Construction Law Primer
What in-house counsel need to know

April 13, 2011

Presented by:

Timothy Hutzul, Aecon Canada Inc.
Director, Legal Services & Assistant Corporate Secretary

Jonathan Goode, Torkin Manes LLP

Sandra Astolfo, Torkin Manes LLP

Gregory D. Hersen, Torkin Manes LLP
Construction Law Primer Program Chair
INDEX

Construction Disputes: Understanding and Effectively Managing the Process
Timothy Hutzul, Aecon Group Inc..........................................................1

Jonathan Goode .....................................................................................2

Priorities and Breach of Trust under the Construction Lien Act
Sandra Astolfo .......................................................................................3

Recognizing and Managing Risk on Construction Projects
Gregory D. Hersen ..................................................................................4

Speaker Profiles & Torkin Manes LLP ..................................................5
Construction Disputes: Understanding and Effectively Managing the Process

OR

“Murphy was an Optimist”

Tim Hutzul
Director, Legal Services & Assistant Corporate Secretary
Aecon Group Inc.

Association of Corporate Counsel, Canada
Wednesday April 13, 2011
Introduction – Unplanned Events

1. Murphy was an Optimist
2. Nature of Typical Construction Project
3. Plan for Unplanned Events
CN TOWER UNDER CONSTRUCTION 1974

BLOOR DANFORTH SUBWAY - 1963

building things that matter
1. Don’t Ignore the Contract
2. Team Approach
3. Need for Enterprise Wide Risk Management
4. Role of Lawyers – Inside & Outside Counsel
The Ten Commandments of Construction Risk Management...

I KNOW THY CONTRACT

II CONCEDE NOT THY LEVERAGE

III THOU SHALT NOT EVER, AT ANY TIME, ANYHOW, FOR ANY REASON, OR UNDER ANY CIRCUMSTANCE, PERFORM CHANGED WORK WITHOUT A WRITTEN, SIGNED, AND AUTHORIZED CHANGE ORDER
The Ten Commandments of Construction Risk Management...

IV DEPEND NOT ON THY Attorneys TO BAIL THEE OUT

V IF THOU ASKEST NOT, THOU RECEIVEST NOT

VI THY TIME IS MONEY
The Ten Commandments of Construction Risk Management...

VII  SURPRISE NOT THY OWNER

VIII  PERSIST

IX   THY BARGAINING POWER EQUALETH THAT OF OTHERS

X    THY JOB IS NOT FINISHED UNTIL THY MONEY BE COLLECTED
Recognizing Changes in the Work...

- Extra Work, Extra Quantities
- Modifications to Work
- Schedule Changes
- Sequencing Changes
- Access Impacts
- Interference or Delay by Owner/Consultant/Contractors
- Excessive Change Orders
- Delay or Acceleration
- Season Shift
- Reduction of Work
- Bid to Construction Design Changes
Recognizing Changes in the Work...

• Changed Site Conditions or Latent Conditions
  ■ subsurface
  ■ hazardous
  ■ archaeological
• Changes Required by Regulatory Agencies
• Conflicts in Work
• Discrepancies between Specifications and Drawings
• Subcontractor/Vendor Deficiencies
• Late Delivery of Owner Supplied/directed materials
• Late Completion of Owner Directed Work
Dealing With Changes In The Work...

- **ANALYSIS OF IMPACT:**
- Cause, Effect & Contractual Entitlement = Change Order / or Claim
1. Maintain a Good Record-Keeping System

- Daily Logs
- Daily Time Records
- Memoranda and Correspondence
- Dated Photos and Video
- Minutes
- Notes
- Journals
- Schedules, Analyses Updated
- Reports
2. **Do Not Waive any Claims**

- Ensure GC’s and Change Orders are followed and implemented
- Notice of Change
- Impact of Change:
  - Price
  - Schedule
  - Scope
  - Performance Guarantees
  - Warranty
3. **Monitor Job Progress**

- Analyze progress prior to site meetings and use them as a forum for discussing delay, extra work.
- Record all conflicts, discrepancies and inform the Owner.
- Track extra work, hours, amount of work accomplished, demonstrating efficiency and impact.
4. Review and Monitor Scheduling Requirements

- Plan scheduling and sequencing requirements
- Ensure proper layout
- Ensure proper understanding of float
Customer Service Focus That Will Optimize Issue Resolution:

1. Communicating Openly
2. Identifying Change Early
3. Accessibility
Customer Service Focus That Will Optimize Issue Resolution:

4. Proactively Communicating Information
5. Problem-solving Skills
6. Issue-resolution Skills
Customer Service Focus That Will Optimize Issue Resolution:

7. Focus on Safety
8. Attention to Detail
9. Focus on Quality
Customer Service Focus That Will Optimize Issue Resolution:

10. Minimal Disruptions
11. Focus on Customer Service
12. Professionalism
Dispute Resolution

1. Change Order Process
2. Use Senior Management
3. Realistic Recognition of Fault
4. Importance of Long Term Relationships
5. Understand Your Objectives
6. Use of Third Parties
   > Arbitration
   > Mediation
   > Outside Counsel
building things that matter
FUNDAMENTAL CONCEPTS

by Jonathan Goode

What is a Lien?
A construction lien is a charge against the interest of an owner in lands and premises which have been improved by the supply of labour, services, or materials. A lien can also secure priority of payment over the rights of conveyances, mortgages or other agreements that may affect an owner’s interest in the premises. In the Province of Ontario, the Construction Lien Act (the “CLA”) provides for a statutory lien remedy which is available to any person who supplies services or materials to a construction project in accordance with the relevant provisions of the CLA. As the construction lien is a creature of statute, the express provisions of CLA must be strictly complied with by any party who wishes to take advantage of them.

Section 14 of the CLA creates the lien remedy, it states that:

Creation of lien

14. (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1).

(Emphasis added)

Contained within this brief section of the CLA are a number of critical concepts and definitions, each of which must be properly understood when dealing with a construction lien. Each of the italicized terms are discussed in more detail below.

1. “person” is not defined under the CLA however any human being or corporation falls within this definition.²

2. “supply of services” is defined under s. 1(1) of the CLA to mean any work done or service performed upon or in respect of an improvement, and includes the rental of equipment with an operator, and, even where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land.

Examples of various types of services that have been found to be included in this definition are the supply of architectural and engineering drawings where these are used to further construction at the project, the supply of site supervision services and the supply of security services, to name a few.

Generally speaking, estimating services, reviewing tender documents and other clerical work which does not result in a direct enhancement to the value of the land are not included within this definition, and are therefore, not lienable.

3. “materials” is defined under s.1(1) of the CLA to mean every kind of moveable 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;
   (b) that is equipment rented without an operator for use in the making of the improvement.

4. “improvement” is defined under s.1(1) of the CLA as:
   (a) any alteration, addition or repair to the land;
   (b) 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; or

(c) the complete or partial demolition or removal of any building, structure or works on the land.

This definition of “improvement” includes recently expanded wording which was part of several amendments to the CLA provided for in the Open for Business Act, 2010.3

The amendment to subsection (b), to expressly include equipment, is a direct response to the Ontario Court of Appeal’s decision in Kennedy Electric Ltd. v. Dana Canada Corporation and Rumble Automation Inc.4 In Kennedy Electric, the Court of Appeal held that the design, build, and installation of a 100,000 square foot automotive assembly line costing $44,000,000.00, did not constitute an “improvement” pursuant to the CLA and therefore did not entitle Kennedy to register a lien in respect of the assembly line, pursuant to the CLA.

The new definition of “improvement” under the CLA would undoubtedly have entitled Kennedy Electric to lien rights in respect of its work.

In addition, clause (c) was also added to ensure that any demolition work performed in relation to an improvement would be lienable.

5. “Owner” is defined under s.1(1) of the CLA to mean any person, including the Crown, having an interest in a premises at whose request and,

(a) upon whose credit, or
(b) on whose behalf, or
(c) with whose privity or consent, or
(d) for whose direct benefit,

an improvement is made to the premises but does not include a “home buyer”;

---

3 S.O. 2010, c16 - Bill 68.
6. “Contractor” is defined under s.1(1) of the CLA to mean a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement.

7. “Contract” is defined under s.1(1) of the CLA to mean the contract between the owner and the contractor, and includes any amendments to that contract.

8. “Subcontractor” is defined under s.1(1) of the CLA to mean a person not contracting with or employed directly by the owner or an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor.

9. “Subcontract” is defined under s.1(1) of the CLA to mean any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement.

10. “Interest in the premises” – is defined under s.1(1) of the CLA to mean an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any lands or premises.

11. “Price” – price” means the contract or subcontract price,
    (a) agreed upon between the parties, or
    (b) where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract.
Section 15 of the CLA states that the right to a lien arises from the moment that a potential lien claimant supplies services or materials to an improvement:

*When lien arises*

15. A person’s lien arises and takes effect when the person first supplies services or materials to the improvement. R.S.O. 1990, c. C.30, s. 15. (Emphasis added)

Section 1(2) of the CLA further states that “materials” are supplied to an improvement when they are,

- placed on the land on which the improvement is being made;
- placed upon land designated by the owner or an agent of the owner that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or
- in any event, incorporated into or used in making or facilitating directly the making of the improvement. R.S.O. 1990, c. C.30, s. 1 (2).

Practically speaking, the combined effect of sections 15 and 1(2) is that lien rights in respect of an improvement will arise the moment that any lienable services or materials are supplied.

The CLA was intended by the legislature to create a streamlined procedure for resolving construction disputes which recognized the fact that the parties performing the work on a construction project will often not have privity of contract with the party for whose benefit the work is performed and who is ultimately responsible for making payment in respect of the work. As such, interlocutory steps are not permitted in a lien action without the consent of the Court, and lien actions are proceedings in rem, in which the ultimate remedy is the sale of the land that is subject to the lien by a Court-appointed trustee.

---

5 CLA, supra note 1 at s. 67. Section 67 states that the procedure in an action shall be as far as possible of a summary character having regard to the amount and nature of the liens in question.

6 Ibid, s.67(2), interlocutory steps have been held to include such steps as Examinations For Discovery, Production of Documents, and Motions for Security for Costs.

7 Ibid, at section 68.
Because of the in rem nature of the CLA, the statute sets out a number of provisions which take effect once lien rights have arisen in respect of a given parcel of land and which can greatly affect an owner’s ability to continue to make payments in respect of a construction project. For example, the CLA gives liens priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders as well as any mortgages taken by an owner (or any other party) to finance an improvement. As a result, lenders will often refuse to make advances under any loan agreement or mortgage taken to finance a construction project once they become aware that a construction lien has been preserved in respect of a project.

The CLA also imposes additional “notice holdback” obligations on any payer of a contract or subcontract, in certain circumstances, following the registration or delivery of a claim for lien. Where the notice holdback obligation applies, a payer of a contract or subcontract will be required to retain an amount sufficient to satisfy the entire amount of the lien. In situations where the amount of the lien is large, the notice holdback obligation can prevent a payer from being able to disperse any additional funds in respect of the project until the lien is removed from title to the premises or otherwise satisfied.

**Holdback Obligations under the CLA**

From a contractual standpoint, a construction project is generally viewed as a pyramid, with the owner occupying the top tier of the pyramid, the general contractor occupying the second tier and subcontractors and suppliers occupying the lower tiers.

---

8 *Ibid*, at s. 77.
9 *Ibid*, at s. 78.
10 Please see the discussion of Notice Holdback and Written Notice of Lien below.
Typical Construction Pyramid

As a result of this structure, an owner will not have privity of contract with most of the parties which are actually supplying the services and materials to the improvement. Conversely, most of the parties performing the work will not have privity of contract with the party that is ultimately responsible for funding the improvement, namely the owner.

