# JCCL - 2009

## SUMMARY TABLE OF CONTENTS

Preface	V
Table of Contents	ix
Table of Cases	xxiii
Adjudication and Mandatory Payment Requirements: "Good	
Practice" or "Good Riddance"?	1
- Stephen Dennison, Q.C. and Zulfikar Khayum	1
Design Professionals' Liability for Field Services  – Bryan S. Shapiro, Q.C.	35
Global Engineering and Construction ADR: Meeting an Industry's Demand for Specialized Expertise, Innovation and	
Efficiency  – Philip L. Bruner	69
Securing Payment and Performance on International Projects	83
Construction Liens Across Canada: An Updated 2009 Survey	121
Book Review—International Construction Arbitration Handbook  - Reviewed by Duncan W. Glaholt and Harvey I. Kirsh	229

## **TABLE OF CONTENTS**

Adj	dication and Mandatory Payment Requirements: "Good
Prac	tice" or "Good Riddance"?
1.	The Right to Payment and the Right to Have It Now
	1.1 Introduction
	1.2 The Scheme of Statutory Adjudication
	1.3 The Payment Framework Established by the Act
	1.4 Standardising the Payment Provisions
	1.4.1 Introduction
	1.4.2 Establishing the Legal Entitlement
	1.4.3 The Sum Due Under the Contract
	1.4.4 The Date for Final Payment
	1.4.5 The Payment Notice
	1.5 Withholding Against a Sum Due
2.	Reform of the Right to Payment
	2.1 Introduction
	2.2 The Proposals for Payment Notices
	2.3 The Proposals for Withholding Notices
	2.4 The Potential Significance of the Changes
3.	Conclusions
	gn Professionals' Liability for Field Services
1.	Field Services—The Problem
2.	Field Services—The Definition
3.	Field Services—Why So Many Claims?
4.	Field Services—The Claims Analysis
	4.1 Inappropriate Definition of Field Services
	4.2 Contractor's Construction Methods
	4.3 Inappropriate Field Service Fees
	4.4 Delayed Identification and Quantification of Contract
	Deviations
5.	Field Services—The A/E as Certifier
6.	Field Services—The Professional and Construction Contracts
7.	Conclusions
App	endix "A"—A/E Loss Control and Risk Management Checklist
App	endix "B"—The A/E's Lament
۵.,	
	al Engineering and Construction ADR: Meeting an Industry's
	and for Specialized Expertise, Innovation and Efficiency
1.	Introduction
2.	The Ten ADR Options
	2.1 Informal Discussions: The "Hot Tub" Approach
	2.2 Structured Negotiations
	2.3 Mediation
	2.4 Conciliation
	2.5 Standing Project Neutral

#### x CCCL JOURNAL 2009

	2.6	Standir	ng Dispute Review Board
	2.7		Determination
	2.8		cation
	2.9		rials/Mini-Arbitrations
	2.10		tion
	3.	Conclu	sion
Secu	ıring P	ayment	and Performance on International Projects
1.			
2.	Discu	ussion	
	2.1	Letters	of Credit
		2.1.1	Introduction
		2.1.2	Terminology
		2.1.3	Theoretical Foundation
		2.1.4	Stand-By Letters of Credit
		2.1.5	Clean/First Demand Letters of Credit
		2.1.6	Documentary Letters of Credit
		2.1.7	The Principles of Independence (or Autonomy) and
			Strict Compliance
		2.1.8	The Fraud Exception
		2.1.9	Uniform Rules for Letters of Credit
	2.2	Bonds	
		2.2.1	Use of Surety Bonds on International Construction
			Projects
		2.2.2	Types of Surety Bonds
		2.2.3	Bond Provisions
		2.2.4	Surety's Right to Investigate
	2.3		Bond or Stand-By Letter of Credit?
	2.4		age
		2.4.1	Introduction
		2.4.2	Common Practice
		2.4.3	Warranty Retainage
		2.4.4	Release of Retainage
		2.4.5	Benefits
		2.4.6	
		2.4.7	Opposition to Retainage
	2.5		aws
	2.6		Company Guarantees
	2.0		
		2.6.1	What are They and When are They Used?
		2.6.2	Common Provisions Contained in Parent Company
		262	Guarantees
	2.7	2.6.3	Enforcement of Parent Company Guarantees
	2.7		ntractor Default Insurance
		2.7.1	Introduction
		2.7.2	Typical Coverage
		2.7.3	Comparison of SDI and Surety Bonds
		2.7.4	Advantages and Disadvantages of SDI
3.	Conc	lusion	

