December 2, 2015

Mr. Bruce Reynolds
Lead Counsel, Expert Review of *Construction Lien Act*
c/o Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West , 44th Floor
Toronto, ON M5H 3Y4

Dear Mr. Reynolds,

RE: Expert Review of the *Construction Lien Act*

The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective judicial resolution of legal disputes.

Members of the Society practise in the area of construction law and have a keen interest in the Expert Review of the *Construction Lien Act* (the "CLA"). The Society has formed a Task Force of its members who practise in construction law, and this Task Force has reviewed the Information Package released by the Expert Review team. The following submissions are made in response to certain questions and issues raised in the Information Package.

In light of the expertise of the Society in matters related to legal advocacy, these submissions focus on the procedural and advocacy aspects of the CLA, and not the substantive areas that are being considered for reform.

Interlocutory process and Section 67(2)

The current CLA requires parties to obtain leave of the court to proceed with interlocutory steps such as production and discovery and motions for summary judgment. Before leave can be granted, the moving party must show that such steps are necessary or would expedite the resolution of the issues.

In most CLA proceedings, parties agree that production and discovery are required and Master MacLeod in Ottawa has held that if the parties agree to production and discovery, they should also be bound by the Discovery Plan rule.[1]

Since these motions for leave are costly to bring and must be heard where the land is situate, the Society suggests that the CLA be amended to make production and discovery mandatory for actions which exceed a certain financial threshold (similar to the threshold under the simplified procedure in the *Rules of Civil Procedure*). For example, if either a claim or counterclaim were to exceed the total principal sum of $250,000 excluding claims for interest and costs, then leave of court would not be required to take interlocutory steps; and if a third- or subsequent-party claim were to exceed the sum of $250,000 while the claim in the main action did not, then leave would not be required in respect of interlocutory steps taken between the parties to the third- or subsequent-party claim. These threshold amounts should be prescribed by order-in-council so that inflation may be taken into account on an annual basis.

Provisions resulting in multiple proceedings

Four provisions of the current CLA result in significant duplication of legal proceedings and inefficiency in the court system. In the Society's view, these provisions ought to be reformed with a view to ensuring the resolution of all related disputes in a single, case-managed proceeding. These provisions are:

1. The prohibition in Section 50(2) of the CLA on the joinder of lien and trust claims;

2. The provision in Section 55(1) of the CLA that a plaintiff may join only a claim for breach of contract or subcontract with a lien claim;

3. The prohibition in Section 55(2) of the CLA on a counterclaim against a non-party; and

4. The requirement in Section 56 of the CLA that leave of the court is required before the issuance of a third-party claim.

The prohibition on the joinder of lien and trust actions and, consequently, the requirement that a a lien claimant must bring separate trust proceedings in respect of the same project for substantially the same relief is unnecessary. In the experience of members of the Society, the Court has been willing to grant an order to have lien and trust proceedings tried together and this simply highlights the need to update the CLA by eliminating Section 50(2).

Similarly, the Society believes that there is no principled reason to restrict a plaintiff to a claim of breach of contract or subcontract but not, for instance, negligence, while allowing a defendant

[1] *Lecompte v Doran*, 2010 ONSC 6290.

to counterclaim in respect of any claim the defendant may be entitled to make, whether or not related to the improvement. At the same time, a defendant is prohibited from counterclaiming against a non-party. Where a defendant wishes to claim against, for instance, the officer or director of a lien claimant, or a corporation related to a lien claimant, the defendant will be required to commence a separate and substantially duplicative civil action.

The current CLA requires leave of the court to issue a third party claim. The court must be satisfied the third party claim will not unduly prejudice the ability of the third party or lien claimant to prosecute the claim or unduly delay or complicate the resolution of the action.

Most often leave is granted and a third party claim is issued. As a result, Section 56 of the CLA creates additional costs to the parties which can be avoided if third party claims are allowed to be issued without leave. Where leave is not granted, the provision creates a significant risk of inconsistent results. This could be seriously prejudicial to, for example, a general contractor who is held liable for payment to a subcontractor based on the court's view that ultimate liability lies with the owner, only to find that in the separate action against the owner, another court refuses to pass on the costs incurred by the general contractor.

If third party claims were to be issued as a matter of course, some members of the Society believe that the third party should be entitled to bring a motion to strike the claim before its defence is required. In certain circumstances, the Court may grant such a motion in order to ensure the expediency of proceeding with different actions.

These provisions, taken together, can result in significant duplication of proceedings and inefficiency. For instance, a plaintiff subcontractor that wishes to preserve all of its legal rights might now be required to bring both a lien claim and a trust action against a general contractor, and a separate action against a bonding company. The general contractor might wish to bring a third-party claim against the owner, but be denied leave and be required to commence a separate civil action. The general contractor might also wish to allege that its subcontract was with an individual officer of the subcontractor corporation, and that that individual acted fraudulently in his personal capacity; but these allegations could not be asserted in a counterclaim, and would need to be made in a civil action. In these circumstances, there would be five separate actions, all dealing with substantially the same subject matter of who is entitled to be paid and by whom in respect of the work performed under a subcontract. It serves neither the interests of justice nor of an overburdened court system to have these issues decided in a multiplicity of proceedings.

