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

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Release No. 1, January 2026**

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**—The Court concluded that Logan met its onus of proving that there was no triable issue that the Accurate lien was preserved out of time and that it had expired. The Court ordered that the Accurate lien be vacated and the Logan security for the lien be returned to Logan. The Court also ordered that the Accurate action to enforce the lien be dismissed. Logan sought an order requiring Accurate to pay Logan \$29,120.06 in damages for the costs of the lien bond it posted for the Accurate claim for lien and for the legal costs involved in having the security posted. Martino’s affidavit contained a letter from Westmount stating that the bonding premium would be 2% per annum of the amount of the bond. 2% of the \$340,861.25 for the Accurate lien bond was \$6,817.22. It had been 17 months since the bond was posted. The bonding premium for that 17-month period was, therefore, \$9,657. The Court ordered that Accurate pay Logan \$9,657 as damages under CA section 35(1)2. That section states that a person who preserves a claim for lien when “the person knows or ought to know that he or she does not have a lien,” is liable for the damages that flow from doing so. Given the Court’s rulings about “bootstrapping,” it concluded that Accurate should have known it did not have a lien when it registered its claim for lien on December 15, 2023. Therefore, it should pay the lien bonding premium in the amount of \$9,657 as damages: *Accurate General Contracting Ltd. v. 485 Logan Developments Inc.*, 2025 CarswellOnt 9383, 2025 ONSC 3498 (Ont. S.C.J.).
- **Procedural Summaries—Lien Procedures—Ontario—Construction Act—Expiry of Perfected Lien—Case Law: Section 46**—The Court commented on Theriault’s reliance on subrule 24.01(2) of the *Rules* as a basis for dismissing NDF’s action. In the Court’s view, relief under that subrule is not available in a lien action. Subrule 24.01(2) mandates that an action shall be dismissed for delay where either of the circumstances in paragraphs 1 and 2 of subrule 48.14(1) apply to the action, namely that the action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action or the action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off. Since the action had not been placed on or struck off a trial list, the second criteria did not apply. With respect to dismissal relief based on the first criteria, the Court determined it to be inconsistent with ss. 37, 46, and 47 of the *CLA*. NDF did not pass a trial record, which would seem to trigger *subrule 48.14(1) of the Rules*. However, passing a trial record is not a prerequisite to a lien action being tried under the scheme of the *CLA* and local practice in Toronto Region with respect to lien references. The “set down” requirement in lien action is found in s. 37(1) of the *CLA*, which requires that an action in which the lien may be enforced be set down for trial or an order is made for the trial of such an action prior to the second anniversary on which a lien was perfected. If neither is done, then the lien expires and lien action may be dismissed by motion under s. 46. Dismissal relief may also be separately sought “upon any proper ground”

under s. 47. In this case, NDF complied with s. 37(1) of the *CLA*. A judgment of reference under s. 58 of the *CLA* was obtained in November 2019 and, thereafter, an order for trial was obtained in December 2019. In the Court's view, it was inconsistent with the scheme of the *CLA* to grant mandatory dismissal relief for non-compliance with paragraph 1 of subrule 48.14(1) of the *Rules* (*i.e.*, failing to deliver a trial record) in circumstances where there had been proper compliance with the requirements of s. 37(1) of the *CLA*: *NDF Financial Inc. v. Tomas*, 2025 CarswellOnt 12250, 2025 ONSC 4427 (Ont. S.C.J.).