The holdback obligations set out in the CLA are designed to accommodate the peculiar structure of the construction pyramid and protect the rights of those parties performing work to receive at least partial payment from parties with whom they are not in privity of contract. The CLA holdback provisions require every payer upon a contract or subcontract under which a lien may arise, to retain a holdback equal to 10% of the price of the services or materials as they are actually supplied under the contract or subcontract in respect of the improvement.\(^\text{11}\) A lien

\(^{11}\) CLA, supra note 1 at s.22.
constitutes a charge upon these holdback amounts and all amounts owed to the payer of the lien claimant’s contract or subcontract.\textsuperscript{12}

Every payor, which is identified in the \textit{CLA} as “the owner, contractor or subcontractor who is liable to pay for the materials or services supplied to an improvement under a contract or subcontract”, in the construction pyramid is required to retain a 10\% holdback from the party they have contracted with below them on the pyramid. In the simple construction pyramid set out above, the Owner will retain a 10\% holdback from the General Contractor, the General Contractor will retain a separate 10\% holdback from each of its three Subcontractors, and Subcontractor 1 will be responsible for maintaining a 10\% holdback from each of its supplier and subsubcontractor.

Given the recent amendments to the definition of “improvement” following the \textit{Kennedy Electric} decision, the scope of contracts and subcontracts which may give rise to lien rights, and thus from which a holdback must be retained, has been greatly expanded. Equipment and machinery which are essential to the intended use of a building or structure are now expressly included in the definition of improvement and thus are subject to a lien.\textsuperscript{13} Owners purchasing this type of equipment and machinery, and their suppliers may be surprised to learn that their contracts are now subject to the \textit{CLA}’s holdback provisions. Accordingly, it is important to ensure that all contracts and subcontracts are reviewed to determine if the holdback obligation applies.

In addition to the “Basic Holdback” obligation set out above, where a payer has received “written notice of lien” from a lien claimant, the payer will also be required to retain an amount sufficient to satisfy the amount of the lien for which notice has been given, in addition to the 10\% Basic Holdback amount.\textsuperscript{14} The term “written notice of lien” is defined by the \textit{CLA} to include a claim for lien and any written notice provided to the payer by a person having a lien

\textsuperscript{12} \textit{Ibid}, s.21
\textsuperscript{13} See note 4 \textit{supra}.
\textsuperscript{14} \textit{Ibid}, s.24(2).
which identifies the payer and the premises, and states the amount that the person has not been paid and is owed to the person by the payer.\(^\text{15}\)

The Holdbacks required to be retained pursuant to the \textit{CLA} are inviolate and must be strictly maintained in accordance with the statute. The statute requires that the holdback be retained until all lien rights have been satisfied, vacated or discharged from the title to the Project, or expired.\(^\text{16}\)

The expiry of liens and the options and procedures for removing liens from title are discussed in more detail below. However, where liens have been registered against title to the Premises, they must be removed from title prior to releasing the Holdback. Where no liens have been registered, the Holdback may be released once all lien rights have expired.\(^\text{17}\)

As the publication of a certificate of substantial performance for a “contract” will trigger the 45 day expiration period for all liens which may have arisen in respect of that “contract”, it is often in an Owner’s best interests to have the certificate published as soon as the site conditions and contractual terms permit.

The \textit{CLA} recognizes that contractors and subcontractors will often be required to perform additional work in respect of a contract or subcontract, following the publication of the certificate of substantial performance. In situations such as this, the payer is obligated to retain a separate 10\% “finishing” holdback in respect of all services and materials which are supplied after the date of publication of the certificate of substantial performance.\(^\text{18}\)

In furtherance of the \textit{CLA}’s goal of ensuring that those parties performing work receive at least partial payment from parties with whom they are not in privity of contract, all liens form a charge against the holdbacks required to be retained under the \textit{CLA}. As noted above, the holdback fund is inviolate, and any form of set-off against the holdback fund is expressly

\(^{15}\) \textit{Ibid}, s.1(1).

\(^{16}\) \textit{Ibid}, s.26

\(^{17}\) \textit{Ibid}, at s. 31(2) and 31 (3) – see discussion of ‘Limitations Periods under the Construction Lien Act’ below for a thorough discussion of the expiry of lien rights and the procedure for vacating and discharging liens from title and having them declared expired.

\(^{18}\) \textit{Ibid}, s.22(2).
prohibited by the \textit{CLA} for as long as the funds can be characterised as holdback funds pursuant to the statute.\footnote{Ibid, s.30.}

In situations where the holdback period expires without the registration of any construction liens, holdback funds cease to be characterised as “holdback” pursuant to the \textit{CLA}, no charge against the holdback will exist, and the holdback will merely be the balance of contract funds, against which the payer may exercise any existing right to set-off. However, where a construction lien has been registered, the holdback must be retained in strict compliance with the statute. Where the holdback is improperly released, the payer may be forced to pay the amount released, again, to any parties that have valid claims against holdback.

The \textit{CLA} recognizes that there is a finite amount of money being held at each level of the construction pyramid for the benefit of all those below it. The owner’s liability in respect of the lien of any subcontractor is thus limited to the amount of an owner’s holdback to its contractor.\footnote{Ibid, s.23(2).}

The owner’s liability in respect of the liens of any sub subcontractors, suppliers or any other parties occupying lower tiers of the construction pyramid is further limited to the lesser of the holdbacks the owner is required to retain (from its contractor) and the holdbacks required to be retained by the contractor or subcontractor from the lien claimant’s defaulting payer.\footnote{Ibid, s.23(3).} In the simple construction pyramid set out above, if the supplier had registered a lien, the maximum liability of the owner in respect of that lien would be lesser of the amount of the owner’s holdback from the general contractor or the amount of the holdback required to be retained by subcontractor 1.

\textbf{Limitations Periods under the \textit{Construction Lien Act}}

The \textit{CLA} contains many pitfalls for the inexperienced or unfamiliar lawyer. Foremost among these are the numerous limitation periods which govern the preservation, perfection, and expiry of construction liens. While the \textit{CLA} provides that a lien arises and takes effect when a person first supplies services or materials to a construction project, the lien will expire if it is not
“preserved” and then “perfected” in strict accordance with the *CLA*. These limitations periods are graphically set out in Appendix “A” to this paper.

**Expiry of Lien Rights**

The *CLA* provides that the lien of a contractor expires upon the earlier of 45 days from the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, and the date that the contract is completed or abandoned.\(^{22}\) Where there is no certification or declaration of the substantial performance of the contract in question, the lien of a contractor will expire 45 days from the date that the contract is completed or abandoned, whichever is earlier.\(^{23}\)

Subsection 2(3) of the *CLA* provides that a contract is deemed to be completed and services or materials are deemed to be last supplied to a construction project when the price of completion, correction of a known defect or last supply is not more than the lesser of 1 percent of the contract price and $1,000.00.

When determining the relevant limitation period for the expiry of the liens of “any other person” that performed work in respect of a given improvement, which will include subcontractors, suppliers, workers and trustees of a workers trust fund, section 31(3) of the *CLA* provides that the lien expires if not perfected within 45 days from the earlier of the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, the date on which the person last supplied services or materials to the project, or the date the subcontract is certified to be completed under section 33 of the *CLA*.\(^{24}\) If there is no certification or declaration of substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, the lien of “any other person” that is not a contractor, will expire upon the earlier of 45 days from the

---

\(^{22}\) *CLA*, *supra* note 1 at s.31 (2)(a)  
\(^{23}\) *Ibid* at s. 31(2)(b)  
\(^{24}\) *Ibid* at s. 31(3)(a)
date on which the person last supplied services or materials to the improvement, and the date that the subcontract is certified to be completed under section 33 of the *CLA*.  

Where a person supplies services or materials to a construction project on or before the date of substantial performance, and also after that date, subsection 31(4) of the *CLA* provides that the persons’ lien rights relating to the services or materials supplied on or before the date of substantial performance will expire without affecting any lien rights the person may have accrued after that date. Practically speaking, this permits a person to preserve a claim for lien for services or materials supplied after the date of substantial performance even though its lien for services or materials supplied prior to that date may have expired.

**Preserving the Lien**

Section 31 of the *CLA* sets out the various methods for calculating the time periods within which a lien must be preserved to prevent its expiry. For the purposes of preservation, the *CLA* differentiates between the lien of a “contractor” and the lien of “any other person”.

In order to prevent its lien rights from expiring, a lien claimant must “preserve” its lien prior to the expiration periods set out above. The *CLA* provides two distinct methods for the preservation of a lien. The method to be used depends upon whether or not the lien interest “attaches” to the premises.

Where a lien attaches to the premises, it is preserved through the registration against title of a “claim for lien” and on “Affidavit of Verification” in the land registry office where the property is situated. Since most property parcels in Ontario have been converted to the Electronic Land Titles System, registration can typically be performed electronically from the lawyer’s desktop. However, where the parcel register for the property in question has not been converted, as is

---

25 *Ibid* at s. 31(3)(b)
26 *CLA*, *supra* note 1 s.34. Note that the requirement for the registration of Affidavits of Verification has been repealed pursuant to the *Open for Business Act, 2010*. These provisions will be in force on a date to be named by the Lieutenant – Governor. In addition in *Petroff Partnership Architects v. Mobius Corp.* (2003) 29 C.L.R. (3d) 277 (Ont. Master) the Court held that an electronically registered lien, registered through the Teranet E-Registration System, is valid in the absence of a sworn paper Affidavit of Verification.
often the case with properties in rural areas, registration will require the attendance of a Conveyancer at the appropriate Land Registry Office.

Where a lien does not attach to the premises, it is preserved by giving the owner a copy of the claim for lien together with the required form of Affidavit of Verification.\textsuperscript{27} Section 16 of the CLA sets out the circumstances under which a lien will not attach to the premises. The Section states that a lien will not attach to the interest of the Crown, which includes a Crown Agency, in a premises or where the premises are a public street or highway owned by a municipality or a railway right-of-way.\textsuperscript{28} Whether or not certain premises such as colleges and universities and municipal parks are premises to which a lien will not attach has been the subject of some judicial commentary. The failure to properly preserve a lien which does not attach to the premises can be fatal to the lien’s validity.\textsuperscript{29}

Where a lien does not attach to the premises, proper preservation will constitute a charge upon the holdbacks required to be retained by the CLA, and on any additional amount owed in relation to the improvement by a payor.\textsuperscript{30}

Unless a lien is properly preserved, as set out above, it will expire.\textsuperscript{31} Once a lien expires, there is nothing that can be done to revive it.

\textit{Perfecting the Lien}

Once a lien is preserved through the registration or delivery of the claim for lien, the lien claimant is then required to “perfect” its lien in accordance with the CLA. Unlike the limitation period for preserving a lien, the time limit for perfecting a lien is not affected by a lien claimant’s position in the Construction Pyramid. Failure to properly perfect a claim for lien, like a failure to preserve it, will result in the expiry of the lien.

\textsuperscript{27} \textit{Ibid.}
\textsuperscript{28} \textit{CLA, supra note 1 s.16 (3).}
\textsuperscript{29} For example see \textit{Dirn v. Dalton Engineering & Construction Ltd.} [2004] O.J. No. 3524 (S.C.J.) where it was held that a lien will not attach to an Ontario College and \textit{Simpson v. Gateman-Milloy Landscape Contractors Ltd.} (1986) 54 O.R. (2d) 734 (H.C.) for a review of what constitutes a street or highway for the purposes of the CLA.
\textsuperscript{30} S.16 and S. 21
\textsuperscript{31} \textit{CLA, supra note 1 s.31.}
A lien will expire unless it is perfected prior to the end of the 45 day period next following the last day on which the lien could have been preserved.\textsuperscript{32} This means that if a lien is properly preserved, a lien claimant will have a total of 90 days, from the date that triggers the commencement of the 45 day time period for the preservation of the lien, to perfect its lien by commencing an action to enforce the lien.\textsuperscript{33} This concept is illustrated graphically in Appendix “A”.

The question of whether or not the lien attaches to the premises also affects the manner in which a lien is perfected. The \textit{CLA} states that, where a lien attaches to the premises, a preserved lien will only be perfected where the lien claimant commences an action to enforce the lien and then registers a certificate of action against the title to the premises.\textsuperscript{34} Where the lien does not attach to the premises, the lien claimant need only commence an action to enforce the lien,\textsuperscript{35} and registration of a certificate of action is necessary.