In our view:

1. The CLA ought to permit the joinder of any claim related to the improvement with a lien claim;

2. A counterclaim should be restricted to claims related to the improvement, but could be advanced against any person; and

3. Third and subsequent-party claims related to the improvement ought to be permitted as of right. An important caveat is that, in order to prevent multiple-party claims from becoming unwieldy, the CLA ought to provide for case management of all lien claims. In our view, one of the principal advantages of a construction lien action is that in some jurisdictions (such as Toronto) the court seized of the case exercises considerable case management powers and ensures a relatively speedy and proportionate process leading up to trial. The court can currently exercise these powers because of the prohibition on interlocutory steps without leave. While the Society believes that prohibition ought to be amended, as set out above, the Society also believes that case management powers ought to be extended to every lien action once an order for trial has been obtained or an action set down for trial. This would ensure that lien actions do not become unwieldy or unduly delayed, as is all too often the case in civil litigation. In the Society's view the chances of settlement would be increased and the interests of justice served if all relevant parties were before the court in a single action, and that action were case managed.

Setting a matter down for trial

The current CLA states, under Section 37(1), 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 or an action in which the lien may be enforced is set down for trial. However, there are different procedures in each of the various court jurisdictions for how a lien claimant sets the matter down in accordance with the time limitations set out under Section 37(1).

In Toronto, a lien claimant can elect to have a matter referred to a construction lien master or proceed with a judge (unless the presiding judge refers the matter). In Toronto, a lien claimant may move for a judgment of reference and, once obtained, attend the construction lien court to set the date, time and place of the trial (or, as is common in Toronto, the "first hearing for directions) where all parties with an interest in the premises are given notice of the trial. At the first hearing for directions, the construction lien master will schedule a timetable.

In other regions, such as Barrie, Bracebridge, Newmarket, Peterborough, Brockville and Kingston, the practice is to set the action down for trial by serving a trial record, requisition and affidavit of service (along with other forms required by a particular jurisdiction) to have a pre-trial or assignment court date scheduled. Anecdotally, this often requires a telephone call to the trial coordinator's office to ensure that the matter is properly identified as being a construction lien matter because the trial record is not an indication that the matter is ready for trial (*i.e.* document and oral discovery have not yet been agreed upon by the parties nor ordered by the court).

In still other regions, such as Brampton, St. Catharines, Hamilton, Windsor and Owen Sound, the practice is to require the parties to schedule and attend a settlement conference under Section 60 of the CLA and, thereafter, if the settlement conference is "unsuccessful", to serve a trial record and proceed with the scheduling of a pre-trial and trial.

Since each jurisdiction has its own procedure for setting an action down, and since there is benefit to having a matter case managed (be it the Toronto construction lien court or the self-management available under a Section 61 settlement conference), the Society recommends that the CLA be amended to bring uniformity to set the action down and expedite the scheduling and direction for pre-trial steps such as Scott Schedules and document and oral discovery.

Posting Security and Vacating Liens from Title

The current CLA allows any person to post security and, having done so, vacate the liens from title. The CLA allows this motion to proceed without notice where the full amount of the lien is being secured, or on notice, where a lesser amount for security is sought.

In Toronto, any person wishing to post security may do so every morning between the hours of 9:30 and 10:00 am. Often this procedure is available to a person regardless of where the premises are located.

In other regions, a person does not have the luxury of posting security every morning but, instead, must wait for the regular motions sittings (unless the person moves on an urgent basis, the onus being on the moving party to demonstrate that there is urgency) or obtain an order over the counter. If a person waits for a regular motion date, that person must still wait for his or her motion to be called upon. Given that the presence of registered liens on title is reason for a payer to withhold payment, project funds are frozen until monies have been posted as security and the liens vacated. Once funds are "frozen", a project schedule is in jeopardy.

Even after "obtaining" an order allowing the liens to be vacated, there is often a backlog of having to wait until the security is actually delivered to the Accountant's Office which can lead to further delay. While this may be technically prudent, the fact is that security is in the form of certified funds, construction lien bond, or letter of credit, any one of which would have already been accepted by the Court before the Court would grant the relief sought.

The Society recommends that the CLA be amended to remove the "urgency" required under the *Rules* in order to bring a motion immediately and without administrative delay. The Society recommends that the CLA be further amended such that upon the Court's satisfaction of the method of security, an order permitting a person posting security to vacate can also be released to that person immediately.

Mandatory Mediation

The current CLA does not contain any mandatory mediation requirements. In the recent past, the Construction Bar in Toronto had the advantage of a voluntary process whereby a construction lien master, who was not seized with the matter by virtue of a judgment for reference, would conduct a case conference (which was essentially a mediation) providing both parties consented to same. This process met with considerable success and resulted in the settlement of a significant number of actions.

Pursuant to Section 67(1), the CLA is to be a summary procedure having regard to the amount and nature of the liens in question. Accordingly, the Society submits that a mandatory mediation requirement would assist in achieving this objective. In fact, non-lien actions in Toronto and other jurisdictions are subject to mandatory mediation which often result in cost effective settlements and speedier resolutions of claims.

The Society further submits that it may be desirable to set a minimum threshold for the application of any potential mandatory mediation clause so as to avoid unnecessary costs in lien actions which fall under a reasonable minimum threshold. One suggestion is to consider setting the threshold at the same level as the *Simplified Rules* threshold of $100,000.

Mandatory Arbitration and Lien Actions

The Courts have established guidelines for staying lien actions in favour of commercial arbitration and procedures for allowing lien claimants to perfect their claims for lien when faced with a stay order. However, the Society believes it is time to consolidate and codify these procedures within the CLA for greater clarity and efficiency.

I hope these submissions are helpful. We would be pleased to discuss them with you further at your convenience.

Yours sincerely,

Martha A. McCarthy
President