are ready to proceed, the time required for the motion and whether a court reporter is required.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. A pre-trial will then be held and if this is to no avail, the action will be placed on the assignment list in order to be set down for trial.

Windsor: General line 519-973-6620; Trial Coordinator 519-973-6627; Fax 519-973-6612.

A. There are no construction lien masters.

B. Short motions are held every Tuesday at 10:00 a.m. Long motions (i.e., over half an hour) are scheduled by contacting the Trial Coordinator, and are usually held on Mondays at 10:00 a.m. or 2:15 p.m. At the time of scheduling long motions counsel must complete a Certificate of Readiness confirming that they are ready to proceed, the time required for the motion and whether a court reporter is required.

C. To set an action down for Trial, a settlement meeting will have to be arranged and held by the parties. If unsuccessful, file a trial record (indicating that the settlement meeting was unsuccessful), requisition and affidavit of service. A pre-trial will be held if requested by the parties. If the pre-trial is to no avail, the action will then be placed on the trial list.

North West Region

Fort Frances: General line 870-274-5961; Trial Coordinator 807-274-5961, ext. 336; Fax (807) 274-0516

A. There are no construction lien masters.

B. Motions commence at 1:00 p.m. and are held once a month, usually on a Tuesday. Contact the Trial Coordinator to find out the schedule for the month. If the motion is long (i.e., over two

hours) a date must be scheduled with the Trial Coordinator by sending a written request detailing the nature of the motion. Fort Frances does not have a sitting judge; all motions are heard by rotating judges from Kenora or Thunder Bay.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. The matter will then be placed on the assignment court list. A pretrial and trial date will then be set by the Trial Coordinator.

Kenora: General line 870-468-2842; Trial Coordinator 807-468-2831; fax (807) 468-2691.

A. There are no construction lien masters.

B. Motions commence at 11:00 a.m. and are held once a month, usually on a Wednesday. Contact the Trial Coordinator to find out the schedule for the month. If the motion is long (i.e., over two hours) a date must be scheduled with the Trial Coordinator.

C. To set down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. The matter will then be placed on an assignment court list and the action will then be set down for trial.

Thunder Bay: General line 870-626-7000; Trial Coordinator 807-626-7082; Fax (807) 626-7089.

A. There are no construction lien masters.

B. Motions are held every Thursday at 10:00 a.m. Motions requiring more than two hours or seeking a specific date must first receive approval of the Court. Motion material must be filed and parties must appear before the Court on a regular Motions day to receive consent to schedule a motion to a date other than regular motions days. The Trial Coordinator must then be contacted to schedule a motion date.

C. To set down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. The matter will then be placed on an assignment court list and the action will then be set down for trial.

North East Region

Cochrane: General line 705-272-4256; Trial Coordinator 705-272-

4256, ext. 203; Fax 705-272-1394**.**

A. There are no construction lien masters.

B. Motions are usually held twice a month on Friday at 10:00 a.m. Contact the Trial Coordinator to find out the schedule for the month. If the motion is long (i.e., an hour or more) a date must be scheduled with the Trial Coordinator.

C. To set down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. The matter will then be placed on an assignment court list and the action will then be set down for trial. Parties may request a pre-trial conference.

*Gore Bay***:** General line 705-282-2461; Trial Coordinator 705-282-2461; Fax 705-282-3245**.**

A. There are no construction lien masters.

B. Motions are usually held on Mondays, commencing at 10:00 a.m. If the motion is long (i.e., an hour or more) a date must be scheduled with the Trial Coordinator.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. A pre-trial date will then be diarized approximately 60 days after the filing of the record. At the conclusion of the pre-trial, the parties will schedule an assignment court date.

*Haileybury***:** General line 705-672-3321; Trial Coordinator 705-672-2639; Fax 705-672-2189**.**

A. There are no construction lien masters.

B. Motions are usually held once a month on a Thursday at 11:00 a.m. Contact the Trial Coordinator to find out the schedule for the month. If the motion is long (i.e., an hour or more) a date must be scheduled with the Trial Coordinator.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. Filing the trial record will prompt the Trial Coordinator to schedule a settlement meeting for the parties. If the settlement meeting is not successful, the matter will then be placed on the assignment court list and then the action will be set down for trial.

*North Bay***:** General line 705-495-8309; Trial Coordinator 705-495-

8330; Fax 705-495-0262**.**

A. There are no construction lien masters.

B. Motions are generally held on Friday at 10:00 a.m. If the motion is long (i.e., over one hour) a date must be scheduled with the Trial Coordinator.

C. To set an action down for trial, a trial record will need to be filed together with a requisition and an affidavit of service. The Trial Coordinator will set a pre-trial date, and if to no avail, the judge or Trial Coordinator will set a date for trial.

*Parry Sound***:** General line 705-746-4251;Trial Coordinator 705-746-8644; Fax 705-746-6189**.**

A. There are no construction lien masters.

B. Motions are usually held twice every month on Monday or Friday at 10:00 a.m. If the motion is long (i.e., an hour or more) a date must be scheduled with the Trial Coordinator. All motion materials must be filed prior to receiving a long motion date.

C. To set an action down for trial, the Trial Coordinator will set a pre-trial date and after the judge or trial coordinator will set a date for trial if necessary and a trial record will need to be filed together with a requisition and an affidavit of service.

Sault Ste. Marie: General line 705-945-8000; Trial Coordinator 705-945-8000, ext. 479; Fax 705-945-8563.

A. There are no construction lien masters.

B. Motions are usually held twice every month on Thursday at 10:00 a.m., even if it is a long motion. All motions go on the court assignment list, and in the case of long motions, the judge will review the list and coordinate with the Trial Coordinator to determine whether a special date is necessary for a long motion.

C. To set an action down for trial, a trial record and affidavit of service must be filed and a pre-trial date will then be scheduled, and if necessary a trial date will be set at the pre-trial.

Sudbury: General line 705-564-7600; Trial Coordinator 705-564-7812; Fax 705-564-7902.

A. There are no construction lien masters.

B. Motions are held every Friday at 10:00 a.m. If the motion is long (i.e., an hour or more) contact the Trial Coordinator and it will be scheduled during a regular motion date.

Timmins: General line 705-360-2050; Trial Coordinator 705-272-4256, ext. 203; Fax 705-272-1394.

A. Construction lien matters are addressed through the Superior Court in Cochrane. The Cochrane office may be reached at 705-272-4256 (see Cochrane practice directions above).

APPENDIX V
PET PEEVES IN CONSTRUCTION LIEN COURT[1]

V

"My experience tells me that not an insignificant number of lawyers find the procedural and technical requirements of the courts to be an **inconvenience** and even an **annoyance**, and there is always pressure from these areas within the profession to meet only the lowest level of procedural compliance. If the courts do not insist on a reasonably high level of procedural compliance and quality, this pressure will drive the level down, resulting ultimately in a reduction of the quality of justice emanating from the courts of this province." (See *Vinski v. Lack* (1987), 61 O.R. (2d) 379 per Sandler, M.)

1. *Pet Peeve*: Failure to identify that a Master is seized of the case.
   Solution: Find out before you come to court.

2. *Pet Peeve*: Careless errors in motion materials (*example*: incorrectly calculating amount required to vacate lien; omitting key portions of orders, such as order to serve order on other parties; omitting space to insert accountant's number for money paid into court)

[1] *Contributors*: Master D. Sandler, Master J. Polika, Master C. Albert and Master B. McAfee.

Solution: Review your material carefully. Catch errors and deficiencies before submitting your documents to the Court.

3. *Pet Peeve*: Person attending at court is unfamiliar with the file and cannot answer the Master's questions.
   Solution: Familiarize yourself with the file. When sending someone else, be sure to brief them about the case and its status.

4. *Pet Peeve*: No motion record is provided.
   Solution: Prepare a motion record. This is where the court endorses the record with the disposition of the motion. Without it a record of the order could be lost, misplaced or not traceable.

5. *Pet Peeve*: Counsel fail to provide a current abstract with deleted instruments shown.
   Solution: Always include in your motion materials an up to date abstract that includes deleted instruments.

6. *Pet Peeve*: Counsel who arrive late for *ex parte* court, or who fail to fill out required forms or do so carelessly.
   Solution: Be in the courtroom at 9:30 a.m., ready to go with all forms filled out (counsel slip, *praecipe* if required) and court file numbers obtained and inserted on all documents. You can prepare templates for the counsel sheet and the *praecipe* in your office and fill out the forms before coming to court. If your matter is urgent arrive extra early so you will be reached before 10:00 a.m.

7. *Pet Peeve*: Counsel who do not know the difference between vacating a lien and discharging a lien, or who register a discharge of lien when the court orders the lien vacated.

Solution: Learn how to properly obtain and register an order vacating a lien, using the Notice to Amend. **Never** register a discharge of lien when the court orders the lien vacated.

8. *Pet Peeve*: Counsel who leave things to the last minute and expect us to extend *ex parte* court or interrupt another court to deal with what has become an urgent matter because of counsel's delay.

   Solution: Bring your motions sufficiently in advance so that you can attend a regular 9:30 a.m. *ex parte* court.

9. *Pet Peeve*: Motions in actions where the lands are outside Toronto and leave to bring the motion in Toronto is not sought.

   Solution: Include in the relief sought a request for leave to bring the motion in Toronto and include a provision in the draft order granting leave to bring the out of town motion in Toronto.

10. *Pet Peeve*: Letters of Credit:

    (i) issued by a Canadian bank branch outside Ontario;
    (ii) with a clause that incorporates by reference a code or rules that are not included in the document itself.

    Solution:

    (i) Have the LC issued from an Ontario branch;
    (ii) Read the LC carefully to be sure that no extraneous codes or rules are incorporated by reference.

11. *Pet Peeve*: Inadequate evidence, particularly when seeking an order declaring the lien expired or discharging a lien and dismissing the action on consent. You must produce copies of all discharges of liens shown in the abstract to prove that the lien was in fact discharged.

Solution: Search the court records fully and include affidavit evidence setting out the contents of the court file or abstract, as the case may be, the litigation events and the current status of the action.

