ARTICLES

IX. CONSTRUCTION AND BUILDERS' LIEN

WHO IS ENTITLED TO MAKE A LIEN CLAIM
March 7, 2002 David I. Bristow, Q.C.
The Canadian Institute, Construction Superconference

WHO IS ENTITLED TO MAKE A LIEN CLAIM

by
David I. Bristow, Q.C.

The Canadian Institute
Construction Superconference
Thursday, March 7, 2002

Montreal Ottawa Toronto Edmonton Calgary Vancouver

WHO IS ENTITLED TO MAKE A LIEN CLAIM

Introduction and Interpretation of the Act

In interpreting the provisions of the *Construction Lien Act* of Ontario, and indeed in all of the common law provinces, it must be remembered that the Act is to be strictly interpreted as to who is entitled to a lien. Once it is found there is entitlement to a lien the rules respecting the rights conferred under the Act to the lien claimant are liberally construed.

> Clarkson Co. v. Ace Lumber Ltd. [1963] S.C.R. 110 at pg. 114-15
>
> 1246798 Ontario Inc. v. Sterling, 1246798 Ontario Inc. v. Sterling (1999) 46 O.R. (3d) 72, 49 C.L.R. (2d) 218 (Quinn J.).

The strict interpretation principle seems to be recited by the Courts when they are not going to allow a lien as in the Clarkson and 1246798 Ontario Inc. cases. When the court allows the lien claim as a rule the strict construction principle is never mentioned.

On the other hand if the Courts wish to find for the lien claimant they usually state that the whole object under the *Construction Lien Act* is to prevent the owners of lands whatever their estate in them from getting the labour and capital of the lien claimants without compensation.

> *Boomars Plumbing & Heating Ltd. v Marogna Bros. Enterprises Ltd* (1988), 51 D.L.R. (4th) 13 at p.20 (B.C.C.A.)
>
> Macklem & Bristow, "Construction Mechanics Liens in Canada", 6th Edition, p. 1-3
>
> McGuiness, "Construction Lien Remedies in Ontario", 2d Edition, pp. 62 and 63.
>
> *Stirn v. Vancouver Arena Co. Ltd.* (1932) 2 W.W.R. 651 at p.659 (B.C.C.A.)

In this paper each section of the *Ontario Construction Lien Act* pertaining to entitlement will be reviewed. The pertinent sections are as follows:

> 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).
>
> 1(1) "improvement" means:
>
> (a) any alteration, addition or repair to, or
>
> (b) any construction, erection or installation on,
>
> any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning; ("amélioré")
>
> "land" includes any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement; ("bien-fond")
>
> "materials" means every kind of movable 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; ("matériaux")

1(2) When materials supplied

For the purposes of this Act, materials are supplied to an improvement when they are:

(a) placed on the land on which the improvement is being made;

(b) 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

(c) 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).

1(1) "supply of services" means any work done or service performed upon or in respect of an improvement, and includes,

(c) the rental of equipment with an operator, and

(d) 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,

and a corresponding expression has a corresponding meaning; ("prestation de services")

It is in most cases useful to review the dictionary definition of the key words in the sections, some of which are as follows:

"Improvement" is defined as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labour and capital, and intended to enhance its value, beauty or utility or to adapt it for new and further purposes".

Black's Law Dictionary, 6th Edition (Minnesota: West Publishing Co. 1990, at p. 757.

"Affix" is defined as "to attach, add to, or fasten on permanently".

Black's Law Dictionary, 6th Edition (Minnesota: West Publishing Co. 1990, at p. 60.

"Alteration" is defined as "variation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity".

Black's Law Dictionary, 6th Edition (Minnesota: West Publishing Co. 1990, at p. 77.

"Addition" is defined as "the action or process of adding; that which is added".

The Shorter Oxford English Dictionary, 3rd Edition (Oxford: Clarendon Press, 1991) at p. 22.

"Enhanced" is defined as "made greater, increased".

Black's Law Dictionary, 6th Edition (Minnesota: West Publishing Co. 1990, at p. 550.

"Erection" is defined as "the act or an instance of erecting; the state of being erected; a thing that is erected or built up, esp. a building or structure".

The Canadian Oxford Dictionary, (Ontario: Oxford University Press, 1998), at p. 472.