Con	struct	ion Liens Across Canada: An Updated 2009 Survey
1.	Intro	oduction
Albe	erta	
11100	1.	What is the name of the lien legislation in Alberta?
	2.	Who is entitled to claim a lien?
	3.	Does the Act bind the provincial Crown?
	4.	Is there a minimum amount for which a lien may be claimed?
	5.	Is there a lien for interest?
	6.	Are there circumstances for which a lien claim may not be available?
	7.	What is the holdback amount?
	8.	How is the holdback calculated?
	9.	Who must retain a holdback, and specifically how is this done?
	10.	For how long must the holdback be retained?
	11.	Is set-off against holdback permitted?
	12.	How long does a lien claimant have to preserve a lien?
	13.	What is a "prevenient arrangement", and how does it affect
		lien rights?
	14.	What is the procedure for preserving/registering a lien?
	15.	How long does a lien claimant have to commence a lien action, and what procedural steps must be taken?
	16.	What may be included in a lien action, and what may not be included?
	17.	How does a lien action differ from any other court action?
	18.	What about priorities?
	19.	What about trust funds?
	20.	Are there any limitation periods to be concerned about with respect to trust fund claims?
	21.	Is a set-off against trust funds permitted?
	21.	Does the lien legislation deal with the consolidation of a
	<i>44.</i>	number of lien actions?
	23.	What rights of information are available to lien claimants, trust
	43.	fund claimants, owners and mortgagees?
	24.	Where a lien attaches to a property that is destroyed (e.g., by
	∠+.	fire), how does the Act deal with insurance proceeds?
	25.	Is a lien claimant entitled to assign his/her lien rights?
	25. 26.	In general terms, what is the practice and procedure for
	20.	enforcing a lien claim, from the commencement of a lien action to trial?
	27	In which court, and before which judicial officer, are lien trials
	27.	usually held?
	28.	What "extraordinary remedies" may be available under the
	۷٥.	what extraordinary remedies may be available under the

#### xii CCCL JOURNAL 2009

29.	How does the existence of a labour and material payment bond
30.	affect lien rights?
ish Co	olumbia
1.	What is the name of the lien legislation in British Columbia?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
5.	Is there a lien for interest?
6.	Are there circumstances for which a lien claim may not be
•	available?
7.	What is the holdback amount?
8.	How is the holdback calculated?
9.	Who must retain a holdback, and specifically how is this done?
	, no must remin a nerocuent, and specifically no viscous and conc
10.	For how long must the holdback be retained?
11.	Is set-off against holdback permitted?
12.	How long does a claimant have to preserve/register a lien?
13.	What is a "prevenient arrangement", and how does it affect
10.	lien rights?
14.	What is the procedure for preserving/registering a lien?
15.	How long does a claimant have to commence a lien action, and
4.6	what procedural steps must be taken?
16.	What may be included in a lien action, and what may not be included?
17.	How does a lien action differ from any other court action?
18.	What about priorities?
19.	What about trust funds?
20.	Are there any limitation periods to be concerned about with
2.1	respect to trust fund claims?
21.	Is a set-off against trust funds permitted?
22.	Does the Act deal with the consolidation of a number of lien actions?
23.	What rights of information are available to lien claimants, trust
	fund claimants, owners and mortgagees?
24.	Where a lien attaches to a property that is destroyed (e.g., by
	fire), how does the Act deal with insurance proceeds?
25.	Is a lien claimant entitled to assign its lien rights?
26.	In general terms, what is the practice and procedure for enforcing a lien claim, from the commencement of a lien
	action to trial?
27.	In which court, and before which judicial officer, are lien trials usually held?
28.	What "extraordinary remedies" may be available under the
	Act?

#### TABLE OF CONTENTS xiii

29.	How does the existence of a labour and material payment bond
30.	affect lien rights?
30.	now does all arbitration clause in a contract affect hen rights?
Manitoba	
1.	What is the name of the lien legislation in Manitoba?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
5.	Is there a lien for interest?
6.	Are there circumstances for which a lien claim may not be available?
7.	What is the holdback amount?
8.	How is the holdback calculated?
9.	Who must retain a holdback, and specifically how is this done?
<i>)</i> .	who must retain a nordouck, and specifically now is and done.
10.	For how long must the holdback be retained?
11.	Is set-off against holdback permitted?
12.	How long does a lien claimant have to preserve a lien?
13.	What is a "prevenient arrangement", and how does it affect lien rights?
14.	What is the procedure for preserving/registering a lien?
15.	How long does a lien claimant have to commence a lien action, and what procedural steps must be taken?
16.	What may be included in a lien action, and what may not be included?
17.	How does a lien action differ from any other court action?
17.	What about priorities?
16. 19.	What about trust funds?
20.	Are there any limitation periods to be concerned about with
20.	respect to trust fund claims?
21.	Is a set-off against trust funds permitted?
22.	Does the lien legislation deal with the consolidation of a
22.	number of lien actions?
23.	What rights of information are available to lien claimants, trust
23.	fund claimants, owners and mortgagees?
24.	Where a lien attaches to a property that is destroyed (e.g., by
27.	fire), how does the Act deal with insurance proceeds?
25.	Is a lien claimant entitled to assign his/her lien rights?
26.	In general terms, what is the practice and procedure for
20.	enforcing a lien claim, from the commencement of a lien action to trial?
27.	In which court, and before which judicial officer, are lien trials
21.	usually held?
28.	What "extraordinary remedies" may be available under the
20.	Act?
	1 100.

