

TABLE OF CONTENTS

<i>Preface</i>	iii
<i>Table of Cases</i>	xv

1. INTRODUCTION: MODERNIZATION OF ONTARIO'S CONSTRUCTION CREDIT REGIME	1
1.1 What changed, what did not, and why	2
1.1.1 Liens and lien procedure	2
1.1.2 Trusts	2
1.1.3 Holdback	4
1.1.4 Prompt payment	4
1.1.5 Adjudication	6
1.2 Transition provisions: what Act applies?	7
1.3 The lawyer's role under this new legislation	9
2. PRESERVING A LIEN	11
2.1 Guide	12
2.2 Do you have a lien?	13
2.3 First meeting with the client	16
2.4 Client identification and verification	18
2.5 The retainer	19
2.6 The "last minute" lien	20
2.7 Some practices to avoid	21
2.8 Some practices to adopt	22
2.9 Securing the records	25
2.10 Document management consultants	28
2.11 Demands for information	29
2.12 Routine searches	31

Table of Contents

2.13 Search #1: Title	31
2.13.1 Search #2: Corporate	33
2.13.2 Search #3: Bankruptcy	35
2.13.3 Search #4: Licensing	36
2.13.4 Search #5: Executions	38
2.14 Completing the form of lien	38
2.14.1 Blank #1: Naming the lien claimant.....	38
2.14.2 Blank #2: Naming the owner	41
2.14.3 Blank #3: Naming the person to whom supply has been made	42
2.14.4 Blank #4: Time within which supply was made	42
2.14.5 Blank #5: Short description of supply	43
2.14.6 Blank #6: Price	44
2.14.7 Blank #7: Amount claimed as owing.....	46
2.14.8 Blank #8: Execution of the lien form: Parts “A” and “B”	52
2.14.9 Schedule “A”: Description of the premises	53
2.14.10 The “curative” section, s. 6.....	55
2.14.11 Preservation by “giving” a copy of the executed lien	56
2.14.12 Written notice of lien	59
2.15 Registration and E-registration	63
2.15.1 Registering a lien on a condominium project	65
2.15.2 Cross-examination on the claim for lien	66
2.15.3 The “sheltering statement”	69
2.15.4 Steps in e-registration	71
2.16 Expiry of non-preserved liens.....	74
2.16.1 Deadlines	74
2.16.2 Substantial performance	74
2.16.3 Completion, declaration of last supply and certifica- tion of completion of a subcontract.....	77
2.16.4 Abandonment	77

Table of Contents

3. PERFECTING A LIEN	81
3.1 Guide	82
3.2 Where to commence the action	82
3.3 Parties to a lien action	82
3.3.1 Plaintiffs	82
3.3.2 Defendants	84
3.3.3 Is the “owner” a necessary party?	85
3.3.4 Priority claims	87
3.3.5 Improper joinder in a lien action	87
3.4 Pleadings in a lien action	89
3.4.1 Claims	89
(1) Statement of claim	89
(2) Service	89
(3) Improper claims in a lien action	91
3.4.2 Defences	91
(1) Defences with respect to timeliness, lienaability and quantum	91
(2) Statutory defences	92
(3) Set-off	93
3.4.3 Counterclaims	94
3.4.4 Crossclaims	95
3.4.5 Third-party claims	96
3.4.6 Service	100
3.4.7 Replies	101
3.4.8 Particulars	101
3.4.9 Amendment of pleadings	102
3.4.10 Default in defence	103
3.5 Certificate of action (O. Reg. 303/18, Form 14)	108
3.6 Liability for exaggerated liens	109
3.7 Pleadings in a trust action	110
3.7.1 Parties in a trust action	111
(1) The owner’s trust	112

Table of Contents

(2) The contractor's and subcontractor's trust113
(3) The vendor's trust113
(4) Section 13 liability114
3.7.2 Trust claim116
 (1) Breach of trust116
 (2) Claims in damages117
 (3) Claims for tracing.....117
 (4) Accounting121
3.7.3 Trust defence122
 (1) Payments discharging trust122
 (2) Reduction of trust funds123
 (3) Set-off124
4. SETTING A LIEN ACTION DOWN FOR TRIAL127
 4.1 Guide127
 4.2 Order of reference131
 4.3 Setting aside an order of reference136
 4.4 Consolidation, connection, carriage, salvage costs138
 4.4.1 Consolidation and connecting orders generally ...143
 4.4.2 How do you consolidate lien actions?146
 4.4.3 How do you connect lien actions?149
 4.4.4 Carriage of a lien action151
 4.4.5 Salvage costs156
 4.5 Section 37161
 4.5.1 Expiration of the perfected lien161
 4.5.2 Motion to declare a lien expired, vacate registration,
 pay out security and dismiss an action171
 4.5.3 Salvaging a s. 37/s. 46 situation175
5. SETTLING A LIEN ACTION179
 5.1 Guide179
 5.2 Reaching terms183
 5.3 The role of the payment bond surety186
 5.4 Trust issues188