APPENDIX VI
SUPERIOR COURT OF JUSTICE PRACTICE DIRECTIONS ON CONSTRUCTION LIENS

VI

Practice Direction Concerning Civil Proceedings in Central East Region — Effective January 1, 2017

This Practice Direction applies to all civil proceedings in the Superior Court of Justice, Central East Region, effective January 1, 2017. It *supersedes* all previous region-specific Practice Directions concerning civil proceedings for the Central East Region issued prior to January 1, 2017, which are hereby revoked.

Counsel and parties are advised to refer to the relevant Parts of the Consolidated Provincial Practice Direction as well as the Consolidated Practice Direction for Divisional Court Proceedings which are available on the Superior Court of Justice website at: www.ontariocourts.ca/scj.

Part I: General

1. In addition to this Practice Direction, counsel and parties to civil proceedings are advised to refer to the *Consolidated Provincial Practice Direction*.

2. In this Practice Direction, any reference to "counsel" includes a self-represented party.

Part II: Motions to Transfer

3. All requests for a transfer of a civil proceeding from one county to another shall be pursuant to rule 13.1.02 of the *Rules of Civil Procedure*. The motion will be granted or denied based on its merits. Counsel and parties are advised to refer to Part III of the Consolidated Provincial Practice Direction which prescribes specific requirements for motions to transfer a civil proceeding.

Part III: Mortgage Proceedings

4. Pursuant to rule 13.1.01(3) of the *Rules of Civil Procedure*, Barrie or Oshawa are designated as the places where mortgage proceedings may be commenced for property located anywhere in the Central East Region.

Part IV: Construction Liens

5. Construction lien pre-trials will be scheduled at intervals at the Newmarket, Barrie, and Oshawa judicial centres. To ensure continuity and efficient management, the pre-trials will be assigned to designated judges at each of the centres.

6. Construction lien pre-trials in Peterborough, Cobourg and Lindsay will be scheduled on an "as needed basis" with the Trial Co-ordinator.

7. Construction lien pre-trials from Bracebridge will be scheduled to be heard in Barrie.

8. In order to accommodate counsel, the pre-trials in construction lien matters will be scheduled on different weeks at each of the judicial centres. For a list of the scheduled dates for the pre-trials, and telephone numbers of the Trial Co-ordinator for each judicial centre, please see the "Court Locations & Schedules" section of the Court's website at: ontariocourts.ca/scj/locations/.

a) First Pre-Trial Conference

9. It is preferred that counsel who will appear at trial and their clients attend the first pre-trial conference. Every effort will be made to discuss a resolution of the proceeding at this first appearance. In the event that a settlement cannot be achieved at this stage, then the pre-trial judge shall order:

i. the exchange of Affidavits of Documents together with a copy of each document referred to in Schedule A;

ii. the date for examinations, as well as the answering of undertakings;

iii. the date for a motion relating to refusals on examinations and any other contemplated motions;

iv. that a "Scott" Schedule and any responding Schedule be prepared and delivered prior to the next appearance date;

v. the next pre-trial date; and,

vi. that Plaintiff's counsel take out an order incorporating the above-noted terms.

b) Second Pre-Trial Conference

10. It is mandatory that all counsel who will appear at trial and their respective clients attend the second (and, if necessary, any subsequent) pre-trial conference.

11. The pre-trial judge will discuss and assess the progress of the proceeding and will consider an appropriate award of costs for non-compliance with the First Appearance Order.

12. At the second pre-trial conference, the parties will be required to detail their respective positions with supporting documentation.

13. In the event that the proceeding is not settled at the conclusion of this second or subsequent pre-trial conference, the pre-trial conference judge shall fix a date for trial within the Civil Trial Sittings.

Part V: Ex Parte Motions in Writing

14. All ex parte motions in writing must be filed with the court office and payment of the applicable filing fee made. They will be put before a judge in chambers for review in the normal course. Ex parte motions may not be "filed" by delivering them to the Trial Co-ordinator for a judge to review, or by sending them by email or otherwise directly to a judge of the court.

Part VI: Civil Proceedings in Newmarket

a) Elimination of "Placeholder" Motions

15. Where counsel or a party has booked with the Trial Co-ordinator a date for the hearing of a motion, a Notice of Motion must be filed (and the necessary filing fee paid) no later than 10 days after the motion date is booked. Unless a Notice of Motion is filed (and the necessary payment made) within this time period, any booked motion date will be vacated without notice to counsel or the moving party. The booking of "placeholder" motions will cease.

b) Civil Motions Consent Orders

16. Where counsel and/or the parties have agreed to a consent order in a civil motion scheduled for hearing, a fully executed consent, to-

gether with a draft order, shall be emailed to the court at Newmarket.SCJ.TC@ontario.ca, along with the motion confirmation form (Form 37B) by 2 p.m. three days before the scheduled hearing, as required by rule 37.10.1. The materials will be put before the presiding judge in chambers for review. If satisfied that the order should issue, the presiding judge will sign the draft order. Counsel for the moving party will be notified by the court that the order is ready to be picked up and entered. Unless otherwise advised by the court, counsel and/or the parties do not have to attend at court on the scheduled hearing date, which shall be vacated.

17. Where counsel and/or the parties have resolved a motion scheduled for hearing by way of a fully executed consent and draft order, after the motion confirmation form is filed, counsel for the moving party may attend at 9:00 a.m. on the morning scheduled for hearing of the motion, and file the consent and draft order with the courtroom registrar. The consent and draft order will be put before the presiding judge in chambers for review. If the presiding judge is satisfied that the order should issue, he/she will sign the draft order. The registrar will return the signed order to counsel to be entered. Counsel is not required to remain in the courtroom after receiving the signed order.

Part VII: Long Motions and Motions for Summary Judgment in Barrie, Bracebridge, Cobourg, Lindsay, Newmarket, Oshawa and Peterborough

18. Dates for all long motions (exceeding one hour) and all motions for summary judgment must be obtained from the Trial Co-ordinator.

19. For all motions exceeding one hour and for all summary judgment motions, counsel (and parties who are self-represented) shall file a factum no longer than 25 pages. In addition to a factum, counsel are to consult with each other and where possible file a Joint Compendium, which shall contain the key material documents to be relied on during oral argument. Where counsel cannot agree on a Joint Compendium, each will file their own separate Compendium, which shall contain the key material documents to be relied on during oral argument. The Compendium should not exceed 30 pages in length.

20. Where counsel intends to rely on case law, he or she shall file a case brief containing only those cases that will be referred to in oral argument, with the relevant passages side-barred.

21. Counsel are encouraged to file an electronic version of the factum, the Joint Compendium (or separate Compendium), and case brief on CD, DVD or USB key. The electronic documents must be submitted in either Microsoft Word format (.doc or .docx) or text searchable PDF format. The CD, DVD or USB key should be accompanied by a covering letter which identifies the materials contained on the CD, DVD or USB key, as follows:

USB Key: The cover letter should include a list of the files contained on the USB key, along with the title of proceedings, Court File #, Counsel Name(s), where applicable, and Party Name. If possible, the key should be labelled with the short style of cause and the Court File #.

CD or DVD: The CD or DVD should be labelled with the title of proceedings, Court File #, Counsel Name(s), where applicable, and Party Name. Include a list of the files contained on the CD or DVD in the cover letter.

Part VIII: Pre-Trial Conferences

a) Purpose

22. The purpose of this Part is to ensure that civil cases proceed to trial only after they have been properly pre-tried and endorsed as ready for trial by the presiding pre-trial conference judge. This will be achieved by the assignment of civil pre-trial conferences to judges who are experienced in civil litigation matters. Those judges will conduct all pre-trial conferences in the Region. It will also be achieved by the establishment of a Central East Trial Scheduling Court ("CETSC"), which will be held in Oshawa and presided over by the Regional Senior Judge or a judge designated by him or her. The CETSC replaces all other Trial Scheduling Courts in the Region and they will be discontinued.

b) Obtaining a Pre-Trial Conference Date

23. All civil cases will proceed to a pre-trial conference once they are certified ready for trial by the filing of a Trial Record.

24. The existing Trial Scheduling Notice and Consent Form is replaced with a Pre-Trial Conference Confirmation Form. Counsel are required to contact the Trial Co-ordinator in the centre where the action is outstanding, to book a pre-trial conference date that is agreed

to by all counsel. Counsel are to record this date on the Pre-Trial Conference Confirmation Form, and transmit it to the Trial Co-ordinator within seven days of booking the pre-trial conference date to the appropriate court location.

Barrie/Bracebridge: Barrie.SCJ.TC@ontario.ca (705-739-6099)

Newmarket: Newmarket.SCJ.TC@ontario.ca (905-853-4863)

Oshawa: Oshawa.SCJ.TC@ontario.ca (905-743-2652)

Peterborough/Cobourg/Lindsay: Peterborough.SCJ.TC@ontario.ca (705-745-3526)

25. In the event that counsel who seeks a pre-trial conference date cannot obtain the agreement of opposing counsel to one of the dates provided by the Trial Co-ordinator, counsel seeking to book the pre-trial conference shall notify the Trial Co-ordinator who will add the case to the next available CETSC.

26. All counsel are required to appear at the CETSC. Counsel opposing the fixing of the pre-trial date must establish good reason why the pre-trial conference cannot proceed on one of the dates provided by the Trial Co-ordinator. The presiding judge shall fix a date for the pre-trial conference. If the presiding judge is satisfied that no good reason was established for counsel's failure to agree to one of the dates provided by the Trial Co-ordinator, the presiding judge may make a costs award against the offending party.

c) Pre-Trial Conference Memorandums

27. Counsel shall file their pre-trial conference memorandums with the court administration office in the centre where the action is outstanding, no later than five (5) business days before the pre-trial conference. Pre-trial memorandums will *not* be accepted for late filing. This filing requirement is intended to ensure that the pre-trial conference judge has adequate time to review the pre-trial conference memorandums in advance of the pre-trial conference.

28. If counsel fails to file the pre-trial conference memorandum in time, the pre-trial conference will be cancelled by the Trial Co-ordinator. Cancellation of the pre-trial conference, absent exceptional circumstances, may result in a costs award against the offending party.

29. If a pre-trial conference is cancelled because counsel for a party failed to file the pre-trial conference memorandum in time, counsel for any other party to the action may unilaterally fix a fresh pre-trial

conference date with the Trial Co-ordinator.