#### xiv CCCL JOURNAL 2009

29.	How does the existence of a labour and material payment bond
20	affect lien rights?
30.	How does an arbitration clause in a contract affect lien rights?
New Bruns	swick
1.	What is the name of the lien legislation in New Brunswick?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
5.	Is there lien for interest?
6.	Are there circumstances for which a lien may not be available?
7.	What is the holdback amount?
8.	How is the holdback calculated?
9.	Who must maintain a holdback, and specifically how is this
	done?
10.	For how long must the holdback be retained?
11.	Is a set off against holdback permitted?
12.	How long does a claimant have to preserve/register a lien?
13.	What is a "prevenient arrangement", and how does it affect lien rights?
14.	What is the procedure for preserving/registering a lien?
15.	How long does a claimant have to commence a lien action and
	what procedural steps must be taken?
16.	What may be included in a lien action and what may not be included?
17.	How does a lien action differ from any other court action?
18.	What about priorities?
19.	What about trust funds?
20.	Are there any limitation periods to be concerned about with respect to trust fund claims?
21.	Is a set off against trust funds permitted?
22.	Does the lien legislation deal with the consolidation of a number of lien actions?
23.	What rights of information are available to lien claimants, trust
23.	fund claimants, owners and mortgagees?
24.	Where a lien attaches to a property that is destroyed (e.g., by
۷4.	fire), how does the Act deal with insurance proceeds?
25.	Is a lien claimant entitled to assign his/her lien rights?
25. 26.	In general terms, what is the practice and procedure for
۷٥.	enforcing a lien clam from the commencement of a lien action
27	to trial?
27.	In which court and before which judicial officer are lien trials usually held?
28.	What "extraordinary remedies" may be available under the Act?

#### TABLE OF CONTENTS xv

29.	How does the existence of a labour and material payment bond
• •	affect lien rights?
30.	How does an arbitration clause in a contract affect lien rights?
Newfound	land and Labrador
1.	What is the name of the lien legislation in Newfoundland?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
5.	Is there a lien for interest?
6.	Are the circumstances for which a lien claim may not be
0.	available?
7.	What is the holdback amount?
8.	How is the holdback calculated?
9.	Who must maintain a holdback, and specifically how is this
<i>)</i> .	done?
10.	For how long must the holdback be retained?
11.	Is set-off against holdback permitted?
12.	How long does a claimant have to preserve/register a lien?
13.	What is a "prevenient arrangement" and how does it affect lien
13.	rights?
14.	What is the procedure for preserving/registering a lien?
15.	How long does a claimant have to commence a lien action, and
13.	what procedural steps must be taken?
16.	What may be included in a lien action and what may not be
10.	included?
17.	How does a lien action differ from any other court action?
18.	What about priorities?
19.	What about trust funds?
20.	Are there any limitation periods to be concerned about with
20.	respect to trust fund claims?
21.	Is a set-off against trust funds permissible?
22.	Does the lien legislation deal with the consolidation of a
22.	number of lien actions?
23.	What rights of information are available to lien claimants,
-2.	owners and mortgagees?
24.	Where a lien attaches to a property that is destroyed (e.g., by
	fire), how does the Act deal with insurance proceeds?
25.	Is a lien claimant entitled to assign his/her lien rights?
26.	In general terms, what is the practice and procedure for
20.	enforcing a lien claim, from the commencement of a lien
	action to trial?
27.	In which court, and before which judicial officer, are lien trials
21.	usually held?
28.	What "extraordinary remedies" may be available under the
20.	Act?