"Installation" is defined as "the action of setting up or fixing in position for service or use (machinery, apparatus, etc.); a mechanical apparatus set up or put in position for use"

The Shorter Oxford English Dictionary, 3rd Edition (Oxford: Clarendon Press, 1991) at p. 1084.

What is an "improvement"?

The ability to place a valid lien upon land usually involves an analysis of the type of materials or services provided. However, there are several issues relating to the type of project itself, which can limit or prevent a lien from attaching to the premises. Such issues generally arise in the context of whether the project is an improvement within the meaning of the Act. An analysis of sections 14(1), the definition section 1(1), and section 1(2) is therefore essential. The case law that has considered the issues relating to improvements is as conflicting and varied as other areas of the Act.

The case law on what is an improvement falls into three main categories:

1. Is the project in the nature of a fixture on the land?

2. What is the nexus between the services or materials supplied and the project, both in terms of time and the work undertaken?

3. Has the work or service enhanced the value of the land?

Is the project in the nature of a fixture on the land?

The guiding principle is that a project must not be a chattel and must instead be a fixture to the land in order for suppliers of services and materials to have a valid lien. However, this principle is of course much easier to apply in the abstract than in the varied number of situations that can arise in industrial and commercial settings.

For example, portable schoolrooms which rested upon cinder blocks and concrete slabs were held not to be improvements. The absence of water or sewage facilities was noted as a factor in determining that the portables were not fixtures

Re Inesco Ltd. (1986), 20 C.L.R. 1 (Ont. S.C.).

However, the integration of an item into the land or a building on the land will also not necessarily lead to the conclusion that a project is a fixture. Laundry facilities which were hooked up to the plumbing in a premises were found not to be improvements to the land and were not lienable: Query how this decision

contrasts to the general real estate principle that appliances in a house are considered to be included in the sale of the house?

Hubert v. Shinder, [1952] O.W.N. 146 (C.A.).

While the hook-up of laundry facilities did not permit a lien, the installation of cabinets and counters was sufficient for them to be considered a fixture and an improvement. Although the cabinets were removable, the Court held that it was intended that they were going to become part of the building.

Levan Millwork Ltd. v. *Larken Industries Ltd.* (1989) 37, C.L.R. 78 (B.C.S.C.).

The removeability of an items of even very heavy machinery or equipment can lead to the conclusion that no lien attaches. For example a water cooling system installed in a factory was held not lienable.

Baltimore Aircoil of Canada Inc. v. *Process Cooling Systems Inc.* (1993), 16 O.R. (3d) 324 (Gen. Div.)

A 2.5 million pound paper making machine (for which the building was constructed around it) was similarly held not to be a lienable item.

Beloit Canada Ltd. v. *Fundy Forest Industries Ltd* (1981), 127 D.L.R. 3(d) 320 (N.B.C.A.)

However, at least one Court has held, on a summary judgment motion, that whether an item of large equipment or machinery is an improvement, even if it could be physically removed, may depend on a practical consideration of the economics and physical aspects of removal. Whether the item could be used at another site (if it could be removed) was similarly an issue for trial. On that case the machinery was a large ore bridge that ran on rails which was used for unloading iron ore from ships at the Dofasco plant in Hamilton.

Dominion Bridge Inc. v. *Noell Stahl-Und Machinebau GMGH and Dofasco Inc.* (unreported, October 12, 1999, Ont. S.C.J., Ferrier J.)

Justice Ferrier in that case states as follows:

> "Here, there are two matters which must be left to a trial judge. The first is the question whether the bridge can be, in practicable terms, moved from the land. In absolute terms, it of course can be removed, but in practicable terms there is an issue as to whether economics and its physical dimension in effect prohibit such transport. There is as well an issue as to whether its design permits installation elsewhere without substantial alternations and rebuilding of the bridge."

As with other issues in the Act, the removeability principle is not applied consistently. Equipment for air cleaning which was removable, and which could even be used at other sites, was held to be lienable:

IBL Industries Ltd., Re (1990), 43 C.L.R. 192 (Ont. S.C.).

What is the nexus between the services or materials supplied and the project, both in terms of time and the work undertaken?

Whether a project is underway or not can itself permit a lien for services which do not normally give rise to one. Similarly, the absence of a project being underway can deprive a service provider of a lien.

Security services which are provided for a construction site are lienable when the construction is ongoing, as an ancillary part of ensuring the safety of the project and preventing tampering with work which is not complete.