30. Where a second pre-trial conference date is cancelled due again to late filing of the pre-trial conference memorandum, the Trial Co-ordinator will put the case to be spoken to at the next available CETSC. All counsel are required to attend the CETSC.

d) The Pre-Trial Conference

31. To ensure that adequate time is allocated for a meaningful pre-trial conference, generally no more than four (4) pre-trial conferences per day will be scheduled before a single judge.

32. The pre-trial conference judge will, in accordance with rule 52.07, assist the parties in working toward a full or partial resolution of the issues in the action. In addition, the pre-trial conference judge will make such case management orders as are appropriate to ensure that the case is ready for trial. This may necessitate the holding of more than one pre-trial conference in a case.

33. The pre-trial conference judge will endorse that the case is ready for trial only when he or she is satisfied of this. The pre-trial conference judge will complete a Pre-Trial Conference Report, which will be provided to the judge presiding at the CETSC, and also to the trial judge. It will include the estimated length of the trial.

e) Central East Trial Scheduling Court

34. Once the pre-trial conference judge has endorsed that the case is ready for trial, the case will be listed for appearance in the CETSC. The CETSC will take place in Oshawa at least once per month, usually on the last Thursday of the month. It will be presided over by the Regional Senior Judge or his or her designate.

35. Counsel of record for each party is expected to attend the CETSC. While it is preferable that counsel attend in person, attendance by telephone conference call at pre-booked times during the course of the day is permissible. Arrangements for attendance by telephone conference call can be made through the Trial Co-ordinator in the centre where the action is outstanding, or the Oshawa Trial Co-ordinator, no later than the Friday before the scheduled CETSC. In the event that counsel of record is not available to attend in person or by telephone conference call, a fully instructed lawyer acting as counsel's agent must attend the CETSC in person.

36. The purpose of the CETSC is to confirm the length of the trial

and to ensure that the case is ready for trial. Civil cases will be listed to be tried at the twice-yearly regional Civil Trial Sittings. The judge presiding at the CETSC will canvass with counsel on which Civil Trial Sittings list the action will be placed. If counsel has more than one case on a particular Civil Trial Sittings list, the presiding judge must be informed of all other cases counsel has on that list and their present status. The purpose of such enquiry is to avoid the adjournments that result when counsel set multiple cases for trial at the same Civil Trial Sittings.

37. If a trial is estimated to take longer than three weeks, the judge presiding at the CETSC will decide whether the case can be tried within the twice-yearly Civil Trial Sittings, or whether the Regional Senior Judge should be asked to assign a fixed trial date.

38. A further purpose of the CETSC is to canvass whether there is any reason why a case cannot be tried at any of the courthouses in the region, so that courtroom and judicial resources can be maximized. Counsel and the parties will be required to show good reason why a case must be tried at a particular courthouse.

f) Adjournments

39. Counsel should be prepared to proceed to trial during the Civil Trial Sittings to which the case has been assigned or on the fixed date set. Any requests to adjourn a trial must be brought at a CETSC. Counsel should expect that adjournments sought when the case is called for trial will not be granted, absent compelling reasons.

Dated: January 1, 2017

Heather J. Smith
Chief Justice
Superior Court of Justice (Ontario)
Michelle Fuerst
Regional Senior Judge
Superior Court of Justice, Central East Region

APPENDIX VII
PRACTICE DIRECTIONS

VII

Practice Directions are supplemental protocols to rules of civil procedure that assist in regulating procedural matters.

Certain practice Directions apply to the entire province while other apply to specific regions or the individual Courthouses. Some Judges and Masters make their own Practice Directions that must be strictly adhered to.

Practice Directions Relating to Motions (See Chart re Motions attached):

The following chart sets out the times for short and long motions for civil and family proceedings in each judicial Region:

REGIONS	SHORT MOTIONS	LONG MOTIONS
Central East:	Under 1 hour	Over 1 hour
Central South:	Under 1 hour	Over 1 hour
Central West:	Under 1 hour	Over 1 hour
East:	Under 1 hour	Over 1 hour
Northeast:	Under 1 hour	Over 1 hour
Northwest:	Under 2 hours	Over 2 hours
Southwest:	Civil: Under 1/2 hour	Civil: Over 1/2 hour
Toronto:	Under 2 hours	Over 2 hours

TORONTO LONG MOTIONS/MOTIONS FOR SUMMARY JUDGMENT BEFORE A JUDGE — DOES NOT apply to long motions before masters.

Key Points:

- Always scheduled through CPC

- No gowning is required at CPC
- Establish Timetable before CPC attendance
- File long motion materials electronically on a USB stick
- Submit chronology of events and compendium
- Once Motion is scheduled, Parties are to advise the Civil Motions Coordinator 30 days prior to the motion hearing date about the status of the motion

Scheduling:

Long motions before a Judge are booked first by contacting the Civil Practice Unit for a date in Civil Practice Court.

Note: CPC commences at 9:30 a.m. Gowns **are not required** in CPC. Several CPC's may sit on a given day.

Before appearing at CPC, parties must seek to establish an agreed timetable for the completion of all steps required prior to the hearing of the motion and to bring a copy of the timetable to Civil Practice Court for approval by the judge.

Motion Materials

As of Tuesday, **April 3, 2018**, parties in civil matters before judges at 393 University Avenue will be required to file long motion materials electronically on a USB stick. Parties will also be required to file paper copies of their long motion materials as required by the Rules of Civil Procedure. The pilot **does not** apply to long motions before masters.

The USB must include a copy of the motion materials, including the factum, where required. Paper copies of the motion materials must also be filed as required by the rules of court.

Acceptable Formats for Electronic Documents

Two electronic versions of each document are required:

1. One copy must be created using Microsoft Word (.DOC), and
2. One copy must be saved in PDF format. Documents converted from Word to PDF are preferable to scanned PDF documents.

Electronic Documents Naming Convention

In order to assist court staff in storing the electronic materials and

the judge in accessing them, when saving electronic documents on the USB, each document must be named using one of the prefixes in the attached list, followed by the short style of cause and court file number (e.g., *MPL Brown v. Brown*, CV-17-12345-0000).

NOTE: Motions that are scheduled through CPC do not need to be secured by filing a Notice of Motion within 10 days of the date of the booking.

Factums

Factums are required for long civil motions and encouraged for all other motions unless otherwise directed by a judge. In the Toronto region no factum may exceed 30 pages unless leave is granted.

Books of Authorities

***List of Often-Cited Cases in Civil Proceedings* — See List attached.**

This list contains certain cases that are frequently relied on and which are supplied to judges hearing civil cases in the Superior Court of Justice, as directed by the provisions in the Consolidated Provincial Practice Direction that address often-cited cases in civil proceedings.

Parties in civil proceedings need no longer include authorities on the list in any book of authorities relied on, however, extracts from those authorities which counsel intend to refer to the court shall be included in the factum or book of authorities.

Manner to Address Masters

Effective December 7, 2018, Masters should be addressed in English as "Your Honour".

Practice Direction Re: File Transfer: Rule 13.1.02

Effective February 1, 2016, all motions to transfer a civil proceeding should be brought at the court location to which the moving party seeks to have the proceeding transferred.

Counsel are *not* required to provide affidavit evidence about the availability of judges and court facilities in the other county to satisfy factor (viii) under rule 13.1.02(2), this factor shall be addressed by the Regional Senior Judge in the Region where the motion is brought,

after consulting with the local administrative judge or Regional Senior Judge for the other county.

Practice Directions Re: Gowning for Counsel

Counsel are required to gown for all trials, motions and appeals before the presiding judge in the Ontario Superior Court of Justice. Counsel who are pregnant are free to modify their traditional court attire in order to accommodate their pregnancy as they see fit, including dispensing with a waistcoat and tabs.

Counsel are not required to gown for appearances before masters or judges and deputy judges of the Small Claims Court (a branch of the Superior Court of Justice).

Counsel are not required to gown before a Superior Court Judge of Ontario when appearing in Assignment Court, case conferences, settlement conferences, trial management conferences, trial scheduling courts, or pre-trials, **unless** a region-specific Practice Direction states otherwise

Commercial List

As of February 11, 2019, parties and counsel will be required to use the Digital Hearing Workspace to deliver documents electronically to the judicial official and/or other parties or counsel in the matter. The failure of a party or counsel to upload documents to the Digital Hearing Workspace may be addressed by the presiding judicial official. The requirement does not apply to documents properly filed before February 4, 2019.

Instructions on using the Digital Hearing Workspace are in the Superior Court of Justice — Digital Hearing Workspace User Guide at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/digital-hearing-workspace/. For information on preparing documents in Commercial List matters for electronic delivery, please consult The Guide Concerning e-Delivery of Documents in the Ontario Superior Court of Justice.

The Digital Hearing Workspace is not a court filing service. Documents shared in the workspace must still be filed in accordance with the Rules of Civil Procedure and applicable practice directions.

Divisional Court Practice Directions

Motions for leave to appeal to the Divisional Court

As of July 1, 2017, rule 62.02 requires that leave to appeal to the Divisional Court regarding appeals of interlocutory orders of a judge, shall be obtained from a panel of that court, rather than by a single judge. These motions for leave to appeal must now be filed at the Divisional Court Office in Toronto.

The motion for leave will be heard in writing by a panel of three Divisional Court judges. Three printed copies of the motion record, factum and transcripts, if any, are required to be filed.

Motions for leave to appeal must include copy of the signed and entered order from which leave to appeal is sought. Both the moving party's and responding party's motion records must include costs submissions respecting the motion for leave to appeal, unless doing so would disclose an offer to settle. Costs submissions should include the proposed quantum of costs (win or lose) and a costs outline (Form 57B).

Filing materials in electronic format, in addition to hard copies, is strongly encouraged.

Judges' Book of Authorities

A Judges' Book of Authorities containing authorities frequently relied on is supplied to each judge who sits in Divisional Court.

In preparing books of authorities, counsel need no longer include authorities contained in the Judges' Book. However, extracts from those authorities which counsel intend to refer to the court should be included in the factum or book of authorities.