#### xvi CCCL JOURNAL 2009

29.	
20	affect lien rights?
30.	How does an arbitration clause in a contract affect lien rights?
Nova Sco	tia
1.	What is the name of the lien legislation in Nova Scotia?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
5.	Is there a lien for interest?
6.	Are there circumstances for which a lien claim may not be
	available?
7.	What is the holdback amount?
8.	How is the holdback calculated?
9.	Who must retain a holdback, and specifically how is this done?
· ·	who must retain a nordottek, and specifically now is ans done.
10.	
11.	
12.	
13.	
13.	lien rights?
14.	
15.	
13.	and what procedural steps must be taken?
16.	* *
10.	included?
17.	
18.	· · · · · · · · · · · · · · · · · · ·
16. 19.	•
20.	
20.	to trust fund claims?
21.	
22.	Does the lien legislation deal with the consolidation of a number of lien actions?
22	
23.	· · · · · · · · · · · · · · · · · · ·
2.4	fund claimants, owners and mortgagees?
24.	T T 3
25	fire), how does the Act deal with insurance proceeds?
25.	
26.	<b>6</b>
	enforcing a lien claim, from the commencement of a lien
	action to trial?
27.	J
•	usually held?
28.	
	Act?

#### TABLE OF CONTENTS xvii

	29.	How does the existence of a labour and material payment bond	
	30.	affect lien rights?  How does an arbitration clause in a contract affect lien rights?	182
			182
Onta	ırio		183
	1.	What is the name of the lien legislation in Ontario?	183
	2.	Who is entitled to claim a lien?	183
	3.	Does the Act bind the provincial Crown?	183
	4.	Is there a minimum amount for which a lien may be claimed?	
	5.	Is there a lien for interest?	184 184
	6.	Are there circumstances for which a lien claim may not be	10-
	0.	available?	184
	7.	What is the holdback amount?	184
	8.	How is the holdback calculated?	184
	9.	Who must retain a holdback and, specifically, how is this done?	184
	10.	For how long must the holdback be retained?	185
	10.	How long does a lien claimant have to preserve a lien?	185
	12.	Is set-off against holdback permitted?	186
	13.	What is a "prevenient arrangement", and how does it affect	100
	13.	lien rights?	186
	14.	What is the procedure for preserving/registering a lien?	186
	15.	How long does a lien claimant have to commence a lien action,	100
	13.	and what procedural steps must be taken?	188
	16.	What may be included in a lien action, and what may not be	
		included?	188
	17.	How does a lien action differ from any other court action?	189
	18.	What about priorities?	190
	19.	What about trust funds?	192
	20.	Are there any limitation periods to be concerned about with	
		respect to trust fund claims?	192
	21.	Is a set-off against trust funds permitted?	192
	22.	Does the lien legislation deal with the consolidation of a	102
	22	number of lien actions?	193
	23.	What rights of information are available to lien claimants, trust fund claimants, owners and mortgagees?	193
	24.	Where a lien attaches to a property that is destroyed (e.g., by	193
	24.	fire), how does the Act deal with insurance proceeds?	194
	25.	Is a lien claimant entitled to assign his/her lien rights?	194
	25. 26.	In general terms, what is the practice and procedure for	194
	20.	enforcing a lien claim, from the commencement of a lien	
		action to trial?	194
	27.	In which court, and before which judicial officer, are lien trials	194
	<i>∠1</i> .	usually held?	195
	28.	What "extraordinary remedies" may be available under the	1).
	20.	Act?	105

### xviii CCCL JOURNAL 2009

2	9. How does the existence of a labour and material payment bond
2	affect lien rights?
3	O. How does an arbitration clause in a contract affect lien rights?
	Edward Island
1	· · · · · · · · · · · · · · · · · · ·
	Island?
2	
3	r
4	. Is unere a minimum amount for which a new may be common a
5	. Is there a lien for interest?
6	
O	available?
7	
8	
9	
,	done?
1	0. For how long must the holdback be retained?
	Is a set off against holdback permitted?
	2. How long does a claimant have to preserve a lien?
-	3. What is a "prevenient arrangement", and how does it affect
	lien rights?
1	4. What is the procedure for preserving/registering a lien?
	5. How long does a claimant have to commence a lien action, and
	what procedural steps must be taken?
1	6. What may be included in a lien action, and what may not be
	included?
1	7. How does a lien action differ from any other court action?
	8. What about priorities?
	9. What about trust funds?
	O. Are there any limitation periods to be concerned about with
_	respect to trust fund claims?
2	Is a set-off against trust funds permitted?
	2. Does the lien legislation deal with the consolidation of a
_	number of lien actions?
2	3. What rights of information are available to lien claimants, trust
_	fund claimants, owners and mortgagees?
2	4. Where a lien attaches to a property that is destroyed (e.g., by
_	fire), how does the Act deal with insurance proceeds?
2	5. Is a lien claimant entitled to assign his/her lien rights?
	6. In general terms, what is the practice and procedure for
_	enforcing a lien claim, from the commencement of a lien
	action to trial?
2	7. In which court, and before which judicial office, are lien trials
	neually held?