> *G.C. MacDonald Supply Ltd.* v. *Preston Heights Estates Ltd.* (1992), 1 C.L.R. (2d) 157 (Ont. Gen. Div.)

The services of a property manager in supervising repairs were lienable because they were done at a time when a project was underway. However, those services of the property manager related to leasing units and purchasing appliances were not lienable.

> *Southdale Towers Ltd.* v. *Carlton Management Group Inc.* (1994), 18 O.R. (3d) 233 (Gen. Div.)

The absence of a project made snow-clearing services not lienable, although the court expressly noted that such services could have been lienable if they had been necessary for construction.

> *G. Newman Aluminum Sales Ltd.* v. *Snowking Enterprises Ltd.* (1980) 13 R.P.R. 275 (Ont. S.C.)

Similarly, the services of a project manager were not lienable for the period before the project was actually underway in, but were allowed once construction began.

> *P.R. Collings & Associates Ltd.* v. *Jolin Holdings Ltd.,* [1978] 3 W.W.R. 602 (Sask. Dist. Ct.),

Has the work or service enhanced the value of the land?

The definition of improvement was changed many years ago to include demolition services, so that in some cases work which is done before the land's value actually increases can be lienable. However, whether the land is worth more as a result of the provision of someone's materials or services can be a relevant consideration in determining whether a lien exists.

A contractor who dug up a large amount of soil on a property as a first step in removing contaminants, but who ultimately did not decontaminate the soil, was not granted a lien. Even though such excavation work could be commonly considered as traditional construction work which would give rise to a lien, the court was guided by the fact that the work done had not increased the value of the premises.

> *Don Chemical Canada Inc.* v. *Southbend Construction Co.* (1996), 27 C.L.R. (2d) 102 (Alta. Q.B.)

Furthermore, recent case law appears to suggest that, as a general proposition, work done for a project which does not ultimately proceed may not be lienable. The Ontario Divisional Court stated this proposition, but went on to note that the Act's definition of "supply of services" expressly includes the provision of services in the nature of plans or specifications where the actual improvement is not commenced but where the value of the land is enhanced by that work. In that case, the architect who prepared plans for a building which did not go ahead was permitted to proceed with its lien claim to trial.

> *1246798 Ontario Inc* v. *Sterling* (2000), 51 O.R. (3d) 220 (S.C.J.)

The court in *Sterling* also provided some guidance on the issue of when to value an enhancement under the definition of supply of services in the Act. An enhancement is to be valued when the work is done and the project is underway (as opposed to a later point in time when the work done may have less or no value), which may avoid some of the conceptual problems of how to value work that is either not completed or which never proceeds.

Further, the court held that to meet the criteria for a valid lien it was not necessary that the enhancement of the owner's interest be proportionate to the price being charged by the lien claimant for the services provided.

In a recent case in New Brunswick the court held that an engineering firm hired to identify deficiencies in a property's construction were not entitled to a lien as the work performed did not qualify as an improvement.

R.B. Builders Ltd. v. *Williamson (G.F.) Engineering Ltd.* (2000), 233 N.B.R. (2d) 172 (Q.B.)

Supply of Materials

"Materials" are defined by the Act as every kind of movable property:

a) That becomes part of the improvement;

b) or is intended to become part of the improvement;

c) or that is used directly in the making of the improvement;

d) or that is used to facilitate directly the making of the improvement.

Equipment rented without an operator is defined as material.

The Act defines services or materials to include both services and materials.

The Act in section 1(2) defines when materials are supplied to an improvement as:

a) placed on the land on which the improvement is being made;

b) placed on land designated by the owner or an agent of the owner that is in the immediate vicinity of the premises. It is to be noted that the placing of the materials on the designated land does not make that land subject to a lien;

c) in any event, if the material is incorporated into or used in the making or facilitating directly the making of the improvement.

In a recent case in our Ontario Court of Appeal where the court found that where the supplier lien claimant was selling material or services without any regard to the purpose or site for which the material was destined it was deemed to be selling on the credit of the buyer alone and no lien was allowed as there was no intent to supply to a particular improvement. The court stated:

> "The Act was not intended to apply to retailers who sell to members of the public in general and who have no direct connection to any improvement to any premises."