Regional Centres for Divisional Court Filings

Note: In accordance with Part II, all motions for leave to appeal to the Divisional Court under rule 62.02 regarding appeals of interlocutory orders of a judge must be filed at the Divisional Court in Toronto.

Region	**Regional Centre**
Central East Region	Durham Region Courthouse 150 Bond St. E. Oshawa, ON L1G 0A2

Region	Regional Centre
Central South Region	Hamilton (John Sopinka) Courthouse 45 Main St. E. Hamilton, ON L8N 2B7
Central West Region	Brampton (A. Grenville & William Davis) Courthouse 7755 Hurontario St. Brampton, ON L6W 4T1
East Region	Ottawa Courthouse 161 Elgin St., 2nd Fl. Ottawa On K2P 2K1
Northeast Region	Sudbury Courthouse 155 Elm St. Sudbury, ON P3C 1T9
Northwest Region	Thunder Bay Courthouse 125 Brodie St. N. Thunder Bay, ON P7C 0A3
Southwest Region	London Courthouse 80 Dundas St. London, ON N6A 6A3
Toronto Region	Osgoode Hall 130 Queen St. W. Toronto, ON M5H 2N5

Court of Appeal Practice Directions

Correspondence

Any correspondence addressed to the Court of Appeal in relation to a court file must be copied to all parties to the proceeding. All such correspondence must contain the Court of Appeal file number (where applicable) and title of proceeding. In the event that correspondence addressed to the Court of Appeal or any of its staff is not copied to all parties or their lawyers, it will not be received, reviewed or answered.

The Court of Appeal E-filing address, COA.E-file@ontario.ca,

must only be used to deliver electronic versions of factums, transcripts and other documents specified in this Practice Direction and in the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario. This email address is not designed or intended to receive any inquiries or other communications about court proceedings.

Service

The Registrar will accept copies of affidavits of service

Motions

A single judge of the Court of Appeal hears motions Monday through Friday in chambers court located in Courtroom 7 at Osgoode Hall. From September to June, motions court starts at 10 a.m. unless the court orders otherwise. In July and August, motions court starts at 9:30 a.m. unless the court orders otherwise (See chart attached for scheduling instructions).

If the moving party's estimated time for arguing a motion is 15 minutes or more, the moving party **must serve and file a factum**. If a party does not file a factum on a motion, the party will be **limited to 15 minutes** of oral argument at the hearing of the motion.

NOTE: Lawyers do not need to wear gowns when they appear on motions before a single judge in chambers.

On Wednesdays and Thursdays, motions brought by or against self-represented parties receive priority. When all parties are represented by lawyers, they are advised to schedule motions on other days of the week if possible in order to avoid delays in having their motion heard.

Ex Parte Motions (Motions Without Notice to the Other Party)

When a party seeks to bring a motion without serving the notice of motion on the opposing party(ies), the moving party must indicate in the notice of motion the reasons for seeking to bring the motion without notice. A judge of the court will review the notice of motion and may grant the request to move without notice if the judge is satisfied that the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary.

Appendix VII

List of Frequently Cited Civil Authorities

Parties do not need to reproduce the full version of the authorities on the following list in their books of authorities. When a party relies on one of the following authorities in the factum, the party should only include a copy of the headnote and the passage relied on in the book of authorities.

Interesting Facts — Regional Practice Directions:

In Toronto, Court requires a chronology of events and compendium on all long motions and motions for summary judgment be filed by the parties.

Newmarket Court is the only other Court Location (other than Toronto) that requires to file a Notice of Motion within 10 days after the motion is booked.

In Milton, Owen Sound and Walkerton, a long motion must be confirmed no later than three weeks prior to the date the motion is to be heard, and all material must be filed by the moving party by that date.

In Central West Region (Brampton and Guelph), confirmation notices for long motions must be received five business days before the matter is to proceed.

In COA, motions brought by or against self-represented parties receive priority on Wednesdays and Thursdays. When all parties are represented by lawyers, they are advised to schedule motions on other days of the week if possible in order to avoid delays in having their motion heard. If a party does not file a factum on a motion, the party will be limited to 15 minutes of oral argument at the hearing of the motion.

Appendix VII

Documents issued electronically — When a document is issued electronically, it is important to provide a copy of the Statement of Claim to the Process server when filing anything subsequent with the Court, otherwise the court will not accept the documents without the Statement of Claim in the court file.

APPENDIX VIII
CIVIL MOTIONS PRACTICE DIRECTIONS — BY REGION

VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
TORONTO REGION							
Toronto	Everyday Start Time: 10:00 a.m.	2 hours	**YES**	30 pages	Short Motions and Long Motions before Masters: Through the Civil Scheduling Unit Long Motions: Through CPC	(416) 327-5535	
Toronto CPC for Urgent/Long Motions	Every day except Thursday. Start Time: 9:30 a.m.	n/a	n/a	30 pages	A requisition to attend Motion Scheduling Court must be completed.	(416) 327-5535	No confirmation is required before attendance at the CPC. Once Motion is scheduled, Parties are to advise the Civil Motions Coordinator **30 days** prior to the motion hearing date about the status of the motion.
Toronto CPC for Summary Judgment Motions	Tuesday and Friday. Start Time: 9:30 a.m.	n/a	n/a	30 pages	A requisition to attend Motion Scheduling Court: Summary Judgment must be completed.	(416) 327-5535	No confirmation is required before attendance at the CPC. Once Motion is scheduled, Parties are to advise the Civil Motions Coordinator **30 days** prior to the motion hearing date about the status of the motion.

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
Toronto Court of Appeal Motions to a single Judge	Monday through Friday in Chambers	30 minutes	n/a	30 pages	For short motions: pick any day and proceed to serve and file in accordance with the Rules. For long motions: contact the motions desk to determine the current status of the list before selecting a hearing date and serving and filing the motion material.	(416) 327-5020	On Wednesdays and Thursdays, motions brought by or against self-represented parties receive priority. When all parties are represented by lawyers, they are advised to schedule motions on other days of the week if possible in order to avoid delays in having their motion heard. NOTE: The notice of motion must contain a statement outlining the jurisdiction of a single judge to hear the motion and to grant the relief requested.
Toronto Court of Appeal Motions to a panel of Judges	To be scheduled upon filing of the motion materials	30 minutes	n/a	30 pages	Except in cases of urgency, panel motions will not be scheduled for hearing until the moving party has filed the motion record, factum and transcript, if any.	(416)327-5020	The oral argument for panel motions shall be limited to 15 minutes for the moving party, 10 minutes for the responding party, and 5 minutes for reply
Commercial List	To be scheduled through Commercial List Office	n/a	n/a	25 pages	For a scheduling motion to a judge to be heard in chambers, counsel should try to provide a list of three mutually convenient and disparate dates from which the judge may select. Counsel are expected to check with the Commercial List Office for available dates immediately prior to the motion.	(416) 327-5045	Commercial List judges will be available in chambers at 9:30 a.m. on each day to deal with ex parte, urgent, scheduling and consent matters, each of which must take not more than 10 minutes. Counsel must book these chambers matters through the Commercial List Office and these bookings will be made to allow the Chambers Judge to hear all chambers matters by 10:00 a.m.

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Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
							As of February 11, 2019, parties and counsel will be required to use the Digital Hearing Workspace to deliver documents electronically to the judicial official and/or other parties or counsel in the matter. Instructions on using the Digital Hearing Workspace are in the Superior Court of Justice — Digital Hearing Workspace User Guide at http://www.ontariocourts.ca/scj/practice/practice-directions /toronto/digital-hearing-workspace/.
Toronto Divisional Court	To be scheduled upon filing of the motion materials		n/a	30 pages	Except in cases of urgency, panel motions will not be scheduled for hearing until the moving party has filed the motion record, factum and transcript, if any.		Counsel for the moving party or applicant may confirm the hearing date by delivering the Confirmation Forms (Form 37B or Form 38B) to the Divisional Court office at Osgoode Hall or by fax transmission to **(416) 327-5549**. Motions under rule 62.02 for leave to appeal the interlocutory order of a Superior Court of Justice judge are exempt from this requirement, as these motions for leave are now heard by a panel in writing only

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
CENTRAL EAST REGION **Barrie, Bracebridge, Cobourg, Durham, Lindsay, Newmarket, Peterborough**							
Newmarket	Tuesday, Wednesday and Thursday	1 hour	**YES**	25 pages	Dates for all long motions (exceeding one hour) and all motions for summary judgment must be obtained from the Trial Coordinator. Long Motion materials MUST be file in *paper* and on a USB stick.	(905) 853-4823	NOTE: for long motions, parties must file electronic copies of their materials on a USB stick, in addition to paper copies. The USB must include a copy of the motion materials, including the factum, where required. USB Must contain both Word and PDF Versions. Civil Motion Consent Orders: Where parties have agreed to a consent order, a fully executed consent, together with a draft order, shall be emailed to the court at Newmarket.SCJ.TC@ontario.ca, along with the motion confirmation form (Form 37B) by 2 p.m. three days before the scheduled hearing. The materials will be put before the presiding judge in chambers for review. If satisfied that the order should issue, the presiding judge will sign the draft order. Counsel for the moving party will be notified by the court that the order is ready to be picked up and entered. Unless otherwise advised by the court, counsel and/or the parties do not have to attend at court on the scheduled hearing date, which shall be vacated.

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
Barrie	Every Tuesday	1 hour	n/a	25 pages	Same as Newmarket.	(705) 739-6151	NOTE: for long motions, parties must file electronic copies of their materials on a USB stick, in addition to paper copies. The USB must include a copy of the motion materials, including the factum, where required. USB Must contain both Word and PDF Versions.
Oshawa	Tuesday and Friday	1 hour	n/a	25 pages	Same as Newmarket.	(905) 743-2800 x7012	NOTE: for long motions, parties must file electronic copies of their materials on a USB stick, in addition to paper copies. The USB must include a copy of the motion materials, including the factum, where required. USB Must contain both Word and PDF Versions.
SOUTHWEST REGION **Chatham, Goderich, London, Sarnia, St. Thomas, Stratford, Windsor, Woodstock**							
London	Every Tuesday	30 minutes	n/a	20 pages	For motions over 30 minutes in length, contact the Trial Co-ordinator to obtain a special date. All parties must complete a Certificate of Readiness of Special Appointment confirming they are, or will be attending on the assigned date.	(519) 660-3052 or (519) 660-3022	Special appointments are required for motions that are than 30 minutes must be obtain through the trail coordinator. To obtain a date, all parties or their counsel must complete a Certificate of Readiness of Special Appointment confirming they are, or will be on the assigned date, ready to proceed, the time required for the motion and whether a court reporter is required.
Windsor	Every Tuesday	30 minutes	n/a	20 pages	Same as London Court.	(519) 537-5811, ext. 231	Same as London Court.