In each case, the proper jurisdiction for the commencement of the action to enforce the lien is the Superior Court of Justice in the area in which the premises are situate.\textsuperscript{36}

The \textit{CLA} also provides a way to perfect a lien which does not involve the lien claimant commencing its own action to enforce its lien; this is known as “sheltering”. The \textit{CLA} permits a preserved lien, in limited circumstances, to “shelter” under a perfected lien, and thus the statement of claim, of another lien claimant where the lien of that other lien claimant is in respect of the same improvement.\textsuperscript{37} the time limits within which a sheltering lien will be considered to be properly perfected are set out in Appendix “A” to this paper. The sheltering provisions are very limited in scope and only permit the sheltering lien claimant to perfect its lien in respect of

\begin{footnotes}
\item[32] \textit{Ibid}, s. 36(2).
\item[33] Because a lien is a charge “upon the interest of the Owner in the Premises improved” a lien claimant must always name the Owner in its Statement of Claim regardless of whether privity of contract exists between the Owner and the Lien Claimant. Failure to do so may result in the lien being invalidated.
\item[34] \textit{CLA}, supra note 1 s.36(3). Note that the Certificate of Action is a prescribed Form under the \textit{CLA} and is set out as Form 10 to the \textit{CLA}. S.36(3) also provides that the registration of a Certificate of Action is not required where the registration of the Claim for Lien has been ‘vacated’ from title to the Premises. The ‘vacating’ of Liens is discussed in Part 10 of this paper.
\item[35] \textit{Ibid}.
\item[36] \textit{Ibid}, s.53.
\item[37] \textit{Ibid}, s.36(4)
\end{footnotes}
the defendants and the “nature of the relief” claimed in the Statement of Claim under which the sheltering takes place.  

The CLA provisions governing sheltering are extremely complex. Where a lien claimant has failed to preserve its lien and does not meet the strict sheltering requirements set out in the CLA, its lien will be deemed to have expired. Accordingly, lien claimants should only seek to rely upon the sheltering provisions as a last resort in seeking to perfect a claim for lien.

The Two-Year Limitation Period
The final limitation period set out in the CLA is the “Two-Year Limitation Period”. Section 37(1) of the CLA 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.

It is the date on which the action is commenced, and not the date on which the certificate of action is registered against title to the premises, which establishes the commencement of the two-year limitation period. Moreover, the enforcement of the two-year limitation period is mandatory and the Court retains no jurisdiction to exercise its discretion in applying it. If the two-year limitation period expires and the appropriate steps under section 37 have not been taken, it will not matter if the parties are engaged in settlement negotiations, in the middle of mediation or arbitration, or whether they have agreed to a stay of proceedings, the lien will have been deemed to have expired. While in some circumstances the Court will then permit a lien action to be converted into a regular breach of contract action, the lien itself will have expired and no further claim against holdbacks or security posted with the Court can be maintained.

38 CLA, supra note 1, at s.36(4)(3).
39 Ibid., s.46 states that: “Where a perfected lien that attaches to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action enforce that lien…..”
It should be noted that local practices across Ontario for “obtaining an order for the trial of an action” and for “setting an action down for trial” for the purposes of section 37 of the statute, can vary greatly. Waiting until the last minute to take the appropriate steps to prevent the two-year limitation period from expiring is never advisable.

**Removing Liens from Title**

The preservation of a lien can adversely affect the rights of payors and mortgagees on a construction project. It is for this reason that the registration of a construction lien against the title to the premises on which a given improvement is being made will have the effect of freezing the payment of funds from the owner to the contractor, from the contractor to its subcontractors, and so on, all the way down the chain of payment in the construction pyramid. This refusal to make payment for services and materials being supplied to an improvement may then lead to refusals to continue with work and to the registration of additional liens for these unpaid amounts. This can have a severe impact on a project and can cause significant delays in completion.

In order to prevent the preservation of a lien from causing significant problems for the entire project, the *CLA* provides a number of different avenues for quickly clearing liens from title and permitting funds to flow or title to be passed cleanly.

**Vacating v. Discharging**

A lien can be removed from title by being vacated, discharged or released.

Vacating” a lien refers to the procedure whereby the registration of a claim for lien (and where the lien attaches to the premises, the certificate of action) is removed from title to the premises upon the payment of a statutorily defined, or other agreed upon, amount of security into Court to the credit of the lien. Where a claim for lien is vacated, the validity of the underlying lien is not affected and an action to enforce the lien may proceed in the normal course. The only change is that the lien ceases to attach to the premises or to any holdbacks which are required to be
retained pursuant to the *CLA*. The lien continues to exist, and becomes a charge upon the security posted with the Court.\(^41\)

A lien that has been “discharged” ceases to exist and cannot be revived. The discharge of a lien is irrevocable.\(^42\) For the purposes of eliminating the notice holdback requirement and allowing funds to flow on a construction project, it does not matter whether the claim for lien is vacated or discharged. In each case, the lien (together with any certificate of action) will be removed from title to the premises, or as a charge against the holdbacks, and the notice holdback requirement will no longer apply.

The *CLA* provides several avenues for vacating and discharging a lien, each of which will be discussed in more detail below.

**Vacating a Claim for Lien by Posting Security with the Court**

Pursuant to section 44 of the *CLA*, any person, regardless of whether they have an interest in the premises, may bring a motion to the Court without notice to any other person, to vacate a claim for lien and a certificate of action by posting with the Court the full amount claimed as owing in the claim for lien plus the lesser of $50,000.00 or 25 per cent of the amount claimed in the lien as security for costs.\(^43\) Section 44 is also a provision of mandatory application; where the moving party posts the required amount of security, the Court has no discretion to decline to vacate the claim for lien or certificate of action.\(^44\)

It is important to note that the procedure for bringing a section 44 motion varies considerably from jurisdiction to jurisdiction. Consideration must be given to such factors as whether or not there is a particular Judge who is assigned the task of dealing with all *CLA* motions; when that Judge is sitting and if he or she is available, and how the local Court deals with *ex parte* motions where no action has been commenced (as will often be the case when bringing a motion to

\(^{41}\) *CLA*, *supra* note 1, at s.44(6).

\(^{42}\) *Ibid*, s.48.

\(^{43}\) *Ibid*. Note that the only forms of security which will be accepted by the Court are Bank Draft, Certified Cheque payable to the Accountant of the Superior Court of Justice, or a Financial Guarantee Bond in the prescribed form

\(^{44}\) *Ibid*, section 44.
vacate a claim for lien). The Construction Lien Master’s Office of the Superior Court of Justice in Toronto has full jurisdiction to deal with section 44 motions, sits every day to deal with *ex parte* matters, and will generally entertain section 44 motions relating to non-Toronto properties, provided that any action commenced in respect of the lien has not advanced too far.

**Settlement and Registration of a Release of Lien**

Often the parties involved in a lien claim will be able to negotiate a settlement without having to incur the expense of a section 44 motion. To facilitate the expeditious settlement of lien claims, the *CLA* permits a preserved or perfected lien to be discharged by the registration of a Release of Lien in the form set out as Form 14 to the *CLA*. As noted above, once a lien has been discharged, it ceases to exist, and the notice holdback obligation in relation to that lien will cease to apply.

The structure of the construction pyramid often results in parties being forced to negotiate a settlement with other parties with whom they have no privity of contract. This situation often arises where a party in the middle of the construction pyramid has been declared bankrupt, or abandons its contract, and a party below it registers a claim for lien against the improvement. In order to address situations of this nature, the *CLA* permits an owner, contractor, or subcontractor to make a direct payment to a party having a lien, with whom it does not have privity of contract, and deems any such payments to have been a payment to the proper payer of the recipient (eg: the bankrupt party). It should be noted however that no such payment reduces the holdbacks required to be retained. Section 28 can be a valuable tool in negotiating settlements to lien claims in certain circumstances.

**Section 45 Motion to declare that a lien has expired for failure to preserve or perfection in time**

In situations where a lien has expired because it has not been properly preserved or perfected in accordance with sections 34 and 36 of the *CLA*, any person is entitled to bring a motion, without notice, to have the lien declared expired and to have the registration of the claim for lien

45 *Ibid*, at s.44.
46 *Ibid*, s.28.
vacated.\textsuperscript{47} Section 45 does not require the Court to also dismiss any action which may have been commenced in respect of the claim for lien or to vacate any related Certificate of Action, however, the Court retains a broad jurisdiction to dismiss an action, and to vacate the registration of a claim for lien and certificate of action pursuant to section 47 of the \textit{CLA}.\textsuperscript{48} In addition, if successful in moving pursuant to section 45 of the \textit{CLA}, the Court is also required to order the return of any security posted to vacate the claim for lien pursuant to section 44 of the \textit{CLA}.\textsuperscript{49}

Although the section 45 motion may be brought on an \textit{ex parte} basis, unless it is entirely evident from the facts set out in the claim for lien itself that the lien was not preserved or perfected in a timely fashion in accordance with the \textit{CLA}, the Court may refuse to proceed on an \textit{ex parte} basis and may require that notice be given to the lien claimant and to any other interested parties. A motion brought under section 45 is analogous to a motion for summary judgment. The onus is on the moving party to demonstrate that there is no “genuine issue for trial”\textsuperscript{50}

\textbf{Section 46 Motion to declare lien expired for failure to abide by the two-year limitation period}

Where a lien expires because a lien claimant has failed to set its action down for trial, or obtain an order for trial, within the 2 year limitation period set out in section 37 of the \textit{CLA}, any person may bring a motion before the Court on an \textit{ex parte} basis for an Order: declaring the lien expired, dismissing the action commenced in respect of the lien, and vacating the registration of any claim for lien or Certificate of Action registered in respect of the lien.\textsuperscript{51} The moving party

\textsuperscript{47} \textit{Ibid}, s.45. Also, Section 45 requires the Court to declare the lien “expired” in the event that proof is given that the lien was not preserved or perfected in accordance with the \textit{CLA}. The effect of having a lien declared expired is the same as having it declared discharged and for all intents and purposes an expired lien = a discharged lien.

\textsuperscript{48} \textit{Ibid}, s.47.

\textsuperscript{49} \textit{Ibid}, 45(3).

\textsuperscript{50} \textit{Demik Construction Ltd. v. Royal Crest Lifecare Group Inc.} [1994] O.J. No. 2536 (Gen Div) at para 19 followed in \textit{Polsoni Estimating and Construction Co. v. Algibon Investments Inc.} [2008] O.J. No. 3364 (S.C.J.) at para 14. Note that on January 1, 2010 the test for Summary Judgment set out in Rule 20 of the \textit{Rules of Civil Procedure} R.R.O. 1990, Reg. 194 was amended to read: “The Court shall grant summary judgment if, the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.” The Rule had previously referred to there being “no genuine issue for trial.” In addition Rule 20 was amended to allow Judges the power to weigh evidence, evaluate the credibility of a deponent, and draw inferences from evidence presented. At the time of writing the Courts have not yet pronounced on whether the new test for Summary Judgment will apply to motions brought pursuant to the \textit{Construction Lien Act}, but on the basis of \textit{Demik, supra}, it is reasonable to assume that it will.

\textsuperscript{51} \textit{Ibid}, s.37.
will be required to provide the Court with enough evidence to satisfy the Court that the action commenced in respect of the lien was not set down for trial and that no Order for trial was obtained.

