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CONSTRUCTION, BUILDERS' AND MECHANICS' LIENS IN CANADA
8th Edition

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This publication offers an exhaustive analysis of the construction, builders' and mechanics' lien legislation from all Canadian jurisdictions; legislative concordances, guidance on construction lien practice; a comprehensive set of construction law forms and precedents; and summaries and analysis of every significant case in the construction lien area decided in trial and appeal courts throughout Canada.

This release features updates to Appendix PS—Procedural Summaries I—Liens Procedures. C—Ontario (Construction Act).

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Highlights

- **Procedural Summaries—Lien Procedures—Ontario—Construction Act—False, Exaggerated Claims—Case Law: Section 35**—Counsel for HBH raised the issue of the court's jurisdiction to reduce the lien, arguing that the provisions of s. 44(5) of the *Act* restrict the court's jurisdiction to reduce the amount of a lien to cases where payment has been made into court to vacate the lien. Justice Reid was satisfied that the court had jurisdiction to consider a reduction in the lien amount based on the broad remedial power contained in s. 35 of the *Act*, as distinguished from the specific authority to reduce in the amount of money paid into court under s.44(5): *Homes by Hendriks Inc. v. Honsberger*, 2025 CarswellOnt 5306, 2025 ONSC 2237 (Ont. S.C.J.).
- **Procedural Summaries—Lien Procedures—Ontario—Construction Act—Cross—Examination on Claim for Lien—Case Law: Section 40**—The defendants sought an order discharging the construction lien registered by the plaintiff because the plaintiff/lien claimant refused to attend and participate in cross-examination on the claim for lien pursuant to s.40 of the *Construction Act*. There was no failure by counsel for the defendants to communicate with counsel for the plaintiff. The record indicated the opposite. No reason was advanced to justify either the failure to respond to counsel for the defendant when attempting to arrange cross-examinations or the position that the plaintiff would not "participate" in the process stipulated by the *Act*. The plaintiff was given two opportunities to comply with the *Act* but failed to do so and, in fact, save for one email indicating that the plaintiff "will not be participating" on the eve of the first examination, ignored counsel for the defendants for five months. That conduct by the plaintiff has delayed the resolution of this lien claim. That conduct was a proper ground justifying the discharge of the lien: *Skyway Canada Ltd. v. Sobeys Capital Incorp. et.al*., 2025 CarswellOnt 6420, 2025 ONSC 2293 (Ont. S.C.J.).
- **Procedural Summaries—Lien Procedures—Ontario—Construction Act—General Powers of the Court—Case Law—Section 47**—The Associate Justice noted that it is trite law that an owner cannot lien its own improved land as this would defeat the purpose of the *CA* namely to provide security for those who supply services and materials to the improvement. It would also be an inappropriate merger of interests with the owner suing itself. An "owner" is defined by section 1 of the *CA* as being any person with an interest in the land at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit an improvement is made. The issue was whether 269 had an interest in the Angus Property. If an improvement is made pursuant to a partnership that owns the land, the partners that do the work are not "contractors" who supply materials and services. They are "owners." The Associate Justice noted that there was no issue that 269 was a "partner," and therefore an "owner," when it did the renovation work. Throughout her section 40 cross-examination, Yang made admissions that clearly established that 269 was a partner and owner when it did the renovation work. Yang called the RPA a "collaboration or cooperation agreement." She also said that the two parties "wanted to work together and to make money together." Indeed, the

RPA gave 269 the equity on any sale to a third party and prohibited any interference by Capitalplus in 269's renovation and design. The payments Capitalplus made to 269 were "loans," not payment for services and materials. Those were the attributes of a partnership. The Associate Justice did not accept that when it terminated the RPA in September 2023 and denied 269 its stake in the eventual sale, Capitalplus turned 269 into a "contractor" and, most importantly, did so retroactively in relation to the renovation work already performed. There is no provision in the *CA* for such a retroactive conversion of non-lienable work done by a partner into lienable work due to a post-work dispute between the partners. *CA* section 14(1) confers the lien right when the services and materials are supplied, not later. If the service and materials were not lienable at the time of supply, they cannot be made lienable by a later dispute. Lien rights expire in real time. Partners who supply services and materials would invariably register claims for lien to protect their positions should there be future partner disputes, thereby causing confusion and prejudicing *bona fide* lien claimants: *2698368 Ontario Inc. v. Capitalplus Development Group Ltd.*, 2025 CarswellOnt 2083, 2025 ONSC 1228, 2025 A.C.W.S. 888 (Ont. S.C.J.).