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
CENTRAL SOUTH REGION **Brantford, Cayuga, Hamilton, Kitchener, Simcoe, St. Catharines, Welland**							
Hamilton	Tuesdays & Thursdays at 10:00 a.m	1 hour	n/a	20 pages	Motions over one hour should be set on short list, then adjourned on consent to any week of counsel's choice by confirmation form. Parties are expected to be ready to proceed when called by Trial Coordinator on short notice.	(905) 645 5322	Parties are expected to agree and adhere to a timetable of events prior to a hearing of a long motion or application
Kitchener	Wednesday & Thursdays at 10 a.m.	1 hour	n/a	20 pages	Short Motions do not need to be booked. Serve and file materials for any date picked. Long motions to be made returnable Thursdays at 2:30 p.m. (to be spoken to) for purpose of putting over to Ready List. Running list weeks arranged through trial coordinator.	(519) 741-3240	Parties are expected to agree and adhere to a timetable of events prior to a hearing of a long motion or application
St. Catharines	Thursdays at 10:00 a.m.	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator. All long motions are set for the week of, not a fixed date.	(905) 988-6200, ext. 446	Parties are expected to agree and adhere to a timetable of events prior to a hearing of a long motion or application
Welland	Wednesdays at 10:00 a.m.	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(905) 735-0010, ext. 251	Parties are expected to agree and adhere to a timetable of events prior to a hearing of a long motion or application

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Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
CENTRAL WEST REGION **Brampton, Guelph, Milton, Orangeville, Owen Sound, Walkerton**							
Brampton	Short motions: Tuesday, Thursday, Friday. Long motions: Wednesdays	1 hour	n/a	20 pages	Long Motions must be scheduled through the Trial Coordinator.	(905) 456-4872	Counsel and litigants are strongly encouraged to fax Central West Region confirmation sheets to the court office by 2 p.m., **five days before a long motion**, to facilitate scheduling and preparation time
Milton	Short motions: Wednesday and Thursday Long motions: Mondays (except 2nd Monday of each month) and Tuesdays	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	Short motions: Ph. (905) 878-7281; Long Motions: Ph. (905) 693-3082	Long motion must be confirmed no later than **three weeks** prior to the date the motion is to be heard, and all material must be filed by the moving party by that date.
Guelph	Short motions: Tuesdays Long motions: 2 Mondays per month	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(519) 824-4100	Counsel and litigants are strongly encouraged to fax Central West Region confirmation sheets to the court office by 2 p.m., **five days before a long motion**, to facilitate scheduling and preparation time
Orangeville	Short Motions: Every Monday Long Motions: Every Monday	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(519) 941-5802, ext. 352 (519) 941-2991, ext. 309	Counsel and litigants are strongly encouraged to fax Central West Region confirmation sheets to the court office by 2 p.m., **five days before a long motion**, to facilitate scheduling and preparation time

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
Owen Sound	Short Motions: Every Wednesday Long Motions: Obtain dates from Trial Coordinator	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(519) 370-2445	A long motion must be confirmed no later than three weeks prior to the date the motion is to be heard. The moving party's factum must be served and filed four weeks prior to the hearing date. The respondent's factum must be served and filed three weeks prior to the hearing date.
Walkerton	Short Motions: Every Friday Long Motions: Obtain dates from Trial Coordinator	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(519) 881-1052	a long motion must be confirmed no later than three weeks prior to the date the motion is to be heard. The moving party's factum must be served and filed four weeks prior to the hearing date. The respondent's factum must be served and filed three weeks prior to the hearing date.
NORTHWEST REGION **Fort Frances, Kenora, Thunder Bay**							
Thunder Bay	Every Thursday	2 hours	n/a	20 pages	Fixed date for long motions are provided only upon approval of the court.	(807) 626-7100	For Construction Lien Settlement Meetings: Contact the Trial Coordinator's office (807) 626-7082 for dates
Kenora	Short Motions: Heard at 10:00 a.m. on the following dates: January 9th, 30th February 6th, 27th March 13th, 27th April 10th, 24th May 15th, 22nd June 5th, 26th	2 hours	n/a	20 pages	Motions requiring 2 hours or more, Contact the Trial Coordinator for specific dates and times	(807) 468-2840	Construction Lien Settlement Meetings: Contact the Trial Coordinator's office (807) 468-2831 for dates or assigned at Assignment Court. Fixed date for long motions are provided only upon approval of the court.

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Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
	July 10th, 31st August 14th, 28th Sept 18th, Oct 2nd October 9th, 16th November 13th, 27th December 4th, 18th						
Fort Frances	Civil Motions (1:00 p.m.) January 8 February 5 March 5 April 30 May 14 June 11 July 9 August 13 September 10 October 8 November 19 December 3	2 hours	n/a	20 pages	Motions requiring 2 hours or more, Contact the Trial Coordinator.	(807) 274-5866	Construction Lien Settlement Meetings Contact the Trial Coordinator's office (807) 274-5866; Or assigned at Assignment Court
EAST REGION **Belleville, Brockville, Cornwall, Kingston, L'Orignal, Ottawa, Napanee, Pembroke, Perth, Picton**							
Ottawa Court	Short Motions: Tuesday, Thursday and Friday. Long: As requested through the civil case management office.	1 hour	No	20 pages	For Short motions: contact the Motions Scheduling Unit to enquire about dates available. For long Motions contact the Master's Office.	Short Motions: (613) 239-1029 Long Motion: (613) 239-1044	

Appendix VIII

Court location	Motions heard on	Long is Motion is over	File NOM within 10 days	Factum	Scheduling procedures	Trial Co-ord contact	Special notations
Belleville	Short Motions: Every other Tuesday commencing January 15, 2019	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(613) 962-9106 (613) 962-4265	A special date must be obtained for motions over two hours. This county will accept three straight adjournments.
Cornwall	Short Motions: Every Friday	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(613) 930-4539	
Napanee	Short Motions: Alternating Friday mornings Long motions: Mondays when time available	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(613) 354-3845, ext. 325	Motions are held at 97 Thomas Street with administration and filing at 41 Dundas Street W.
Kingston	Short Motions: Thursdays at 10:00 am	1 hour	n/a	20 pages	Long motions heard on dates arranged through trial coordinator.	(613) 548-6811 (613) 548-6827	A special date must be obtained for motions over two hours.

APPENDIX IX
LIST OF OFTEN-CITED CASES IN CIVIL PROCEEDINGS

IX

Seizure of Proceeds of Crime

1. *1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem)*, 2011 ONCA 363
2. *A.G. of Ontario v. $11,900 in Canadian Currency*, 2015 ONSC 4583
3. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19
4. *Ontario (Attorney General) v. $1,650 in Canadian Currency (In Rem)*, [2008] O.J. No. 2076
5. *Ontario (Attorney General) v. $13,900 in Canadian Currency (In Rem)*, 2015 ONSC 2267
6. *Ontario (Attorney General) v. $10,000 in Canadian Currency (In Rem)*, 2014 ONSC 944
7. *Ontario (Attorney General) v. $104,877 in U.S. Currency (In Rem)*, 2014 ONSC 5688
8. *Westerhof v. Gee Estate*, 2015 ONCA 206

Summary Judgment

1. *Hryniak v. Mauldin*, 2014 SCC 7
2. *2313103 Ontario Inc. et al. v. JM Food Services Ltd. et al.*, 2015 ONSC 4029 [best foot forward assumption]
3. *Ferreira v. Cardenas*, 2014 ONSC 7119 [best foot forward assumption]
4. *Rahimi et al. v. Hatami et al.*, 2015 ONSC 4266 [best foot forward assumption]
5. *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 [assessment of when it is in the interests of justice to proceed summarily]
6. *R. v. N.S.*, 2012 SCC 72 [value of witness demeanour in assess-

ing credibility]

7. *R. v. Singh*, 2014 ONCA 791 [value of witness demeanour in assessing credibility]

8. *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200 [roadmap to summary judgment analysis]

9. *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 [partial summary judgment]

10. *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922 [partial summary judgment]

Mareva Injunctions

1. *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2

2. *Dai v. Zuo*, 2015 ONSC 3008

3. *Mareva Compania Naviera SA v. International Bulkcarriers SA The Mareva*, [1980] 1 All ER 213 (CA)

4. *Sibley & Associates LP v. Ross et al.*, 2011 ONSC 2951

Self-represented Parties

1. *Ali v. Ford*, 2014 ONSC 6665

2. *Bilich v. Toronto Police Services Board*, 2013 ONSC 1445

3. *Meads v. Meads*, 2012 ABQB 571

4. *Sanzone v. Schechter*, 2016 ONCA 566

The Test for an Interlocutory Injunction

1. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504

2. *Eli Lilly Canada Inc. v. Novopharm Limited*, 2010 FC 241

3. *Hennigar v. Target Corp.*, 2011 ONSC 2271

4. *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

Consent and Capacity Board Appeals

1. *Anten v. Bhalerao*, 2013 ONCA 499

2. *Byberg v. Diaz*, 2015 ONSC 2934

3. *Starson v. Swayze*, 2003 SCC 32

Anton Piller Orders

1. *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.)

2. *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189

Norwich Pharmacal Orders

1. *Bergmanis v. Diamond & Diamond*, 2012 ONSC 5762
2. *Norwich Pharmacal Co. v. Comrs. Of Customs and Excise*, [1974] A.C. 133 (H.L.)