The moving party must be able to satisfy the Court that there are no other actions which have been set down for trial, or in which an Order for Trial has been obtained, in which the lien in question could have been enforced. In large and complicated lien actions there will often be numerous lien claimants and, in certain circumstances, an Order for Trial obtained by any one of those other lien claimants can be enough to prevent the two-year limitation period from expiring. As is the case with a section 45 motion, where it is not extremely clear on the face of the evidence submitted to the Court that the two-year limitation period has expired, the Court retains the discretion to require the moving party to bring the motion on notice to all affected parties.
APPENDIX “A”
TIMELINES FOR REGISTRATION AND PERFECTION OF LIENS
UNDER THE CONSTRUCTION LIEN ACT

Lien Claimant

Date of First Supply

Date of Last Supply or Publication of Certificate of Substantial Performance

Lien rights will expire unless claim for lien is preserved

Lien will expire unless claim for lien is perfected

Lion will expire unless Lien Claimant sets its action down for trial or obtains an order for the trial of its action within two years of commencing its lien action

Sheltering Lien Claimant

Date of Sheltering Lien Claimant’s Last Supply

42 Days

If the Lien Claimant does not set its action down for trial or obtain an order for the trial of its action within two years of commencing its action, the Sheltering Lien Claimant’s lien will expire

Sheltering Lien Claimant’s lien rights will expire unless claim for lien is preserved

If the Lien Claimant’s lien is already perfected, then Sheltering Lien Claimant’s lien is automatically sheltered

42 Days

50 Days

SHELTERING PERIOD

Sheltering Lien Claimant’s lien rights will expire unless claim for lien is preserved
If the Lien Claimant’s lien is already perfected, then Sheltering Lien Claimant’s lien is automatically sheltered

Contact Jonathan Goode: Tel: 416 360 4733 | jgoode@torkinmanes.com
www.torkinmanes.com
TIMELINES FOR REGISTRATION AND PERFECTION OF LIENS
UNDER THE CONSTRUCTION LIEN ACT

Lien Claimant

Date of First Supply

Date of Last Supply or Publication of Certificate of Substantial Performance

Lien rights will expire unless claim for lien is preserved

Lien will expire unless claim for lien is perfected

Lien will expire unless Lien Claimant sets its action down for trial or obtains an order for the trial of its action within two years of commencing its lien action

Sheltering Lien Claimant

Date of Sheltering Lien Claimant’s First Supply

Date of Sheltering Lien Claimant’s Last Supply

45 Days

90 Days

45 Days

90 Days

SHELTERING PERIOD

Sheltering Lien Claimant’s lien rights will expire unless claim for lien is preserved. If the Lien Claimant’s lien is already perfected, then Sheltering Lien Claimant’s lien is automatically sheltered

If the Lien Claimant has not perfected its lien, then the Sheltering Lien Claimant’s lien will expire, unless it has been separately perfected

If the Lien Claimant does not set its action down for trial or obtain an order for the trial of its action within two years of commencing its action, the Sheltering Lien Claimant’s lien will expire.
A construction lien is a form of security given to contractors, subcontractors and material suppliers under the Construction Lien Act. Although the Construction Lien Act sets out the priorities amongst lien claimants, wage earners and mortgagees, one must also look to other legislation to determine where a lien claim ranks in priority to other creditors such as taxation authorities, the Canada Employment Insurance Commission, provincial Workers’ Compensation legislation and bankruptcy legislation. This paper provides an overview of the competing claims within a construction project and also summarizes an additional remedy available under the Construction Lien Act to unpaid creditors.

1. The Priority Scheme Under the Construction Lien Act

Section 77 of the Construction Lien Act provides that a lien claim generally has priority over all judgments, executions, assignments and garnishments. That section states:

The liens arising from an improvement have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders except those executed or recovered upon before the time when the first lien arose in respect of the improvement.

According to this section, where a lien arises (which happens as soon as any work starts on the land) before a judgment is executed or recovered upon, the lien claim has priority. The

---

1 R.S.O 1990, c.C.30 as amended
2 An analysis of the inter-play between the Construction Lien Act and Bankruptcy and Insolvency Act is beyond the scope of this paper.
3 Section 15 of the Construction Lien Act
reasoning behind this priority is that “the essential purpose of the lien created by the Act is to ensure that those who have contributed their services or materials towards the improvement of a premise will be entitled to claim against the premises in priority to general creditors of the owner.”

(a) Claimants of the Same Class are Equal

While section 80(1) of the Construction Lien Act provides there is no priority amongst claimants of the same class and that members of the same class rank equally and without preference in respect of any monies available for distribution, section 80 does not apply to wage earners.

With respect to competing claims amongst contractors, subcontractors and sub-subcontractors which are found to be in compliance with the Construction Lien Act, those parties rank as follows:

- Sub-subcontractors have a claim against the holdback of the subcontractor (being the primary debtor to the sub-subcontractors) in priority to the claim of the subcontractor.

- Subcontractors are entitled to be paid out of the holdback which is otherwise payable to the general contractor before the general contractor is paid on account of its own lien.

---

5 Except where it is otherwise provided by this Act,
   (a) no person having a lien is entitled to any priority over another member of the same class;
   (b) all amounts available to satisfy the liens in respect of an improvement shall be distributed ratably among the members of each class according to their respective rights; and
   (c) the lien of every member of a class has priority over the lien of the payer of that class.
   R.S.O. 1990, c. C.30, s. 80 (1).
6 “The generally accepted definition of a class of lien holders is lien holders who contract directly with or are employed by the same person.” David I. Bristow et al. Construction Builders’ and Mechanics’ Liens in Canada, 7th ed. (Toronto Carswell, 2005) at p 8-3.
7 Bristow, supra at pgs. 8-3 and 8-4
(b) Special Priority for Workers

Section 81 of the *Construction Lien Act* contains a limited priority for wage earners over all other liens. That section provides as follows and limits the priority given to the extent of 40 days’ wages:

The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the amount of forty regular-time working days’ wages. R.S.O. 1990, c. C.30, s. 81 (1).

Where monetary supplementary benefits are payable to a workers’ trust fund instead of to a worker, the trustee of the workers’ trust fund is subrogated to the rights of the worker under this Act with respect to those benefits. R.S.O. 1990, c. C.30, s. 81 (2).

Every device to defeat the priority given to workers by this section is void. R.S.O. 1990, c. C.30, s. 81 (3).

(c) The General Lien

“The concept of a general lien exists mainly to facilitate the realization of claims by persons who supply services or materials to housing subdivisions. Section 20(1) of the *Construction Lien Act* provides:

Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person’s lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials the person supplied to all the premises. (emphasis added)
Section 20(2) of the *Construction Lien Act* however provides that no general lien arises under or in respect of a contract that provides in writing that liens shall arise and expire on a lot by lot basis.\(^8\)

Section 82 of the *Construction Lien Act* applies where an unpaid trade registers a general lien while another unpaid trade registers a lien against one unsold lot within a residential subdivision.

Where for example, a subcontractor has one agreement to supply two lots and supplies $5,000 worth of concrete to each of the two building lots, it could register a claim for $10,000 against both lots in the form of a general lien. If another subcontractor only supplies lumber to one of the two lots and registers a $2,000 lien against that one lot, section 82 deals with the priority between these two claimants when the lot with two liens is sold:

Where a general lien is realized against a premises in an action in which other liens are also realized against the premises,

(a) the general lien shall rank with the other liens according to the rules of priority set out in section 80 only to the extent of,

(i) the total value of the general lien, divided by,

(ii) the total number of premises to which the person having the general lien supplied services or materials under contract or subcontract; and

(b) in respect of the balance of the general lien, it shall rank next in priority to all other liens against the premises, whether or not of the same class. R.S.O. 1990, c. C.30, s. 82.

\(^8\) Kirsh, *supra* at 56-58
In other words, if upon the sale of the one lot with the two liens there was $2,000 in sale proceeds, the concrete supplier would recover $1,428.57 while the lumber supplier would recover $571.43. If, however, the sale proceeds were $10,000, the concrete supplier would be paid $5,000, the lumber supplier would be paid $2,000 and the remaining $3,000 would be paid to the concrete supplier since it is still owed $5,000 on account of its general lien.

(d) Other “Claimants”

Beyond the *Construction Lien Act*, there are provincial statutes which also try to advance a priority claim over the claims made by construction lien claimants. For example:

- The Municipal Act (*Ontario*) makes taxes due to a municipality and costs a special lien on the land and gives that lien priority over every claim, lien and encumbrance except the Crown. For example, in *Traders Realty Ltd. v. Huron Heights Shopping Plaza*\(^{11}\) it was held that a mortgagee who paid the municipal taxes after construction liens were registered was given priority over the liens to the extent of the payment since the mortgagee was subrogated to the rights of the municipality which had priority over the lien claimants.\(^{12}\)

- The Corporations Tax Act (*Ontario*) makes taxes payable under that Act a first lien and charge upon the corporation’s property located in Ontario to the extent of the unpaid taxes together with interest, penalties and costs.

- The Workplace Safety and Insurance Act (*Ontario*) makes any amount owed under that Act a first lien upon the property of the employer used in connection with the

---

\(^9\) General Lien calculated as follows: $5000 ÷ $7000 (total value of liens against the one lot) x $2000 = $1,428.71;
\(^{10}\) Single Lien calculated as follows: $2,000 ÷ $7000 x $2000 = $571.43
\(^{11}\) Kirsh, *supra* at 234-235
\(^{12}\) Bristow, *supra* at 8-16
industry with respect to which the employer is required to make payments under the insurance plan. This claim however is subordinate to a claim for municipal taxes.¹³

2. **Priority of Mortgages and Mortgage Advances**

   The priority scheme contained in section 78 of the *Construction Lien Act* becomes important when the progress of a construction project is disrupted by the insolvency of the owner and/or refusal of the mortgagee to advance further funds and/or registration of construction liens and/or appointment of a lien trustee. When one or more of these events occur, the lien claimants and mortgagees must look to section 78 to determine their secured interest in the property and to assess the priority of their claims.

   Section 78(1) of the *Construction Lien Act* states:

   > Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner’s interest in the premises.
   
   R.S.O. 1990, c. C.30, s. 78 (1).

   The claims described in section 78 are claims for priority and are not claims for damages or request for financial payment from the lender. A lender, for example, is named as a defendant in a lien action when the claimant claims its lien has priority over the lender’s interest in the land. The lender is not named for the purpose of collecting money from that lender.

   A mortgage has priority over a lien claim only when the lender can show that its mortgage falls within the exceptions contained in section 78 of the *Construction Lien Act*. If the lender does not fall within those exceptions, the lien claim has priority over the mortgage when the time comes to distribute the proceeds arising from the forced sale of the land.

¹³ Bristow, *supra* at pgs. 8-11 and 8-12
(a) The Building Mortgage

There are two basic types of mortgages:

(i) Building Mortgages; and

(ii) Non-Building Mortgages.

A “building mortgage” is a mortgage which is taken “with the intention to secure the financing of an improvement.” All other mortgages are non-building mortgages.

Where a mortgage is found to be a “building mortgage”, then irrespective of when the mortgage was registered, the lien claimant has priority over the mortgage to the extent of any deficiency in the holdback required to be retained by the owner under the Construction Lien Act.

Whether a mortgage is a building mortgage is a question of fact and a request for information under section 39(2) of the Construction Lien Act and the response received can assist in making this determination.

Under section 39(2), a lender must provide sufficient details concerning its mortgage to enable the person who makes the request for information to determine whether the mortgage was taken for the purpose of financing the making of the improvement. In most cases, a lender will acknowledge whether its mortgage is a building mortgage in its section 39 reply letter. If the response is not clear, the lender’s commitment letter often contains a notation indicating the mortgage purpose and a request for production of the commitment letter should be made.

(b) Non-Building Mortgages Registered After the Time the First Lien Arises

Section 15 of the Construction Lien Act provides that a lien is created when the person first supplies services or materials to the improvement. That date, commonly known as “when the shovel hits the ground”, as well as the date a mortgage is registered and advanced are important in the process of determining the priority claim of the lien claimant and the lender.

14 Section 78(2) of the Construction Lien Act
A non-building mortgage registered after “the shovel hits the ground” is a subsequent mortgage and is treated on the same basis as a building mortgage. In both cases, sections 78(2) and 78(5) give special priority to the lien claimant to the extent of any deficiency in the holdback to be retained by the owner under section 22 of the *Construction Lien Act*.

Where, for example, a lender registers a collateral mortgage after construction has started but before any liens are registered, section 78(5) provides that liens arising from the improvement have priority over the collateral mortgage to the extent of any deficiency in the holdback required to be retained by the owner under section 22.

The effect of sections 78(5) and 78(6) is that a subsequent non-building mortgage loses priority to a lien claimant:

(a) to the extent of a deficiency in the holdback; and

(b) to the extent of any advances made after the preservation of a lien or after a mortgagee receives written notice of the lien.

(c) **Non-Building Mortgages Registered Before the Time the First Lien Arises**

A mortgage registered before the first supply of services or materials to the project generally has priority over all liens which may subsequently arise and is divided into two categories:

Prior Mortgage/Prior Advance; and

Prior Mortgage/Subsequent Advance.

With respect to a prior mortgage/prior advance, that mortgage priority is limited to the lesser of:

(a) the actual value of the premises at the time when the first lien arose, and

(b) the total amount of all advances made up to the time when the first lien arose.