Table of Contents

5.5	Costs on settlement	189
5.6	The funding dilemma: What comes first, cash or clear title?	191
5.7	Documenting the settlement	192
5.7.1	Releases: exceptions for unperformed work and unexpired maintenance and warranty obligations	193
5.7.2	Workplace Safety and Insurance Board releases	194
5.7.3	Revenue Canada third-party notices	195
5.7.4	Assignments of lien and trust claims	197
5.8	Settlement meetings under the <i>Construction Act</i>	198
5.8.1	Process	198
5.8.2	Enforcing the outcome of a settlement meeting con- ducted under the <i>Construction Act</i>	203
5.8.3	Consequences of default in attendance at a settlement meeting conducted under the <i>Construction Act</i>	204
5.9	Vetting committees	205
6.	PRACTICE BEFORE THE COURT	213
6.1	Motions in lien actions	214
6.1.1	Guide	214
6.1.2	Vacating liens	219
(1)	Vacating or discharging	219
(2)	Foreign currency and tax issues	227
(3)	Consequences of payment into court	228
(4)	Vacating certificates of action	230
(5)	Process for removing construction liens from title	233
6.1.3	Motion under s. 45 to declare that a lien has expired for failure to preserve or perfect in time	237
6.1.4	Motion to discharge under s. 47	239
6.1.5	Getting security out of court.....	244
6.1.6	Application for declaration of substantial performance	244

Table of Contents

6.1.7 Summary judgment in lien and trust actions	246
6.1.8 Motion for security for costs	250
6.2 Trial management: pre-trial conferences, hearings for directions	255
6.2.1 Guide	255
6.2.2 Arranging and conducting pre-trial conferences and hearings for directions	258
(1) In Toronto	258
(2) Outside of Toronto	264
6.2.3 Consequences of failing to attend a trial management pre-trial Conference	267
6.3 Discovery in lien actions	269
6.3.1 Documentary discovery	269
6.3.2 Electronic documents	273
6.3.3 Examination for discovery	278
6.3.4 Preparing and conducting a lien discovery	281
6.3.5 Lawyer's conduct at discovery	285
6.3.6 Refusals and undertakings	287
6.3.7 Scott Schedules	288
(1) Guide	288
(2) The Scott Schedule as particulars of pleadings	290
(3) The form of the Scott Schedule	292
6.4 Trial of the action	294
6.4.1 Guide	294
6.4.2 Inquisitorial jurisdiction	295
6.4.3 Self-represented parties	297
6.4.4 Preparing for trial	298
(1) A simple lien trial	298
(2) A complex lien trial	299
(3) The final trial management pre-trial	303
(4) Document management issues	305
(5) The trial brief	307

Table of Contents

6.4.5 Conducting the trial	312
(1) Opening statements	313
(2) Evidence at trial	315
(3) Conduct at trial	325
(4) Examination in chief	333
(5) Cross-examinations	335
(6) Expert evidence	344
(7) Lay opinion evidence	354
(8) Technical assistance	356
(9) Jury notice	358
(10) Demonstrative evidence and evidentiary aids	358
(11) reading in discovery transcript	360
(12) Taking a view	362
(13) Closing and arguing a lien case	362
6.4.6 The Report	365
(1) Judgment or report in rem and in personam ...	369
(2) Reports and interim reports	370
(3) Amending, setting aside or varying the report	375
(4) Pre- and post-judgment interest	375
(5) Costs	376
7. APPEALS AND OPPOSING CONFIRMATION OF THE MASTER'S REPORT	379
7.1	379
7.1.1 Judgments	379
7.1.2 Final v. interlocutory orders	380
7.1.3 Divisional Court jurisdiction	382
7.1.4 Timeliness of appeal	383
7.1.5 Standard of review	384
7.1.6 Motions to oppose confirmation of a master's report	385
(1) Timeliness of motion	386

Table of Contents

(2) Venue	387
(3) Standard of review	387
(4) Appeal	387
7.1.7 Conduct of an appeal	388
8. EXECUTION AND SALE OF LAND	391
9. THE CONSTRUCTION ACT TRUSTEE	397
9.1 Guide	397
9.2 When to appoint a lien trustee	397
9.3 How to appoint a lien trustee	401
9.4 Pros and cons of lien trustees	403
10. PROMPT PAYMENT AND ADJUDICATION	407
10.1 Prompt payment	407
10.2 Statutory adjudication	410
10.2.1 Basic concepts	414
(1) Statutory minimums	414
(2) Targeted adjudication	414
(3) Proper invoice	416
(4) Binding until and unless overturned	416
(5) Enforcement of adjudicator's determination	416
10.2.2 Adjudication timelines in Ontario	417
10.2.3 Step 1: choosing an adjudicator	418
10.2.4 Minimum qualifications	419
10.2.5 Preparing a claim for adjudication	421
(1) The notice of adjudication	421
(2) Detailed submissions	422
(3) Documents relied upon	422
10.2.6 Serving the claim	423
10.2.7 Responding to a claim	423
10.2.8 Rebuttals, replies, sur-rebuttals and sur-replies	424
10.2.9 In-person hearings the exception, not the rule	424

Table of Contents

10.2.10 The adjudicator's determination	425
(1) Form and timing	425
(2) Interim binding nature of determination	426
(3) Costs	426
10.2.11 Compliance with determination	427
10.2.12 Application to set aside adjudicator's determination	427
(1) Statutory grounds	427
(2) Natural justice	428
10.2.13 Select bibliography	431
APPENDIX	433
APPENDIX I — Regulations	435
APPENDIX II — Precedents	533
APPENDIX III — Holdback Distribution	579
APPENDIX IV — Courthouse Practice Directions	587
APPENDIX V — Pet Peeves in Construction Lien Court	609
APPENDIX VI — Superior Court of Justice Practice Direc- tions on Construction Liens	613
APPENDIX VII — Practice Directions	623
APPENDIX VIII — Civil Motions Practice Directions — By Region	631
APPENDIX IX — List of Often-Cited Cases in Civil Proceeding	641
APPENDIX X — Judges' Book of Authorities — Divisional Court	645
APPENDIX XI — List of Frequently Cited Civil Authorities — Court of Appeal	647
INDEX	651