Costs

1. *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.)
2. *Davies v. Clarington (Municipality)*, 2009 ONCA 722
3. *DUCA v. Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601
4. *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited et al.*, 2014 ONSC 4715
5. *Yelda v. Vu*, 2013 ONSC 5903
6. *Valentine v. Rodriguez-Elizalde*, 2016 ONSC 6395 [costs as applied to threshold and deductible]

Motions to Strike Pleadings — Rules 21 and 25

1. *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Sup. Ct.)
2. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
3. *M'Alister (or Donoghue) v. Stevenson*, [1932] UKHL 100
4. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
5. *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.)

Vexatious Litigants; Rules 2.1, 21, 25, 37.16 and s. 140 of the CJA

1. *Gao v. WSIB*, 2014 ONSC 6497
2. *Scaduto v. The Law Society of Upper Canada*, 2015 ONCA 733
3. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
4. *Peoples Trust Company v. Atas*, 2018 ONSC 58; additional reasons 2018 CarswellOnt 2839 (S.C.J.); additional reasons *Caplan v. Atas*, 2018 CarswellOnt 17154 (S.C.J.); affirmed 2019 CarswellOnt 6854 (C.A.); leave to appeal refused 2020 CarswellOnt 5671, 2020

Appendix IX

CarswellOnt 5672 (S.C.C.)

Appeals of Master and Other Statutory Appeals — Rule 62

1. *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165 (Ont. C.A.)
2. *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415

APPENDIX X
JUDGES' BOOK OF AUTHORITIES — DIVISIONAL COURT

X

Prematurity in judicial review

1. *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561
2. *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Div. Ct.)

Divisional Court Jurisdiction under the *Judicial Review Procedure Act*

1. *Setia v. Appleby College*, 2013 ONCA 753

Jurisdiction of tribunals to determine questions of constitutional law

1. *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765

Standard of review in appeals of judges' orders

1. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235

Standard of Review in administrative law

1. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190
2. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654
3. *Rogers Communication Inc. v. Society of Composers, Authors and Music Publishers of Canada (SOCAM)*, [2012] 2 S.C.R. 283
4. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895
5. *First Ontario Realty Corporation Ltd. v. Deng*, 2011 ONCA 54
6. *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227

Appendix X

Adequacy of Reasons in administrative law cases

1. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708

Procedural Fairness

1. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
2. *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282
3. *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504

Reasonable apprehension of bias

1. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484

Review of abuse of discretion

1. *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539

Admissibility of Affidavit Evidence in judicial review applications

1. *142445 Ontario Limited (Utilities Kingston) v. International Brotherhood of Electrical Workers, Local 636* (2009), 251 O.A.C. 62 (Div. Ct.)
2. *Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.)

Validity of Regulations

1. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810

Interlocutory Relief

1. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

APPENDIX XI
LIST OF FREQUENTLY CITED CIVIL AUTHORITIES — COURT OF APPEAL

XI

Effective: 1 March 2017

Parties do not need to reproduce the full version of the authorities on the following list in their books of authorities. When a party relies on one of the following authorities in the factum, the party should only include a copy of the headnote and the passage relied on in the book of authorities.

The authorities are listed chronologically by subject matter.

Administrative Law

- *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929
- *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190

Class Proceedings

- *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158
- *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184
- *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534

Contracts

- *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633
- *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494
- *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842

Costs

- *Boucher v. Public Accountants Council for the Province of On-*

tario (2004), 71 O.R. (3d) 291 (C.A.)

- *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303

Courts — Jurisdiction

- *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077
- *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] S.C.J. No. 17

Damages

- *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130
- *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595
- *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3
- *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362

Evidence — Standard of Proof

- *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41

Family

- *Pettkus v. Becker*, [1980] 2 S.C.R. 834
- *Moge v. Moge*, [1992] 3 S.C.R. 813
- *Peter v. Beblow*, [1993] 1 S.C.R. 980
- *Gordon v. Goertz*, [1996] 2 S.C.R. 27
- *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420
- *Francis v. Baker*, [1999] 3 S.C.R. 250
- *Hickey v. Hickey*, [1999] 2 S.C.R. 518
- *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014
- *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303
- *Fisher v. Fisher*, 2008 ONCA 11, 88 O.R. (3d) 241
- *Kerr v. Baranow/Vanasse v. Seguin*, 2011 SCC 10, [2011] 1 S.C.R. 269

Injunctions

- *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

Motions for Intervention

- *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.)
- *Peixeiro v. Haberman* (1994), 20 O.R. (3d) 666 (Ont. Ct. (Gen. Div.))
- *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355, 9 C.P.C. (5th) 218 (C.A.)
- *Zoe Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.)
- *Bedford v. Canada (Attorney General)*, 2009 ONCA 669

Motions for Leave to Appeal

- *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.)
- *Iness v. Canada Mortgage and Housing Corp* (2002), 62 O.R. (3d) 255 (C.A.)

Mental Health/Jurisdiction of Administrative Boards

- *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625
- *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765

Rule 20 of the Rules of Civil Procedure (Summary Judgment)

- *Combined Air Mechanical Services Inc. v. Flesch* (2011), 2011 ONCA 764, 108 O.R. (3d) 1
- *Hryniak v. Mauldin Group*, 2014 SCC 7
- *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8

Rule 21 of the Rules of Civil Procedure

- *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
- *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3

S.C.R. 45

Standard of Appellate Review

- *Stein v. Kathy K (The)*, [1976] 2 S.C.R. 802
- *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.)
- *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235
- *Waxman v. Waxman* (2004), 186 O.A.C. 201
- *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401

Statutory Interpretation

- *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
- *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559

Tort

- *Donoghue v. Stevenson*, [1932] A.C. 562
- *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575
- *Anns v. London Borough of Merton*, [1978] A.C. 728
- *Queen v. Cognos*, [1993] 1 S.C.R. 87
- *Athey v. Leonati*, [1996] 3 S.C.R. 458
- *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165
- *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537
- *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643
- *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83

Tort and Contract

- *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147

Trusts

- *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

APPENDIX XII
TIPS FOR A SUCCESSFUL HEARING BEFORE A CONSTRUCTION COURT MASTER

XII

Construction Law: Arbitration and Adjudication Advocacy The Advocates' Society — April 30, 2019

Master Donald E. Short & Master Todd Robinson[1]

The below outlines a list of common issues, "pet peeves" and best practices tips to keep in mind when booking and appearing before a construction master in *ex parte* court, for booked unopposed and opposed motions, in lien references and in lien trials. This is intended to supplement the "Pet Peeves in Construction Lien Court" included at Appendix V to *Conduct of a Lien Action* (Thomson Reuters).

A. Construction Lien Ex Parte Court

1. **Using Ex Parte Court**: Construction lien *ex parte* court is for only one of three purposes:

(a) motions properly brought without notice to any party (*i.e.*, expressly permitted by the *Construction Act* or meeting the requirements for a motion without notice under Rule 37.07(2) of the *Rules of Civil Procedure*), although the granting of relief without notice is always in the discretion of the court;

(b) unopposed motions (including part consent and part unopposed), where the positions of all affected parties are known prior to bringing the motion; and

(c) consent motions, having the consent of all affected parties.

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[1] Contributions to these materials also from Master C. Wiebe, Master R. Muir, and Master B. McAfee

2. **Transition Provisions**: Determine before bringing your motion which provisions of the act apply pursuant to Section 87.3 of the *Construction Act*: the act as it read on June 29, 2018 (*i.e.*, the now-former *Construction Lien Act*) or the act as it currently stands. Transition is not just relevant for security when vacating liens, but also for the applicable forms and applicable provisions in the act and regulations. For example, the provisions of the former version of the act governing procedures under Part VIII are now contained in O. Reg. 302/18.

In the absence of evidence speaking to the transition provisions, the court will presume the new act applies.

The transition provisions as they stand today (after amendments from Bill 57), are as follows:

(a) *Date of Prime Contract*: If the prime contract for an improvement was entered into on or before July 1, 2018, then the prior act and regulations apply. Note that the date on which any subcontract is entered into is irrelevant.

(b) *Date of Procurement*: If a procurement process for the improvement as outlined in Section 1(4) of the *Construction Act* was commenced by the owner prior to July 1, 2018, then the prior act and regulations apply. Section 1(4) states that a procurement process is commenced on the earliest of the making of a request for qualifications, a request for quotation, a request for proposals, or a call for tenders. None of them are defined.

(c) *Leased Premises*: For a premises subject to a lease agreement entered into prior to July 1, 2018, but where the prime contract for an improvement is entered into or procurement process is commenced between July 1, 2018 and December 6, 2018, the prior act and regulations apply. Otherwise, the amended act and regulations apply to any prime contract for an improvement entered into or procurement process commenced after December 6, 2018. The date on which any subcontract is entered into is irrelevant.[2]

(d) *Prompt Payment / Adjudication*: Prompt Payment (Part I.1)

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[2] This transition requirement arises from Bill 57, which repealed the originally contemplated exception for long-term leases, except for anything falling into the period between July 1 and December 6, 2018.

and Adjudication (Part II.1) do not apply to contracts entered into before those provisions come into force (October 1, 2019), contracts entered after those amendments come into force where the procurement process was commenced prior to that date, or subcontracts made under such contracts. This transition provision does not itself come into force until October 1, 2019.

3. **Security When Vacating a Lien**: With the recent amendments to the *Construction Act*, the security required to vacate a lien was increased from the lesser of $50,000 or 25% of the amount claimed in the lien to the lesser of $250,000 or 25% of the amount claimed in the lien. This impacts the quantum of security for costs for any lien greater than $200,000, which means you must include evidence speaking to the transition provisions if you are seeking to vacate a lien greater than $200,000 using security calculations based on the old formula in the now-former *Construction Lien Act*. Otherwise, you will need confirmation from the lien claimant and any other affected parties that they consent to or do not oppose vacating the lien on the basis of the proposed security.

4. **Using Existing Security for Additional Liens**: When seeking to vacate a lien using security already posted with the Accountant of the Superior Court of Justice, motion materials should indicate the reason such relief is appropriate (*e.g.*, subcontractor lien fully subsumed in contractor lien, on consent, etc.) and there must be consent of all affected parties. Where the security is a previously posted lien bond or letter of credit, the surety or financial institution are parties affected by the order, and their position is required (confirmed as not opposing or consenting prior to attending court).