---

15 Section 78(5) of the *Construction Lien Act*

16 Section 78(3) of the *Construction Lien Act*
For example, if the actual value of the premises at the time the first lien arose was $100,000 but only $80,000 was advanced by the lender at that time, the mortgage has priority over the lien to the extent of $80,000 only. If however, the mortgagee advanced $100,000 when the value of the land was $80,000, the mortgagee’s priority is limited to $80,000 and its claim for the remaining $20,000 is subordinate to the lien claims.¹⁷

(d) Prior Mortgage + Subsequent Advance

Section 78(4) expands the priority of the mortgagee granted under 78(3) to address the situation where a mortgage is registered prior to the time the first lien arose but where advances are made after that date. A mortgage registered before the time when the first lien arose has priority over the liens arising from the improvement to the extent of any advance made after the time when the first lien arises unless:

(a) at the time the advance was made, there was a preserved or perfected lien; or

(b) prior to the advance the lender received written notice of a lien.¹⁸

(e) Mortgage Postponements

Where a non-building mortgage is registered prior to the first supply of services or materials to the project postpones its position as “first mortgage” in favour of another lender with a “building mortgage”, the non-building mortgage will have lost the priority claim given to it under sections 78(3) and 78(4) when it comes time to distribute the sale proceeds. In other words, the non-building mortgage becomes a “second mortgage” and will only receive the balance of any sale proceeds after the holdback liability is satisfied and the building mortgage is paid. This priority scheme is contained in section 78(5) and (6) of the Land Titles Act,¹⁹ which state:

¹⁷ Kirsh, supra at 222
¹⁸ Kirsh, supra at 222-223
¹⁹ R.S.O. 1990, c.L.5
Priorities

(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

R.S.O. 1990, c. L.5, s. 78 (5).

Postponement of registered rights

(6) Upon registration of an instrument in the prescribed form, the rights of priority acquired by registration may be postponed to rights acquired or claimed under another registered instrument.

R.S.O. 1990, c. L.5, s. 78 (6).

(f) Priorities in Play

See charts at the back of this paper.

3. What to do with a Canada Revenue Agency Requirement to Pay?

“Using its constitutional taxation power, the federal government has enacted “super-priority” provisions to collect unpaid taxes and misapplied source deductions.” This “super-priority is often used by the Canada Revenue Agency ("CRA") in an attempt to have its claim rank over and above the claims of other creditors, including lien claimants and trust beneficiaries under the Construction Lien Act.

The “super-priority” claim is triggered when the CRA issues a Requirement to Pay to the primary debtor of the party in arrears (the Requirement to Pay is similar to a garnishment or

Bristow, supra at p. 8-11
direction to pay). The relevant section of the Income Tax Act (Canada) is section 224(1.2) which provides as follows:

Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act and section 11.09 of the Companies’ Creditors Arrangement Act, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment (emphasis added).

(a) to another person (in this subsection referred to as the “tax debtor”) who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor’s liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.
Definitions

(1.3) In subsection 224(1.2),

“secured creditor” means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;

“security interest” means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

“similar provision” means a provision, similar to subsection 227(10.1), of any Act of a province that imposes a tax similar to the tax imposed under this Act, where the province has entered into an agreement with the Minister of Finance for the collection of the taxes payable to the province under that Act.

The consequences of failing to comply with a Requirement to Pay are set out in that same section which states:

(4) Every person who fails to comply with a requirement under subsection 224(1), 224(1.2) or 224(3) is liable to pay to Her Majesty an amount equal to the amount that the person was required under subsection 224(1), 224(1.2) or 224(3), as the case may be, to pay to the Receiver General.
The CRA has a “super priority” claim for income tax, CPP contributions and Employment Insurance contributions deducted from employee wages. Lien claimants have generally been unsuccessful in challenging the CRA’s “super-priority” claim.

The Supreme Court of Canada in TransGas\(^2\) held that section 224(1.2) is valid legislation and that the collection of taxes is a claim in priority to the claims of construction trade creditors. The Requirement to Pay issued by the CRA in that case was given priority and the CRA was entitled to be paid in advance of the construction trade claims.\(^2\) “The situation in Transgas was somewhat unusual in that the funds withheld by the payor from the tax debtor were sufficient to satisfy the CRA’s claim and the holdbacks. As a result, the payor was allowed to pay the holdback to the lien claimants while the entitlement to the trust money proceeded through the court system.”\(^2\)

Numerous cases have been heard following the ruling made in Transgas as lien claimants continue to challenge the “super-priority” claim of the CRA. Stephen Tatrallyay in his article “Construction Insolvencies and Revenue Canada – Life After Transgas” makes the following comments for consideration:

Revenue Canada’s requirement to pay attaches to any sums of money which, except for the security interest, would be payable to the tax debtor. Frequently in construction insolvencies situations, if it were not for the security interest, nothing at all would be payable to the tax debtor.

A good example is a construction contract in which the general contractor absconds from the site leaving unfinished work, and the owner incurs a cost overrun to complete the project which is

\(^{21}\) Trans-Gas Ltd. v. Mid-Plains Contractors Ltd. (1994), 18 C.L.R. (2d) 157 (S.C.C.)
\(^{22}\) Bristow, supra at 8-14
greater than the amount of the holdback. The owner would ordinarily be entitled to set off this cost overrun as against the general contractor, if it were not for its holdback obligations and the claims of the lien claimants. Thus it is open to the owner to say that, “if it were not for the Construction Lien Act, I would owe nothing to the general contractor.”

Therefore, if in such circumstances Revenue Canada served a requirement to pay upon the owner, the owner could legitimately take the position that there is no sum of money to which the requirement to pay can attach for the only money in the owner’s hands is not money, which, except for the security interest, would otherwise be payable to the tax debtor. It would be payable to the owner to compensate him for his cost overruns.

It is noteworthy that in Dias v. MacLean, for example, the owner was permitted to reduce the amount of money in his hands by the cost overruns which he incurred to complete the work.24

In a more recent case, the above-noted comments appear to have been considered by the British Columbia Supreme Court when it was asked to determine whether lien claimants or the CRA had priority over the holdback funds.

In PCL Constructors Westcoat Inc. v. Norex Civil Contractors Inc. et al.,25 the general contractor retained a subcontractor who in turn retained various sub-subcontractors. The subcontractor was in default and the general contractor completed the work and corrected deficiencies in the work. Once these expenditures were taken into account, the general contractor took the position that no money was owed to the subcontractor. The sub-subcontractors

24 Tatrallyay, supra at 184
25 2009 BCSC 95
registered liens and sought payment of the holdback from the general contractor. The subcontractor owed the CRA money on account unremit ted employee withholdings and GST, therefore, the CRA claimed priority over the holdback funds.

In its decision, the Court made the following comments:

- When set-off is claimed, it means the amount owed under the contract, if any, is unclear and that claim must be determined before the subcontractor becomes entitled to the holdback fund. The trust only applies to monies due for “work done under the contract,” meaning work properly done, so the funds said to be held in trust are the net amount due under the contract after claims to setoff are settled.²⁶

- A contractor is required to maintain a 10% holdback fund; Sub-subcontractors have priority to this fund through the Builders Lien Act lien scheme; once their claims are satisfied, the holdback fund is payable to the subcontractor, subject to any claims to setoff from the contractor.²⁷

- It is settled law that once the subcontractor’s entitlement to the fund arises so that the fund is only charged with the liens of the sub-subcontractors, Her Majesty takes priority over them as secured creditors because of the explicit language of the ITA. There is, however, nothing suggesting that Her Majesty’s interest becomes something more than it was in the hands of the subcontractor. Until the entitlement arises, the subcontractor’s interest in the fund is a conditional right, and no more than that. When the subcontractor’s right is appropriated by Her Majesty, Her Majesty’s interest is exactly the same.²⁸

²⁶ PCL, supra at paras 53 and 54
²⁷ PCL, supra at para 56
²⁸ PCL, supra at para 63
- 16 -

- If the subcontractor would never have become entitled to the holdback fund and yet Her Majesty was allowed to claim it, the CRA would be taking money out of the hands of the contractor, not the tax debtor.\(^{29}\)

- A claim for setoff is inextricably involved in the issue of what money, if any, the contractor is entitled to.\(^{30}\)

In summary, according to the court in \textit{PCL}, where the subcontractor is not owed any money after the general contractor deducts its completion costs from the balance owing and those costs exceed the holdback, then the subcontractor and the CRA are not entitled to any payment from the contractor while the lien claimants are entitled to payment of the holdback funds.\(^{31}\) Where however the set-off claims does not exceed the holdback, the subcontractor’s and the CRA’s entitlement is equal to the amount of the holdback minus the set-off. Since the CRA’s claim takes priority over the lien claimants, it is entitled to claim any funds which the subcontractor would have been entitled to but for the claims of the sub-subcontractors.\(^{32}\)

One must always be mindful of section 30 of the \textit{Construction Lien Act} which prohibits a payor from setting off costs incurred by it against the 10\% statutory holdback. “The inviolable nature of the holdback survives as long as the holdback can be characterized as such. This characterization terminates when all the lien rights against the holdback have expired, or have been satisfied, discharged or vacated from title…When the holdback can no longer be considered holdback, section 17(3) of the Act would apply and the owner or person primarily liable would be entitled to use the funds of the defaulting contractor or subcontractor for set off purposes.”\(^{33}\)

Since the struggle for priority between lien claimants and the CRA continues, when served with a Requirement to Pay an owner or contractor may consider paying the holdback funds into Court

\(^{29}\) \textit{PCL}, \textit{supra} at para 64  
\(^{30}\) \textit{PCL}, \textit{supra} at para 65  
\(^{31}\) \textit{PCL}, \textit{supra} at para 67  
\(^{32}\) \textit{PCL}, \textit{supra} at para 67  
\(^{33}\) Duncan Glaholt and David Keeshan “The 2011 Annotated Ontario Construction Lien Act” (Toronto: Carswell) at 195
(following any claims for set-off which may reduce the funds\textsuperscript{34}) and allow the claimants and the CRA to obtain a priority determination from the Court.

Finally, the super-priority provisions may also not apply to penalties and interest, therefore, a party served with a Requirement to Pay may request the CRA identify what portion of the claim is for principal, interest and penalties.\textsuperscript{35}

4. **Breach of Trust under the Construction Lien Act**

The *Construction Lien Act* creates a statutory trust in which an owner, a contractor (being one who has a direct contract with the owner of the project) or subcontractor (being one who has a contract with the contractor) is a trustee of all funds received by it in respect of the construction project. The beneficiaries of this trust are the contractor, sub-trades and suppliers to the contractor or subcontractor.\textsuperscript{36}

Sections 7 and 8 of the *Construction Lien Act* provide that a trustee shall not use trust funds for any purpose inconsistent with the trust. More specifically, trust funds may only be used to pay the claims of persons who supplied goods and services to the improvement and who are owed money in respect of the improvement. Money impressed with the statutory trust is for the sole benefit of these trust beneficiaries until such time as all of them have been paid in full. The duty to preserve the trust fund is a continuous duty and does not expire until all the work is completed and all of the trust beneficiaries have been paid.\textsuperscript{37}

**Who are the beneficiaries of the trust and what are the trustee’s obligations?**

The unpaid debtor (plaintiff), in a breach of trust action, must satisfy the Court that on the balance of probabilities, a trust existed. More specifically, the plaintiff must show that:

\textsuperscript{34} Section 12 of the *Construction Lien Act* permits an owner to set-off against trust funds but not against the statutory holdback.
\textsuperscript{35} Tatraliyay, *supra* at 184
\textsuperscript{36} Section 8 of the *Construction Lien Act*
a) the general contractor received monies on account of its contract price for a particular project/site or in the case of an owner, the owner received funds to be used in the financing of the improvement;
b) the plaintiff supplied materials to that project/site; and
c) the general contractor or owner owes money to the plaintiff for those materials.