In this case the invoices from Central Supply Co. (the lien claimant) to Modern Tile Supply Co. did not refer to a specific work site, improvement or premises where the product was to be incorporated. Central Supply had never shown any interest in tracing the product supplied to Modern Tile to a specific work site, land or improvement such that a claim for lien could have been registered under the Act.

Central Supply Co.(1972) Limited v. *Modern Tile Supply Co. Ltd.*, 55 O.R. (3d) 783 (Ont. C.A.)

If materials however delivered were actually incorporated in the building being erected on the land sought to be charged with the lien and the claimant can prove this then there is a lien.

For example, where the material man is supplying to the central warehouse of the general contractor who is building on several properties under contracts with several different owners, the material man would have to trace his material and able to identify it in each of the buildings being erected on the several properties.

Kelly and Cracknell Limited v. *Armstrong Housing Industries Ltd.*(1948) O.W.N. 417 (M.C.)

Brunswick Construction Lteé v. *Michaud* (1978) 23 N.B.R. (2d) 143, affirmed 16 N.B.R. (2d) 55 (C.A.)

Nelson Lumber Co. v. *Integrated Buildings Corp. Ltd.* (1973) S.C.R. 456

Placed in the immediate vicinity

Section 1(2) of the *Construction Lien Act* states that materials are supplied to an improvement when they are placed on land designated by the owner or an agent of the owner that is in the immediate vicinity of the premises.

An adjoining lot purchased especially for storage was held to be in the "immediate vicinity".

Trussed Concrete Steel Co. v. *Taylor Engineering Co.*, (1919) 2 W.W.R. 123 (Alta. T.D.)

Used directly in the making of the improvement

For material that is used up in the building construction, such as coal that is burned, a lien was allowed.

Wortman v. *Frid Lewis Co.* (1915), 9 W.W.R. 812 (Alta TD)

Explosives used during the preparation of the site for construction are lienable items.

JB Turney and Co. v. *Farelly Bros. Ltd.* [1922] 3 W.W.R. 289

Gas and oil consumed by machines during construction are lienable items.

Re *Bodner* (1963), 43 W.W.R. 641 (Man.)

In *JB Turney and Co.* v. *Farelly Bros. Ltd.* [1922] 3 W.W.R. 289 the court held that explosives, fuses and detonators were lienable since they were consumed. However, the wire connecting the batteries to the detonators remained reusable tools and were not lienable. Question - whether this is still applicable after the Ontario Act was amended in 1983 to include equipment rented without an operator, if the wires had been rented.

A general contractor subcontracted for the construction of moulds for use in the formation of pre-cast cement guide way segments for the construction of a rapid transit system. The general contractor leased land and built a construction shed for use as the fabrication facility. The shed was constructed to hold the weight of the moulds which were bolted to the floor. After the rapid transit system was constructed the moulds were to be sold to the system and likely removed from the shed. The subcontractor filed a lien against the leased land. It was held by the British Columbia Court of Appeal that the moulds were erected or built on land attached to it by bolted connection to floor or piles by their own weight. The moulds were

intended to be in place for at least the duration of the project, which was a substantial time, and held sufficient to satisfy the requirements of the definition of improvement.

Deal v. *Cherubini Metal Works Ltd.* (2001), 6 C.L.R. (3d) 173 (B.C.C.A.)

A lien was permitted under the British Columbia Act for equipment held in standby during a work stoppage. The case is currently under appeal.

J.W. Price Construction Ltd. v. *Elan Construction Ltd.* (2001) B.C.S.C. 1125

A lien claim for repairs to rental equipment was rejected.

Joe Pasut Contractors Ltd. (1973), 18 C.B.R. (N.S.) 87 Ont. S.C.

But if the cost of repairs was to be borne by the lessee then these costs were found to be lienable.

Blackwood Hodge Equipment Ltd. v. *Henfrey Sampson Belaire Ltd.*, (1985) 15 C.L.R. 301

Supply of Services

According to section 14(1) of the *Construction Lien Act* a person who supplies services is entitled to a lien. Importantly, the terms "workdone" and "services" are not defined in the Act. Although the defined term "supply of services" in s.1(1) the Act does not exactly coincide with the phrase "supplies services", it can be assumed that the two phrases refer to the same concept. Therefore, to create a lienable interest, one must fall within the definition of "supply of services" under section 1(1) of the Act. The courts have attempted to clarify the meaning of "supply of services" under this section through the common law.