5. **Lien Bonds as Security to Vacate**: When lien bonds are used as security to vacate a lien, make sure you are using the correct bond form, that the surety is a licensed surety in Ontario and that the bond affixes the seal of both the surety and the principal (which will generally be a corporation if a lien bond is obtained). The name and title of the person executing on behalf of a company should also be listed. The seal of the surety is required. If a corporate seal from the principal is not included, then the name and title of the signing officer must at least be included, and it will be in the discretion of the presiding master if the security is accepted.

Where the surety is not a well-known surety company, include evidence of the surety's licensing, which can be obtained from the Fi-

nancial Services Commission of Ontario website: https://www.fsco.gov.on.ca/en/insurance/Licensing-Registration/Pages/lic_companies.aspx

6. **Order for Trial — Procedure in Toronto**: Once a judgment or order of reference has been obtained, in order to constitute the reference, a motion to have a day, time and place fixed for the trial of the action must be brought: Section 9(1) of O. Reg. 302/18 under the *Construction Act* or Section 60(1) of the now-former *Construction Lien Act*, as applicable. This is properly brought in *ex parte* court, although it is common to have discussed available dates with affected parties prior to attending.

7. **Motions to Declare Preserved Lien Expired**: Section 46 of the *Construction Act* permits a motion to be brought *ex parte* to declare a preserved lien expired. If being brought *ex parte*, there should be evidence confirming whether or not the lien attaches to the premises, evidence that no certificate of action has been registered if attaching to the premises or evidence that no action has been commenced if not attaching to the premises, and evidence supporting that the lien is not sheltering under another perfected lien pursuant to Section 36(4) of the *Construction Act*. A current parcel abstract with deleted instruments and evidence regarding perfection of other liens is required.

8. **Motions to Declare Perfected Lien Expired**: Section 46 of the *Construction Act* permits a motion to be brought *ex parte* to declare a perfected lien expired. If being brought *ex parte*, there must be evidence supporting that the lien claimant's action has not been set down for trial and that no order for trial has been made. A terminal printout of the case history, affidavit from a process server attending court, or other evidence from the court confirming there has been no set down or order for trial, is advisable.

The language of Section 37(1) is that a perfected lien expires unless "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". If there are other liens against the same improvement, there must accordingly also be evidence that actions perfecting those liens have not been set down for trial and that there has been no order for trial in such actions. If such actions have been set down or are the subject of an order for trial, there must be evidence that they are not actions in which the subject lien can be enforced.

Except in a clear case of expiry of a perfected lien, bring these mo-

tions on notice may be advisable.

Note that, in Toronto construction lien *ex parte* court, Section 46 motions will only be heard regarding a Toronto proceeding. If not a Toronto proceeding, these motions must be brought in the jurisdiction where the action was commenced.

9. **Return of Security — Other Lien Claimants**: In any motion seeking a return of security, be mindful of the pooling provisions under the *Construction Act*. The position of all other lien claimants is required (unopposed or consent), or evidence that they are not affected by the order, such as all other liens having been previously vacated with full security. Copies of registered applications to delete construction lien (with attached vacating orders, where applicable) are generally sufficient evidence to demonstrate other liens have been discharged, released, or vacated. For projects where liens do not attach to the premises, seek confirmation from the owner (to whom liens must be delivered to be properly preserved) regarding what liens have been given and the status of those liens.

10. **Return of Security — Rule 72.03(2)(c)(ii)**: When moving in *ex parte* court for any relief involving return of security, note that Rule 72.03(2)(c)(ii) of the *Rules of Civil Procedure* requires an affidavit stating that the time prescribed for an appeal of the order has expired and no appeal is pending. Unless this requirement is waived in the order returning security, the appeal period following issuance of the order must expire before return of security is requisitioned from the Accountant of the Superior Court of Justice.

11. **Draft Orders**: Check and re-check draft orders to ensure that they correctly reflect the position of affected parties, reference the correct instrument numbers, dates and property descriptions, reference the correct Accountant's account number (if dealing with posted security), and attach all schedules and/or appendices referenced in the order (these should not be handed up separately). Also make sure there is space at the top of the order for the master's name and date, and a signature line at the end of the order on the same page as the last paragraph.

12. **It's Still a Motion**: You are bringing a motion, so the requirements of Rule 37 of the *Rules of Civil Procedure* apply. Always consider what evidence the court needs to determine if the order can and should be granted. Masters (and judges) are not rubber stamps: we must be satisfied the order should issue, even if on consent, before it

is signed. If evidence is required to satisfy the court as to the circumstances and appropriateness of any order, then an affidavit (even a brief one) should be prepared.

The best practice is have a notice of motion and affidavit for all motions. Rule 37.01 expressly requires a notice of motion for any motion "unless the nature of the motion or the circumstances make a notice of motion unnecessary". Even if a motion is on consent, the best practice is to have, at a minimum, a notice of motion with the consent in a motion record. If you come without a notice of motion or supporting evidence for why the order should be granted, have a good reason.

B. Construction Lien Motions

1. **Leave Requirement**: Determine before bringing a motion if it will require leave. Interlocutory steps in an action under the *Construction Act* that are not permitted by the provisions of the act or regulations require leave of the court: Section 13 of O. Reg. 302/18 under the *Construction Act* and Section 67(2) of the now-former *Construction Lien Act*. **This is a statutory requirement that cannot be bypassed by booking your motion on a regular list before a non-construction master**.

For all interlocutory motions requiring leave, there should be evidence demonstrating the statutory requirement that the interlocutory step is necessary, or that the interlocutory step would expedite the resolution of the issues in dispute. The onus is on the moving party to prove that one of those tests is met.

For example, a motion to vacate a lien under Section 44 or a motion to discharge a lien under Section 47 does not require leave, so such evidence would not be required. However, a motion for summary judgment or a motion to compel answers to undertakings and refusals would require leave, and thereby evidence of necessity or expediting determination of issues is required.

2. **Booking Motions in Toronto**: Booked motions in lien actions for relief under the *Construction Act* are generally heard by one of the two sitting construction lien reference masters, and should be booked directly through the masters' office, not through the scheduling unit. Contact one of the Assistant Trial Coordinators to a construction reference master. Motions in lien actions that appear on regular motions lists before non-construction masters are often adjourned to be

booked and heard before a construction master.

3. **Transition Provisions**: See A2 above. Considering which version of the act and regulations apply to your motion is a must.

4. **Draft Orders**: See A11 above.

C. Construction Lien References

1. **Notice of Trial — Procedure in Toronto**: Once an order for trial is obtained (see A6 above), which fixes the first hearing for directions, the moving party must still comply with Section 9(4) of O. Reg. 302/18 under the *Construction Act* or Section 60(4) of the now-former *Construction Lien Act*, as applicable. This requires that a notice of trial be served on the parties required by Section 9(2) of O. Reg. 302/18 under the *Construction Act* or Section 60(2) of the now-former *Construction Lien Act*, as applicable. At the first hearing for directions, a current parcel abstract with deleted instruments should be brought, and appropriate service on all required parties will be reviewed. Proper notice to all statutory parties is a prerequisite to properly constituting the reference.

2. **Parcel Abstracts / Additional Liens**: For lien references involving liens that attach to the premises, particularly in commercial projects where work is ongoing while the reference continues, it is helpful to have an updated parcel abstract (or abstracts) brought to each hearing for directions. Counsel should be mindful that additional liens arising after a first hearing for directions (whether registered or given) generally need to be addressed in the course of the reference, if nothing else because of the statutory requirement that the construction reference master try and completely dispose of all matters and questions arising in connection with the action.

3. **Scott Schedules**: Proper use of a Scott Schedule is equivalent to a claim quantification or breakdown. Particulars of the aspects of a claim or counterclaim are captured (*e.g.*, specific items of deficient and incomplete workmanship), together with quantification of loss claimed for each item. It may be appropriate and helpful to have multiple Scott Schedules depending on the issues, such as an owner-alleged deficiency Scott Schedule and a separate lien claimant extras Scott Schedule.

To be most beneficial at examinations for discovery and generally in the action, parties should endeavour to reference in their Scott Schedule (or response to Scott Schedule) all relevant productions and

expert reports, if any, relied upon. Such production references are sometimes ordered.

4. **Determination of Issues before Trial / Trial of an Issue**: Rule 55.01 of the *Rules of Civil Procedure* provides that a referee shall, subject to any limitations in the order of reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference. Section 58(4) of the *Construction Act* provides construction lien masters with all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action. Together, these provisions allow for flexibility by both the construction master and parties to be creative about how best to adjudicate issues.

Where an issue or issues are discrete and may permit summary disposition of the proceeding, or an early determination of an issue may expedite the overall proceeding, it may be appropriate to seek leave from the construction master for pre-trial determination of such issues (see B1 above regarding leave). Motions under Rule 20 and Rule 21 may be appropriate, or even a trial of an issue by summary, hybrid or traditional trial.

D. Construction Lien Trials

1. **Mode of Trial**: Generally, there is a preference to toward summary or hybrid trials in all construction lien matters, from smaller home renovation cases to large, complex disputes. Traditional trials often require more court time than is available before construction masters. Involvement of the Regional Senior Judge and Administrative Master may be required where parties estimate lengthy trial durations.

When determining trial witnesses, consider the extent to which the witness needs to be examined-in-chief, and if affidavit evidence is preferred or reasonably possible. This is an easy way to bring down total trial length estimates and often an efficient way to conduct trials. Hybrid trials (*i.e.*, affidavit evidence supplemented by *viva voce* examination-in-chief) are now being commonly ordered for larger matters. Where witnesses are giving *viva voce* evidence-in-chief, witness statements summarizing the anticipated evidence are still generally ordered.

2. ***Joint Materials***: Where trial is proceeding by summary or hybrid trial, and there are common documents to be referenced by multiple

affiants, or there is a single version of a document that all parties agree is the correct version, consider a joint document book with all affidavits referencing the same version of a document included in that book.

3. **Scott Schedules**: By the time of trial, Scott Schedules are generally key in terms of outlining the issues remaining in dispute. It is helpful to direct evidence to Scott Schedule items and to be prepared to summarize evidence and organize arguments around Scott Schedule items in closing submissions. It may be helpful to file updated and final Scott Schedules prior to trial, since disputes on some items change between delivering Scott Schedules and trial.