Once the plaintiff establishes these three elements, the provisions of sections 7 and 8 of the Construction Lien Act come into play and the defendant must show it complied with its obligations as trustees of those monies.\textsuperscript{38} Trustees are accountable for the trust money received by them and have an obligation to protect the trust fund. The onus is on the trustees to show that they have complied with their obligations by establishing that any payment(s) made out of the trust funds were to beneficiaries of the trust or were within the exceptions contained in the Construction Lien Act.\textsuperscript{39}

Once a plaintiff satisfies the three pronged test described above, the failure of the trustee(s) to account for trust funds received allows the Court to find the trustee(s) are in breach of the trust provisions contained in the Construction Lien Act.\textsuperscript{40}

To the extent a trustee is unable to account for the trust money received by it, it follows that such money has been converted to a use inconsistent with the trust provisions of the Construction Lien Act. It will be presumed that money diverted by the trustee would have been used to pay the trust


beneficiary up to the extent of the debt owed to the plaintiff. The diverted funds, up to the extent of the debt owed to the beneficiary (plaintiff) will be the measure of damages.\(^41\)

**Payments From Trust Funds**

Who is properly a trust beneficiary has been decided by the Ontario Court of Appeal in *Rudco Insulation* and *Dietrich Steel*. Both of these cases address whether payments for overhead expenses can be made from trust funds. The Court of Appeal in these cases held that only payments made for services supplied to an improvement are payments made to trust beneficiaries. Since payments by a trustee for overhead expenses and payments directly to officers and directors are not services supplied to an improvement, the Court of Appeal concluded that the recipients of the overhead expenses and payments to the officers and directors are not qualified beneficiaries. Payments for overhead costs and payments to officers and directors are payments inconsistent with the trust and any such payments made out of trust funds are made in breach of trust.\(^42\)

**Liability**

The *Construction Lien Act* specifically provides that directors and/or officers and/or persons with effective control of the trustee corporation who assent to, or acquiesce in conduct that he or she knows or reasonably ought to know amounts to a breach of trust by the corporation is liable for breach of trust. *Mens rea* is not an element of liability under section 13(1) of the *Construction Lien Act*.\(^43\)

The test contained in the *Construction Lien Act* is disjunctive – “knows or reasonably ought to know”. With respect to the second part of the test, the Court will apply an objective test of what

\(^{41}\) *RSG Mechanical v. ABCO Construction* (2001), 5 C.L.R. (3d) 294 (Ont. Sup. Ct.)

\(^{42}\) *Rudco Insulation v. Toronto Sanitary* (1998), 42 O.R. (3d) 292 (Ont. C.A.);


a reasonable person ought to know in the circumstances. Knowledge of the trust provisions of the Construction Lien Act is deemed and ignorance of the law is no defence. 44

The purpose of section 13(1) of the Construction Lien Act is to prevent the use of a shell corporation as a device for defrauding creditors. It is consistent with the purpose of the section to find the corporate vehicle and the individuals who control the corporation, liable for the breach of trust. In closely held corporations, the principals clearly direct the actions of the corporate trustee. It is sufficient to satisfy the requirements of section 13 if the individual knew or ought to have known of the constituent factual elements of the trustee corporation’s conduct. 45

**Conclusions and Practical Considerations**

A breach of trust action is a powerful remedy available to unpaid trade creditors, however, unless payors of the trust funds provide details of the dates and payments made to the creditor, the cost of pursuing a breach of trust claim can quickly exceed the debt owed. As a result, the solvency of the corporate debtor and the individuals who make decisions on behalf of the corporation should be considered in advance of pursuing a breach of trust action.

---

Distribution #1 Following Forced Sale

Facts:
- Owner did not retain holdback
- $1,000,000 in net sale proceeds
- $800,000 total value of services and materials in place resulting in $80,000 in deficiency in owner's holdback
- $1,000,000 owed to building mortgage

Distribution
1. $80,000 to subcontractors to be shared pro rata
2. $920,000 to building mortgage resulting in $80,000 loss
**Distribution #2 Following Forced Sale**

**Facts:**
- Owner is insolvent and did not retain holdback
- $2,000,000 in net sale proceeds
- $500,000 total value of services and materials in place for each contract resulting in $50,000 holdback liability to each contractor
- $500,000 owed to land mortgage
- $1,000,000 owed to building mortgage

**Distribution**
- $500,000 to land mortgage
- Each contractor has a $50,000 priority claim over the building mortgage
- $1,000,000 to building mortgage
- $350,000 left over to be shared amongst contractors on a pro rata basis
Distribution #1 Following Forced Sale

**Facts:**
- Owner retained $50,000 holdback, but abandons project
- $1,000,000 in net sale proceeds
- $800,000 total value of services and materials resulting in $80,000 holdback liability
- $1,000,000 owed to building mortgage

Distribution
1. $30,000 to subcontractors to be shared pro rata
2. $970,000 to building mortgage resulting in $30,000 loss
RECOGNIZING AND MANAGING RISK ON CONSTRUCTION PROJECTS

by Gregory D. Hersen

Project Delivery Methods and Contract Forms

There are a number of project delivery methods and contract structures that are available for an owner’s consideration when embarking upon a construction project. Each project delivery method and contract structure has its own advantages and disadvantages which must be carefully weighed by the owner when deciding how to proceed. Not all methods and forms are suited to all projects. The project delivery method chosen can have significant impact on the risk allocation between the owner and the contractor, the level of involvement of the owner in the completion of the project and on numerous other factors. The most frequently used project delivery models in Ontario are design-bid-build, design-build and construction management. Less frequently used project delivery methods are build-finance and design-build-finance-maintain. These are known as “Alternate Financing and Procurement” models which are often used by the Ontario Government in infrastructure, healthcare and similar projects. An analysis of these last two models is beyond the scope of this paper.

Design-Bid-Build

The most commonly used project delivery model is known as “design-bid-build”. With this model, the owner retains its own consultant, typically an architect or engineer, to design the project and to prepare the detailed drawings and specifications which will form the basis of the scope of work. Where the owner wants to hold a competition to obtain the best price to complete the work, the consultant might also be responsible for preparing the Bid Package or Request for Proposals (“RFP”). The consultant may also be involved in assisting the owner in analyzing bids once they are received, awarding the contract and certification for payment of work completed under the construction contract and performing other contract administration tasks.
Once the consultant has completed its design and procurement responsibilities, the owner will retain a contractor through a competitive bid process to build the project in accordance with the consultant’s detailed drawings and specifications. Under this project delivery method, the contractor will be completely responsible for the construction of the project in accordance with the consultant’s design. Accordingly, the contractor accepts the risk and responsibilities associated with the actual construction of the project. The owner and the consultant accept the risk of designing the project.

There are a number of advantages to using the design-bid-build project structure. This model is the one that is the most familiar. It is simple and well understood. The owner is able to reduce its risk by entering into single separate contracts with its consultant and its contractor. This project structure also allows for competitive bidding for a fixed scope of work. This can lead to fewer change orders and more certain price evaluation, budgeting and financing by the owner. The contractor bears the risk of cost overruns while retaining the benefit if the project is completed under budget.

Certain disadvantages must also be taken into account by an owner when considering the design-bid-build project delivery method. In particular, it will be necessary for the owner to co-ordinate the responsibilities and performance of the design consultant and the contractor. In addition, a project can take longer to complete as the entire design must be completed before construction can begin. In circumstances where the consultant also acts as the owner’s representative during the course of construction, an adversarial relationship may develop between the consultant and the contractor if problems arise on the project that relate to design, scheduling, contract interpretation or numerous other matters. Determining which party is at fault may be difficult.

The two main contract forms that are used on a design-bid-build project are the stipulated price (or “fixed price”) contract and the cost plus contract.

The stipulated price/lump sum contract is perhaps the most well known and well used form in Ontario. The stipulated price contract is an agreement between an owner and its general contractor to perform a fixed scope of work, for a fixed price, within a defined period of time.
In Canada, the most widely used standard form construction contract is the CCDC 2-2008 stipulated price contract. Under this form of contract, a contractor performs a specified scope of work for a fixed price for an owner. All work performed is inspected and certified for payment by a consultant who is named in the CCDC 2, but is retained under separate contract by the owner.

The CCDC 2 contract and others have been developed over many years by the Canadian Construction Documents Committee (“CCDC”). The CCDC is a national joint committee which is responsible for the development and publication of Canadian standard form construction contracts and other documents. The CCDC was formed in 1974. It is a committee which balances the interests of all participants in the construction pyramid. The CCDC currently includes members from Construction Specifications Canada, Royal Architectural Institute of Canada, Association of Consulting Engineering Companies-Canada, and the Canadian Construction Association. The CCDC also includes two owner representatives from each of the public and private sectors. A lawyer from the Canadian Bar Association, Construction Law Section sits as an ex-officio member of the committee. The committee works by consensus, and a contract will not be released for publication until all members agree on its contents.

**Cost Plus Contracts**

The other contract form that is frequently used in the design-bid-build project delivery method is the Cost Plus Contract. The CCDC 3 – 1998 Cost Plus Contract is a standard prime contract between an owner and contractor to perform the required work on an actual-cost basis. A percentage or fixed fee is applied to the actual cost of the work. The contract may guarantee a maximum price. The cost plus contract is similar to the stipulated price contract in that the owner will still separately retain a consultant to design the project and assist in procuring the contractor. However, a fixed price for the completion of the required scope of work is not agreed to in advance of the work being performed. Instead, the contract will entitle the contractor to be reimbursed for its actual cost of performing the work, including its overhead expenses. The contractor will also be entitled to receive a profit in addition to the actual cost of the work. This profit is calculated as a percentage of the actual cost of the work, or as a fixed fee.
With a cost-plus contract, the owner will benefit from the savings if actual construction costs are lower than the projected estimate. Unless there is a guaranteed maximum price, the owner will be responsible for any costs incurred in excess of its estimate. Cost-plus contracts are often used in circumstances where a stipulated price contract would not be appropriate because the design is incomplete, where numerous changes to the work are expected or where the project is relatively small with a low risk of cost-overrun. With this type of contract it is important that an owner regularly verify the costs actually incurred by the contractor.

The inherent risk to the owner with a cost plus contract is that the price of the work is not capped and could end up costing far more than estimated. It is therefore common to see clauses included in such a contract to limit the cost of the work, known as “Guaranteed Maximum Price” ("GMP") clauses. Often these clauses will provide monetary incentives to the contractor to perform the work for an amount that is less than the GMP and will limit, or completely prohibit, payment to the contractor for any sums in excess of the GMP. Where a GMP clause excuses the owner from making any additional payment to the contractor in excess of the GMP, at the moment the GMP is reached, the cost plus contract is treated as a stipulated price contract, and any further monetary risk above the GMP will be borne by the contractor.

Stipulated Price/Costs Plus Contract Structure:
**Design-Build**

With the design-build method of project delivery, the owner retains a single entity (the “design-builder”) to be responsible for both the design and building of the project. To facilitate a competitive procurement process, the owner will often retain its own consultant to prepare a set of project performance requirements and specifications upon which the design-builder will bid and base its design.

The collaboration and co-operation that takes place between the design professional and the contractor in the design-build project delivery model permits construction to proceed on an expedited and cost effective basis. Work is often able to commence before the final design for the project has been completed. The owner benefits from having only one point of contact and responsibility for design, construction, and the on-time completion of the project.

The structure of the design-build project model results in the owner and design-builder being able to agree upon a fixed price at the outset for the completion of the entire project. This provides greater certainty to an owner when establishing budgets and when negotiating with project financiers. However, the inability to accurately project the total price of a project before the final design has been completed can lead to significant cost allowances being built into design-build contracts.

The design-build model is often best suited to projects that involve the use of standardized designs that require minimal modification and which can be constructed to established and proven performance levels. The owner will have less involvement in the design of the project than with a design-bid-build project. For this reason, it is important to ensure that the owner and design-builder have a mutual understanding with respect to the final design, quality and performance requirements of the project before proceeding too far.

As the entire risk of designing and constructing the project is passed on to the design-builder, the risk of conflict between the designer and the builder is greatly reduced since they are, in effect, the same entity. However, with this project model the owner loses its ability to control the design process and its role, and that of its consultant, will often be limited to ensuring that the project
requirements and specifications are complied with by the design-builder. If specific design details are important, the owner may wish to consider retaining a separate design consultant to create detailed project specifications and to monitor the design-builder’s progress.

The CCA Document 14-2000 Design Build Stipulated Price Contract is a standard prime contract between owner and design-builder where the design-builder performs design services and construction under one agreement, for a single, pre-determined stipulated or fixed price.