#### TABLE OF CONTENTS xix

28.	What "extraordinary remedies" may be available under the
	Act?
29.	How does the existence of a labour and material payment bond
20	affect lien rights?
30.	How does an arbitration clause in a contract affect lien rights?
ec	
1.	What is the name of the lien legislation in Quebec?
2.	Who is entitled to claim a lien?
3.	Does the Act bind the provincial Crown?
4.	Is there a minimum amount for which a lien may be claimed?
_	T. d
	Is there a lien for interest?
6.	Are there circumstances for which a lien claim may not be available?
7.	What is the holdback amount?
	How is the holdback calculated?
	Who must retain a holdback, and specifically how is this done?
<i>/</i> ·	who must retain a holdotex, and specifically now is this done.
10.	For how long must the holdback be retained?
11.	Is set-off against holdback permitted?
12.	How long does a lien claimant have to preserve a lien?
13.	What is a "prevenient arrangement", and how does it affect
	lien rights?
14.	What is the procedure for preserving/registering a lien?
15.	How long does a lien claimant have to commence a lien action,
	and what procedural steps must be taken?
16.	What may be included in a lien action, and what may not be
	included?
17.	How does a lien action differ from any other court action?
18.	What about priorities?
19.	What about trust funds?
20.	Are there any limitation periods to be concerned about with
	respect to trust fund claims?
21.	Is a set-off against trust funds permitted?
22.	Does the lien legislation deal with the consolidation of a
	number of lien actions?
23.	What rights of information are available to lien claimants, trust
	fund claimants, owners and mortgagees?
24.	Where a lien attaches to a property that is destroyed (e.g., by
	fire), how does the Act deal with insurance proceeds?
25.	Is a lien claimant entitled to assign his/her lien rights?
26.	In general terms, what is the practice and procedure for
	enforcing a lien claim, from the commencement of a lien
	action to trial?
27.	In which court, and before which judicial officer, are lien trials
	usually held?
	29. 30. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26.

#### xx CCCL JOURNAL 2009

	28.	What "extraordinary remedies" may be available under the Act?
	29.	How does the existence of a labour and material payment bond
	20	affect lien rights?
	30.	How does an arbitration clause in a contract affect lien rights?
Sas	katchev	wan
	1.	What is the name of the lien legislation in Saskatchewan?
	2.	Who is entitled to claim a lien?
	3.	Does the Act bind the provincial Crown?
	4.	Is there a minimum amount for which a lien may be claimed?
	5.	Is there a lien for interest?
	6.	Are there circumstances for which a lien claim may not be available?
	7.	What is the holdback amount?
	8.	How is the holdback calculated?
	9.	Who must retain a holdback, and specifically how is this done?
	10.	For how long must the holdback be retained?
	10.	Is set-off against holdback permitted?
	12.	How long does a lien claimant have to preserve a lien?
	13.	What is a "prevenient arrangement", and how does it affect
	13.	lien rights?
	14.	What is the procedure for preserving/registering a lien?
	15.	How long does a lien claimant have to commence a lien action, and what procedural steps must be taken?
	16.	What may be included in a lien action, and what may not be
	17.	included?  How does a lien action differ from any other court action?
	18.	What about priorities?
	19.	What about trust funds?
	20.	Are there any limitation periods to be concerned about with respect to trust fund claims?
	21.	Is a set-off against trust funds permitted?
	22.	Does the lien legislation deal with the consolidation of a
	22	number of lien actions?
	23.	What rights of information are available to lien claimants, trust fund claimants, owners and mortgagees?
	24.	Where a lien attaches to a property that is destroyed (e.g., by
	۷٦.	fire), how does the Act deal with insurance proceeds?
	25.	Is a lien claimant entitled to assign his/her lien rights?
	26.	In general terms, what is the practice and procedure for
	20.	enforcing a lien claim, from the commencement of a lien
		action to trial?
	27.	In which court, and before which judicial officer, are lien trials
		usually held?

	TABLE OF CONTENTS	xxi
28.	What "extraordinary remedies" may be available under the	
	Act?	227
29.	How does the existence of a labour and material payment bond	
	affect lien rights?	227
30.	How does an arbitration clause in a contract affect lien rights?	
		227
Book Review—International Construction Arbitration Handbook		