4. **Hearsay**: The rules of evidence apply at a trial, whether proceeding as a summary, hybrid or traditional trial. That means hearsay is inadmissible unless a hearsay exception applies. Rule 39.01(4) of the *Rules of Civil Procedure*, which permits statements of a deponent's information and belief in affidavits, applies only to motions. If hearsay will be relied upon, be ready to argue why it should be admitted and the weight to be given.

5. **Electronic Trials**: Electronic trials are becoming more and more a reality, both as a matter of time efficiency and given costs of paper production, particularly in large matters. Parties should consider efficiencies in proceeding with an electronic trial, and work cooperatively in doing so. Failure to proceed with trial in a cost-effective manner may be a basis for disallowing costs claimed or for an adverse cost award following trial.

6. **Timing at Trial**: All construction lien reference trials involve prior estimation of examination time, with allowance for opening and closing submissions and objections. Time estimates are extremely important to ensuring trials are completed within the scheduled dates. Be reasonable when making your estimates, but also be mindful that the practice of construction masters is to hold parties to the estimates given. This generally takes the form of a "chess clock" approach, where the time spent by each party is tracked to ensure they do not exceed total estimated trial time allocated to that party. Whether or not "banking" time saved from an examination that runs shorter than estimated for use in other examinations will be permitted depends on the particular circumstances of the trial.

1) Please add an asterisk following "Procedures" to indicate a footnote.

2) At the bottom of this page, please include the following footnote:
* This Practice Direction was issued by Justice Stephen E. Firestone, Regional Senior Judge, Ontario Superior Court of Justice, Toronto Region, as amended September 28, 2020 and August 31, 2020; online: https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/#H_Procedures_for_Actions_Governed_by_the_Construction_Act.

APPENDIX XIII
SUMMARY OF SUPERIOR COURT OF JUSTICE NOTICE TO PROFESSION — TORONTO AFFECTING LIEN PROCEDURES

XIII

1.0 Matters Properly Brought before a Master in Construction Lien *Ex Parte* Court

1.1 Construction lien masters are hearing matters properly brought in construction lien *ex parte* court. In particular, the following matters will be heard:

1.1.1 Motions that may be brought without notice as provided in the *Construction Act*;

1.1.2 Motions on consent of all affected parties and persons, including other lien claimants affected by the order sought; and

1.1.3 Motions brought on an unopposed basis, where all affected parties and persons have confirmed that they do not oppose the relief sought prior to the motion being brought.

1.2 Subject to resumption of in-person construction lien *ex parte* court, all *ex parte*, consent and unopposed construction lien motions will presumptively be heard in writing, unless the master hearing the motion directs otherwise. Parties are encouraged to continue bringing non-urgent *ex parte*, consent and unopposed matters in writing pending return to regular operations of in-person construction lien *ex parte* court. Matters that will be heard in-person are expected to be more limited during the initial phases of resuming regular construction lien *ex parte* court.

1.3 Motion materials shall be filed in searchable PDF format as follows:

1.3.1 For non-urgent motions in matters that have not been

referred to a construction lien master for determination, through the Civil Submissions Online portal.

1.3.2 For urgent motions in matters that have not been referred to a construction lien master for determination, as attachments to an email sent to Toronto.Masters.ConstructionLienMatters@ontario.ca.

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1.4 If the master hearing a motion brought in writing determines that an oral hearing is required, then the construction lien office will contact the moving party to arrange a hearing date/time. At the discretion of the master hearing the motion, the moving party may be directed to correspond directly with the master by email regarding the oral hearing.

1.5 Motions for an order to have a day, time and place fixed for the trial of the action (following a judgment of reference or order directing a reference) must include availability of all counsel / parties for a first trial management conference/hearings for directions, absent which the court may fix the first available date.

1.6 Motions for a judgment of reference or order directing a reference cannot be brought before a master. These motions must be made to a judge: s. 58(1) of the *Construction Act*.

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2.0 Other Hearings in Construction Lien Actions

Urgent motions: Urgent motions in construction lien actions that have not been referred to a construction lien master for determination may be brought in accordance with the following:

2.1 For motions to a judge, the same procedure for bringing an urgent civil motion to a judge should be followed.

2.1.1 All summary judgement motions, appeals from the Consent and Capacity Board, long motions, long applications, and urgent matters must be scheduled through Civil Practice Court. Civil Practice Court sits every Tuesday at 9:30 a.m. by Zoom. Sitting days may increase as volume requires. To obtain an appointment for Civil Practice Court, parties are required to email a requisition form to Civilpracticecourt@ontario.ca

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2.1.2 If an urgent request to schedule a matter cannot wait until the next Civil Practice Court, requests for an attendance before a judge may continue to be sent to Civilurgentmatters-

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SCJ-Toronto@ontario.

2.2 For motions to a master, a telephone case conference with a construction lien master will be required in order to determine the length of time required, set a timetable for any remaining steps before the hearing of the motion, and fix a return date for the motion. Motion requests are made by submitting a Construction Lien Motion Request Form as an attachment to an email sent to Toronto.Masters.ConstructionLienMatters@ontario.ca with "Urgent" in the subject line. The moving party must consult or attempt to consult with all affected responding parties before submitting the request form.

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Non-urgent motions: All non-urgent construction lien motions in actions that have not been referred to a construction lien master for determination may be brought in accordance with the following:

2.3 For motions to a judge, the same procedures as set out above.

2.4 For motions to a master, motion requests are made by completing a Construction Lien Motion Request Form and submitting it as an attachment to an email sent to Toronto.Masters.ConstructionLienMatters@ontario.ca. The moving party must consult or attempt to consult with all affected responding parties before submitting the request form. Requested dates for any oral hearing that are mutually available for all affected parties must be clearly indicated. For all long motions, a telephone case conference with a construction lien master will be required in order to determine the length of time required, set a timetable for any remaining steps before the hearing of the motion, and fix a return date for the motion.

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3.0 Motions in actions subject to a reference

All urgent and non-urgent motions in construction lien actions that have been referred to a construction lien master for determination shall be brought and filed in accordance with the following:

3.1 Motions made without notice, on consent, or on a confirmed unopposed basis may be filed in searchable PDF format as attachments to an email sent to the attention of the reference master's Assistant Trial Coordinator at Toronto.Masters.ConstructionLienMatters@ontario.ca.

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3.2 Parties wishing to bring a short motion should complete a Construction Lien Motion Request Form and submit it as an at-

tachment to an email sent to the reference master's Assistant Trial Coordinator or to Toronto.Masters.ConstructionLienMatters@ontario.ca. The reference master will issue directions for the disposition of the motion or convene a case conference for that purpose.

3.3 Parties wishing to bring a long motion should complete a Construction Lien Motion Request Form and submit it as an attachment to an email to the reference master's Assistant Trial Coordinator or Toronto.Masters.ConstructionLienMatters@ontario.ca. The reference master will issue directions for the disposition of the motion or convene a case conference for that purpose.

4.0 Trial management conferences

4.1 Trial management conferences / hearings for directions in construction lien actions continue to be scheduled, with priority being given to hearings that have been adjourned since March 16, 2020. Pending hearings will be proceeding as scheduled, although they will be heard remotely unless the court otherwise directs. Requests for trial management conferences / hearings for directions, including rescheduling previously adjourned hearings, may be made to the reference master's Assistant Trial Coordinator.

5.0 Settlement conferences

5.1 Settlement conferences before a construction lien master are being scheduled and heard in all actions that have been referred to a construction lien master, subject to the court's availability. Priority will be given to settlement conferences that were cancelled between March 16, 2020 and July 3, 2020. It is expected that parties and counsel will attend settlement conferences remotely, unless the court otherwise directs. Parties attending are expected to participate with the full intention and authority to settle the case. Provided all parties consent to proceeding with a settlement conference, a request to schedule a settlement conference may be made by emailing a request to the reference master's Assistant Trial Coordinator with requested available dates or timeframes. Directions for the settlement conference will be issued once approved by the reference master and scheduled by the court.

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6.0 Construction lien reference trials

6.1 Trials in construction lien actions referred to a master are currently proceeding in Toronto as scheduled, subject to the instructions of the reference master. If not already scheduled, counsel and parties should contact the reference master's Assistant Trial Coordinator to arrange a hearing in advance of any pending trial for directions on the conduct of trial. Trials that were adjourned due to the pandemic from March onwards may now be re-scheduled by arranging a hearing with the reference master. Prior to the hearing for directions on conduct of the trial, counsel and parties must discuss if they have any issues, concerns, or objections to a remote trial via videoconference.

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7.0 Conduct of Teleconference or Videoconference Hearings

7.1 All oral hearings required in construction lien matters will be conducted by teleconference or videoconference, unless the court otherwise directs an in-person hearing. It is anticipated that the court will provide the parties with access to necessary teleconference or videoconference facilities. However, if required, the construction lien office or the master hearing the matter may direct counsel to provide them.

8.0 Material Filing for Construction Lien Matters before Masters

8.1 Materials for Motions: In addition to any other document organization requirements that the court may impose, all motion materials are to be filed through the Justice Services Online (JSO) Civil Submissions Online portal. Where the JSO portal cannot be used, or is not required to be used either as provided above or as provided in Section 2 of the Supplementary Notice to the Profession and Litigants in Civil and Family Matters — Including Electronic Filings and Document Sharing (Caselines Pilot) (August 5, 2020), materials should be submitted for filing by email sent to Toronto.Masters.ConstructionLienMatters@ontario.ca.

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8.2 Materials for Other Hearings: Materials for non-motion hearings should be submitted in accordance with any directions provided by the master hearing the matter or else by email sent to Toronto.Masters.ConstructionLienMatters@ontario.ca.

8.3 Filing Format: All documents should be submitted in

searchable PDF format. Affidavits, facta and draft orders should also be submitted in Word format.

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8.4 Email Filing: For all permitted email filings, the email must indicate the court file number, short title of proceedings, party filing the materials, the hearing-type (e.g. opposed motion), and the assigned or seized master (if known).

8.5 Participant Sheets: For all hearings, counsel/parties must file a participant sheet outlining the names and contact information, including email addresses, for all anticipated participants.

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