**Design-Build Contract Structure**

![Design-Build Contract Structure Diagram]

*Construction Management*

The construction management project delivery model is similar to the design-bid-build model in that as the design and construction responsibilities for the project are separately contracted out. The primary difference between these two models is that, with construction management, a construction manager is retained by the owner to act as an advisor throughout the project. To be most effective, the construction manager should be retained as early in the design process as possible. This encourages co-operation between the designer and the contractor, and enables the construction manager to provide input into the construction cost implications of the proposed design. If may also be possible for a construction manager to begin engaging some trades or
suppliers before the design has been completed. A construction manager will typically assist the owner with schedules, developing a project budget or tendering, selection of trades and trade contract administration.

The retention of a construction manager is often a benefit for those owners without a great deal of experience in construction. The construction manager can be relied upon for its technical expertise and experience and to assist the owner with issues that may arise with the consultant, the contractor, and with scheduling and cost control measures.

Construction management projects can be divided into two distinct categories. The first is the “pure” structure, where the construction manager only provides technical advice and management services to the owner. With this model, the owner will enter into direct contracts (“trade contracts”) with each of the trades required to perform the work. The price mechanism for the trade contracts may be calculated on a stipulated price basis or a cost plus basis. Under the “Pure” form of construction management, the construction manager does not take on the risk for proper performance of the work. That risk remaining with the owner and individual trade contractors. While the construction manager will be contractually obligated to act as the owner’s agent to ensure that the project is completed in accordance with the terms of the trade contracts, the owner is basically acting as its own general contractor. The construction manager does not take on the risk for proper performance of the work. That risk remains with the owner and individual trade contractors.

The second category are those projects where, in addition to the “pure” construction management obligations referenced above, the construction manager also takes on the role of general contractor by entering into individual trade contracts for the performance of the construction work. This project delivery method is known as Construction Management - “At Risk”, as the construction manager is also taking on the risks involved with the construction of the project.

When considering the use of the construction management project delivery method, an owner should be aware of the fact that, if it enters into individual trade contracts for the completion of the work and accepts the accompanying risk for the completion of the project as a whole, the
owner is also taking on the responsibility of being the “constructor” under the *Occupational Health and Safety Act*. This can have serious consequences for the owner, including substantial fines and incarceration, if there are any accidents or breaches of this *Act* that occur on the project site. This risk can be avoided if a construction manager “At-Risk” is retained.

Using the construction management model may also result in some uncertainty on the part of an owner as to the ultimate cost of a project. The cost may not be accurately projected when the construction manager is retained as the design will often not have been completed. In addition, the final construction cost of the project will not be known until all trade contracts have been entered into.

**Construction Management - “Pure/Not-at-Risk”**
Construction Management “At-Risk”
The CCDC has recently published construction management contracts for use on both construction management “Not At Risk” and “At Risk” project delivery methods. The CCDC 5A-2010 Construction Management Contract – For Services, is a standard form contract between an owner and a construction manager in which the construction manager acts as a limited agent of the owner providing advisory services and administering and overseeing the individual contracts that have been entered into between the owner and the trade contractors.

With the CCDC 5B-2010 Construction Management Contract – For Services and Construction, the construction manager provides advisory services to the owner during the pre-construction phase and performs the required work during the construction phase. At the outset, the construction work is performed on a cost plus basis. The parties may agree to change this arrangement to a guaranteed maximum price, guaranteed maximum price plus percentage cost savings, or convert the contract into a stipulated price contract.

Contract Risk Management
Risk management in the context of a construction project begins with identifying the various risks which may arise, and then determining how those risks can be equitably distributed between the owner, the design consultant and the contractor.

In addition to the various risks that may arise relating to the form of project delivery method chosen, which have been addressed previously in this paper, different risks arise throughout the entire life of a construction project. There are risks related to the various participants involved in the project, as well as risks that arise during the design and construction phases of a project.

Risks related to the individual participants in a construction project can be extremely varied. That being said, contracting with any particular participant will generally carry its own risks. From an owner’s standpoint, the risks involved in the engagement of a consultant, a general contractor or a construction manager are very similar. These risks relate to the technical ability of the party to complete its obligations on schedule and in accordance with its contractual agreement and to the ability and commitment of the party to see the project through to
completion. The extent of these risks can be affected by the financial strength and personalities of the people involved as well as the capabilities of anyone who that party has retained to assist it in completing its contractual obligations.

The most important objectives for an owner involved in a construction project are to ensure that the project is completed on schedule, within budget (for the contracted amount) and to avoid becoming involved in disputes or other problems which may arise during construction. An owner can effectively manage these risks by ensuring that proper up-front research is conducted into the capabilities of those parties it is considering contracting with. This can be facilitated through the use of pre-qualification procedures, contract security such as performance bonds, labour and material payment bonds, letters of credit and by the use of appropriate contractual arrangements and terms.

The risk to a contractor of contracting with an owner will primarily relate to that owner’s capability or willingness to make payment for work that has been completed. Other risks to a contractor can include the risk of unreasonable expectations on the part of the owner. These expectations can relate to schedule, performance, scope of work changes and more. A contractor will want to make a profit on its contract, receive timely payment, make timely payments to its own subcontractors and suppliers, complete its project on time and avoid claims or other disputes. These objectives can be achieved and the stated risks can be minimized by working co-operatively and maintaining open communications with the owner and consultant, proper administration of the construction contract, negotiating favourable terms into the construction contract, and reliance on the applicable terms of the Construction Lien Act.

Maintaining proper and complete project records throughout the entire course of a construction project is a key risk management tool that should be employed by all parties. It is important to ensure that all agreements, instructions, directions, changes and communications are maintained through the consistent use of correspondence, minutes of site meetings, diaries, notes and memoranda, change orders, site instructions and directions, photographs, and any other appropriate documentary records.
Construction Contract Administration

Once a project delivery method has been selected, an appropriate contract has been negotiated and signed, and construction has begun, it is important that the parties remain aware at all times of their contractual rights, responsibilities and obligations in order to ensure that the project is completed on time and within budget. No matter how well drafted a contract may be, if it is not properly understood and followed by the parties, the performance of the project may be significantly impacted, the parties may incur substantial economic losses, and they may become engaged in expensive and time-consuming dispute resolution. In order to minimize these risks, there are a number of best practices which should be adopted by all parties.

Each of the parties to a contract must ensure that they read and thoroughly understand all of their rights and responsibilities under the construction contract. If the contract being signed incorporates other documents by reference, ensure that those documents are available for review, and are reviewed and accepted, by the appropriate parties.

Before finalizing or signing a construction contract it is necessary to consider the appropriate use, and potential side-effects of using high-risk clauses such as:

a) Pay if paid clauses;
b) Pay when paid clauses;
c) Liquidated damages or penalty clauses;
d) Unrealistic schedule requirements;
e) Unacceptably long payment terms;
f) Unlimited liability; and
g) Liability for consequential or special damages.

Owners should be aware of the fact that including clauses such as these in a construction contract may lead to increased project cost as contractors budget for the increased risk, and to less bidder interest in the project as contractors seek to avoid these terms.
As stated above, all parties should ensure that they maintain detailed records during the construction phase and that they adopt best practices to ensure that their record keeping requirements are complied with. Even the smallest construction project will typically involve the performance of work by several different parties. Determining who is responsible for deficiencies or incomplete work after a project is complete can be challenging.

Finally, with respect to the actual performance of the work, parties must ensure that the written contractual provisions that have been so carefully considered, negotiated and drafted are consistently followed throughout the life of the contract. Parties failing to do so run the risk that compliance with existing contractual terms will be considered by a Court to have been waived. This is particularly important when dealing with contractual terms that govern changes to the scope of work or scheduling requirements.

**Contract Security Options**

One risk management option that is available to owners, and in some circumstances, general contractors, is the use of contract security. The most commonly used form of contract security are construction surety bonds. The requirement to provide surety bonds is often used by owners as a way to pre-qualify appropriate contractors for their project. If a contractor is unable to procure the bonds required by the bid documents, it will not be able to submit a bid. By requiring surety bonds, an owner has the additional security of knowing that, in the event of default by the contractor or subcontractor named as Principal in the bonds, the Surety will step in as required and the project will proceed.

The obligations of the Principal, typically the contractor, and Surety under a surety bond are joint and several. However, the obligations of the Surety are conditional in that its obligations are secondary to those of the Principal. If the Principal fulfils its obligations towards the Obligee (the owner), the Surety’s obligations are considered to have been fulfilled as well. It is only when the Principal is in default under its contract with the Obligee, that the Surety is required to step in to fulfil its obligations in accordance with the terms of the bond.
The wording of the bond will specify the circumstances in which a Surety will be required to respond as well as the limits of the Surety’s obligations. A Surety will not simply respond to claims on demand, as is typically the case with a claim against an insurance policy. Generally speaking, before a Surety will consider making a payment under a bond, the claim will be thoroughly investigated in order to determine, among other things, whether there has actually been a default under the bonded contract by the Principal, the nature and reason for the default, and the extent to which the claimant is entitled to receive any payment from the Principal.

A bond can be distinguished from a letter of credit, which is another form of contract security that can be used. A letter of credit guarantees that, in appropriate circumstances, liquid cash will be paid to the owner on demand up to the amount of the instrument. This enables the owner to have control over the rectification of any default by the Principal. A bond is not liquid security. A surety bond guarantees performance on default by the Principal. The rectification of the default is not left solely to the owner. The Surety may arrange for the completion of the contract under default in accordance with the terms of the bond.

Because they are not liquid security, bonds are usually written for amounts up to the entire bonded contract price. Letters of credit on the other hand, tend to be for amounts representing only a small percentage (ie. 10% to 15%) of the contract price. Therefore, compared to a letter of credit, the use of a bond typically provides the Obligee and any other potential claimants under a bond with an increased likelihood that they will recover a higher percentage of their claim. While a bond limits the amount of control an Obligee can exercise in rectifying a default and does not offer the “cash on demand” feature of a letter of credit, it instead spares the Obligee the administrative headache of arranging for contract completion, which obligation usually falls to the Surety where a bond is in place.

The three main types of surety bonds available for use in relation to a construction project are:

1. Bid Bond;
2. Performance Bond; and
3. Labour and Material Payment Bond;
**Bid Bonds**

The purpose of a bid bond is to provide security to an owner in the event the contractor fails or refuses to enter into a formal construction contract upon acceptance of its bid by the owner in accordance with the bid documents. The contractor and Surety are both signatories to the bid bond.

Bid Bonds are typically required to be posted by bidders, as Principal, as part of their tender submissions to an owner. In essence, a Bid Bond represents the Surety’s promise to pay the penalty sum stipulated in the Bid Bond to the owner in the event that the bidder, if selected as the successful bidder, fails to enter into a contract with the owner for the performance of the work set out in the tender. The penalty is generally expressed as a lump sum, or a percentage of the amount of the Principal’s bid and will often contain conditions which limit the surety’s obligation to pay the full amount of the penalty to the Obligee.¹

**Performance Bonds**

A Performance Bond is intended to ensure that the specific bonded contract between the Principal, typically a general contractor, and the Obligee, the owner, is completed in accordance with its terms and conditions in circumstances where the Principal is in default of that contract.

A Performance Bond is usually issued by a Surety in conjunction with a Labour and Material Payment Bond for a project. A contractor’s ability to procure a Performance Bond will often serve as an indication to the owner that the contractor is financially stable and better able to complete the project. The specific obligations of the Surety under a Performance bond, and the limitations on the owner’s ability to make a claim, will be precisely defined in the bond’s terms and conditions.² Having a Performance Bond on a construction project also gives the Obligee the

---

¹ For example, the CCDC-220-2002 Standard Form Bid Bond obligates the owner to take all reasonable steps to mitigate the amount of excess costs incurred by way of the bidders’ default. The Surety is only obliged to pay the owner the difference in the amount of the defaulting bidders’ bid and the amount of the owner’s subsequent contract with another party to perform the work in question. This amount is limited to the penalty amount expressed in the Bond.

² For example, see the CCDC 221-2002 Standard Form Performance Bond.
security of knowing that, if the Principal defaults under the contract, the Surety will step in to rectify the situation to the extent required by the bond.

In order to engage a Surety’s obligation to respond under a Performance Bond, the terms of the CCDC form of bond require that:

(a) The contractor shall be in default under the contract;
(b) The contractor shall have been declared to be in default by the owner; and
(c) The owner has performed its obligations under the contract.

If any of one of the three preconditions are not met, the owner has no right to claim, and the Surety has no obligation to respond, under the Performance Bond.

If the contractor is in default of its contract and has properly been declared to be so in accordance with the contract terms, a written demand under the Performance Bond must be delivered to the Surety by the owner. Failure to give adequate or timely notice of the contractor’s default to the Surety can jeopardize the owner’s right to recover under a Performance Bond. Once Notice of Default has been given by the owner, the Surety is likely to wait until after the time allowed in the contract for the contractor to remedy the default has expired before taking any steps under the Performance Bond.

The CCDC standard form of Payment Bond provides that, if all of the preconditions referenced above are met, the Surety is required to promptly:

(a) Remedy the default;
(b) Complete the contract; or
(c) Re-bid the remaining work under a new contract and pay for the difference in the cost of completion; or
(d) Pay the owner the lesser of the bond amount or the owner’s proposed cost of completion, less the balance of contract funds still available.
Which of the above options the Surety chooses is at the sole discretion of the Surety. The owner has no right to dictate which of the above options the Surety must complete.

In a situation where a contractor is in default under its contract, a Surety will most often choose to obtain bids for the completion of the contract for the owner to enter into. The financial and other contractual obligations which arise under the completion contract remain those of the owner in this scenario. Once a completion contract has been awarded, the owner pays the balance of the original contract price to the completing contractor in accordance with the contract terms. The Surety is required to make any additional funds which may be required to complete the contract available to the owner under the Performance Bond, subject to the bond amount. If the cost to complete the contract exceeds the bond amount, any remaining cost is the owner’s responsibility.

**Labour and Material Payment Bond**

The purpose of a Labour and Material Payment Bond is to provide financial protection to those who supply labour, services and materials, typically subcontractors and suppliers, directly to the Principal of the bond, typically a general contractor, on a specific construction project. The owner of the project will always be named as the Obligee in a Labour and Material Payment Bond.

In the event that the general contractor defaults on its payment obligations to its subcontractors, the Labour and Material Payment Bond gives recourse to the subcontractors and suppliers to make a claim against the Labour and Material Payment Bond for the amount of their losses incurred in respect of the general contractor’s default. The Labour and Material Payment Bond will specify a limit to the Surety’s obligation to indemnify the subcontractor claimants and will always impose specific limitation periods and notice obligations on any claim made against the bond.³

---

³ For Example, the CCDC 222-2002 Standard Form Labour & Material Payment Bond makes all claims subject to the condition precedent that written notice of the claim must be given to the Surety by registered mail within 120 days of the date on which the claimant should have been paid in full. In addition, no claims may be made after the expiration of one year following the date on which the contractor ceased its work under the contract with the owner.
In addition to the obvious benefits to suppliers of labour and materials on a construction project, Labour and Material Payment Bonds are also beneficial to owners who are spared the time and expense of dealing with the defaulting contractor’s unpaid labourers and suppliers. The preservation of liens against a project may also be reduced if claims are being addressed under a Labour and Material Payment Bond. The ability of a contractor to obtain a labour and material payment bond may also be indicative to the owner of the financial stability of the contractor, which may be of assistance to the owner in ensuring that the most stable and reliable contractors are attracted to the project.

The presence of a Labour and Material Payment Bond in a project in a default situation may also encourage and enable a Surety to maintain a continuity of subtrades in remedying a default by a contractor under a performance bond. This potentially saves time and money in ensuring the completion and consistency of the contract work on a timely basis.

When dealing with surety bonds, it is of critical importance that the specific wording of the instrument and the underlying contract be reviewed in detail in order to understand the duties and obligations of the parties involved. In particular, careful note must be taken of the express notice and limitation periods set out in the bonds, as failure to comply with them can result in the denial of a claim.
Greg Hersen is a partner of the firm, and the chair of Torkin Manes' Construction Law Group. He is certified by The Law Society as a Specialist in Construction Law and practises exclusively in the area of construction law, on behalf of general contractors, public and private owners, sureties, subcontractors, suppliers, financial institutions and design professionals. Greg’s practice includes all aspects of construction contract and other document drafting and construction claims, defences and surety bond work, employing alternative dispute resolution, and advocacy at trial and appellate levels.

Greg also serves as counsel to the Lawyers’ Professional Indemnity Company, providing opinions, strategy and representation relating to the standard of practice of lawyers in Ontario confronted with construction law issues.

Greg was the first lawyer to be appointed as a member of the Canadian Construction Documents Committee (CCDC), where he participated in the revision and development of standard CCDC construction contracts, including the CCDC 2 - 2008 Stipulated Price Contracts and other documents. Greg was a member of the CCDC and its Surety Subcommittee from 1998 until 2008.

Publications

“Delay Clauses in International Construction Contracts” Canadian Section, Kluwer Law International, 2010


Speaking/Teaching Engagements

“Managing Your Risk and Protecting your Rights on Construction Projects – A Legal Perspective,” Client Seminar, June 4, 2010

(Continued)
Gregory D. Hersen

“Construction Lien Rights,” Lumbermen’s Seminar, April 22, 2010

Co-Chair “Construction Lien Primer and Update,” OBA Professional Development, October 6, 2009

“Managing Risk on Construction Projects – A Legal Perspective,” BILD Seminar, April 3, 2009


“Intro to CCDC and CCDC Documents,” OBA Professional Development, March 4, 2008


Professional Affiliations

• Past Chair, Ontario Bar Association’s Construction Law Section
• 1996 - Present: Member-at-Large, Ontario Bar Association’s Construction Law Section
• Past Ex-Officio Member, Canadian Construction Documents Committee (CCDC)
• Canadian Bar Association’s National Construction Law Section

Member:
• Toronto Construction Association
• Grand Valley Construction Association
• Construction Specifications Canada
• Advocates’ Society
• Canadian Bar Association
• Metropolitan Toronto Lawyers’ Association

Community Involvement

• Black Belt in Shotokan Karate
• T-Ball and Baseball coach with the Lawrence Park Athletic Association

Education

• Called to the Ontario Bar, 1991
• LLB, University of Windsor, 1989
• BA, University of Western Ontario, 1986
Sandra Astolfo, an associate in our Construction Law Group, practises exclusively in the area of construction law which includes prosecuting and defending lien and breach of trust claims, product liability proceedings in relation to construction projects, receiverships and lien trustees and negotiating and drafting construction contracts.

Publications


Speaking Engagements


Professional Affiliations

- Ontario Bar Association - Construction Law Section Executive, Member-at-Large
- Advocates’ Society

Education

Called to the Ontario Bar, 1995
LLB, Queen’s University, 1993
BA (Honours) in Sociology and Humanities, York University, 1990
Jonathan Goode, an associate in our Construction Law Group, practises exclusively in the area of construction law, on behalf of general contractors, public and private owners, sureties, subcontractors, suppliers, financial institutions and design professionals.

Jonathan's practice includes all aspects of construction document drafting and construction claims, defences and surety bond work, employing alternative dispute resolution, and advocacy at trial and appellate levels.

Prior to joining Torkin Manes, Jonathan practised construction law with a leading construction law boutique and at a large national firm.

Publications


Professional Affiliations

• The Law Society of Upper Canada
• Canadian Bar Association
• Advocates' Society
• Construction Law Section of the Ontario Bar Association

Education

• Called to the Ontario Bar, 2006
• LLB, Queen's University, 2005
• BA, McGill University, 2000
Tim Hutzul is Director, Legal Services and Assistant Corporate Secretary to Aecon Group Inc. (“Aecon”), Canada’s largest publicly traded construction and infrastructure company. His duties encompass a range of legal issues including corporate finance and governance, P3, mergers and acquisitions, construction and commercial contract review & negotiation, as well as litigation management. Tim is a member of the Project Review Committee, IFRS Steering Committee, and Disclosure Committee of Aecon.

Before joining Aecon (a former client), Tim practised corporate and securities law at several leading Bay Street firms where he advised both public and private company clients across a wide spectrum of industries. Earlier in his career (prior to being seduced by the glamour of construction law), Tim “dabbled” in Sports and Entertainment Law having worked with professional athletes, unions and franchises as well as film production financing.

A frequent speaker, Tim has spoken at a variety of events and conferences throughout North America, most memorably—at least in hindsight—on the same program as the Mayor of New Orleans just before Hurricane Katrina. In 2009 he was a finalist for the “Top 40 Lawyers under 40 in Canada” (sadly his last year of eligibility) and part of the team that won the Lexpert Industrial Deal of the Year Award for the acquisition of Lockerbie & Hole.

Tim earned his BA and LLB at the University of Toronto. He is the International Historian for Phi Delta Phi, International Legal Fraternity having addressed students from more than 50 law schools throughout the world on the importance of ethics and the history of Phi Delta Phi. An avid reader, Tim continues to pursue a variety of interests including the social history of the heavyweight boxing championship.
Construction Law Group

Our Construction Law Group regularly acts for general contractors, owners, sureties, construction managers, design-builders, subcontractors, suppliers, financial institutions, as well as design professionals, such as architects and engineers. We provide a full range of construction law services, including:

- bid package and contract drafting;
- contract negotiation;
- pursuing construction claims, such as claims for lien, delay claims and surety bond claims;
- defending construction claims;
- negotiating and settling construction disputes informally and through ADR and arbitration;
- representing clients at trial and appellate levels; and
- acting as counsel to LawPRO on issues relating to the standard of practice of lawyers in Ontario confronted with construction law issues.

Our Construction Law Group consists of four lawyers, two of whom have been certified by The Law Society of Upper Canada as Specialists in Construction Law.

The Group understands construction industry issues, through years of experience. We draft and negotiate construction contracts in a manner which protects our clients’ interests, while maintaining an appropriate balance of risk. We guide our clients through the complex limitation periods and rules relating to construction claims and defences. We confidently protect our clients’ interests and advance their cases in court or pursue a negotiated resolution where warranted, to achieve their desired results.

We aggressively advocate our clients’ rights, to ensure that their potential for success is maximized and the risks and costs minimized.

Please contact any lawyer listed below for further information about our Construction Law Group.

Sandra D. Astolfo ....... 416 360 4731  
Jonathan Goode ......... 416 360 4733  
Gregory D. Hersen ...... 416 777 5400  
Max Shafir, QC .......... 416 360 4737
Our Firm

Torkin Manes is a full-service law firm and offers the same areas of expertise as larger firms—but with all the advantages of a mid-size entrepreneurial law firm. We built our firm from the ground up—by understanding our clients’ business needs, by being goal and achievement oriented, by being practical, by being smart, cost effective, and responsive. When you are building and growing a firm, you know that clients want expertise, experience and service.

Many of our lawyers are highly respected and well known in the profession and in the community at large as leaders in their practice areas, as well as teachers, authors and advocates for The Law Society and the Ontario Bar Association. They have chosen to work in a collegial and close knit group with an entrepreneurial approach to the practice of law—build client relationships and build a great law firm. In the course of doing so, and from relatively modest beginnings, our clients now span a broad spectrum of organizations and industries, including a range of institutional clients, mid- to large-size business companies and various municipalities, Crown agencies and quasi-governmental bodies.

We pay close attention to building client relationships and trust. It is how we grew and it is fundamental to our firm culture. To do this, we first need to know and understand our clients’ operations and the compelling issues they face in any particular negotiation or endeavour. We know this: clients like to know the lawyers they are dealing with. They don’t like to get bounced around a law firm. They like continuity in their advisors—the core of the team stays the client’s team. They like to be kept in the loop, they like to know what is going on and they like to know what things are going to cost. They like their lawyers to be creative and innovative problem and file solvers. Clients don’t like to feel like unnecessary members of the team or to feel like we don’t care about the depth of the client’s pocket. As a result, we take pride in being efficient, getting results and not wasting time.

The lawyers at Torkin Manes share a common philosophy that building strong client relationships and understanding our clients’ needs are as critical to success as technical expertise. We also believe that consistent and dedicated service to our clients is what it takes to create these long term relationships. In that respect, we offer our clients a strong team approach and demonstrated expertise in the areas of Administrative Law, Business Law, Civil and Commercial Litigation, Commercial Real Estate, Construction Law, Corporate Finance, Family Law, Financial Services and Corporate Recovery, Health Law, Insurance Defence Litigation, Labour Relations and Employment Law, Medical Malpractice, Not-for-Profit and Charities, Restructuring, Security Realization, Tax, and Trusts and Estates.