In Respect of an Improvement

The Dictionary of Canadian Law, Second Edition, defines "in respect of" in the following way:

> "…'[I]n relation to', 'with reference to' and 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters." *Nowegijick* v. *R.*, [1983] 2 C.N.L.R. 89 at 96, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, 46 N.R. 1, 144 D.L.R. 93d) 193, 83 D.T.C. 5041, the court per Dickson J.

In *Desourdy 1949 Paving Inc. (Trustee of)* v. *Teperman and Sons Inc. (Trustee of)* [2000] O.J. No. 1560, (2000) 17 C.B.R. (4th) 66, (2000) 3 C.L.R. (3d) 93, the fact that the operations of the lien claimant were off-site was held to be immaterial to a finding as to whether the claimant's services were an "improvement". In *Alcorn & Associates Ltd.* v. *634713 Ontario Ltd.,* Kirsh's C.C.L.F. 20.2, the court held that the plans prepared by the plaintiffs were services performed for an improvement despite the fact that the planned improvement was not commenced in the particular case. The plan prepared by the plaintiff was useful to the owner or subsequent purchaser for planning applications, including zoning, official plan change, and for financing and investment. Similarly, in *Smith & Smith Kingston Ltd.* v. *Kinalea Development Corp.*, (1994) 22 C.L.R. (2d) 234, the court held that whether or not construction takes place is not the determinative factor.

Rental of Equipment with an Operator

In Ontario, definitions of "materials" and "supply of services" in subsection 1(1) of the Act were amended in 1983 to provide that a person who rents equipment with operators for use on a contract site will be deemed for the purposes of the Act to have performed a service for which he is entitled to a lien for the price of the rental.

Where The Planned Improvement Is Not Commenced

The Act states that where the 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 creates a lien.

This part of the definition means that people such as engineers, interior designers, surveyors, may be entitled to liens since their services fall within the definition of supply of services, even though the construction or project is not commenced.

The following have been held to fall within the definition of "supply of services," as provided in the Act:

(e) **Engineering Services:** In *Urban Systems Ltd.* v. *Mission Hill Management Inc.* [1998] B.C.J. No. 1834, Urban had provided engineering services relating to a new residential subdivision. It was held that Urban was entitled to judgment for a portion of the value of its work actually done on the liened properties, however, Urban was not allowed to claim a lien for work that related to proposed investments that did not actually occur.

(f) **Estimating Work:** (see *Edwards Stephens Associates Ltd.* v. *G.L. Trenching Ltd.* (1989), 73 O.R. (2d) 112, 40 C.L.R. 161 (H.C.J.);

(g) **Security Services:** A claim for the provision of security services on a construction site was held to be the proper subject matter of a lien where the services were performed entirely on the property, within the time during which the construction project was being carried on, were necessary to ensure the protection of the site from potential loss due to vandalism and theft, and were of benefit not only to the general contractor, but to the lien claimants: *G.C. MacDonald Supply Ltd.* v. *Preston Heights Estates Ltd.* (1992), 1 C.L.R. (2d) 157 (Ont. Gen. Div.). Similarly, a lien for security services provided on a construction site was also allowed in *M.W.M. Construction of Kitchener Ltd.* v. *Valley Ridge Inc.* (1993), 8 C.L.R. (2d) 25 (Ont. Gen. Div.), affirmed (1993), 15 C.L.R. (2d) 139 (Ont. Gen. Div.);

(h) **Disposal Services:** In *Desourdy 1949 Paving Inc. (Trustee of), Re* (2000), 3 C.L.R. (3d) 93 (Ont. S.C.J.), the subcontractor was hired to dispose of rubbish during the demolition of a building by the contractor. According to the court, the work performed by the subcontractor constituted an “improvement” within the meaning of section 1(1) of Act. The disposal services were part of the contractor’s contract, and were directly related to the demolition activity performed by the contractor. In *Benny Haulage Ltd.* v. *Carosi Construction Ltd.*, (1998) 39 C.L.R. (2d) 175 (Ont. Div. Ct.) affirmed 1998, 40 C.L.R. (2d) 247 (Ont. C.A.) the court held that the excavation and disposal of soil physically contributed in a direct and essential way to the construction of an improvement and therefore qualified as a "supply of service".

(i) **Surveying Services:** A surveyor's lien was upheld in *Smith & Smith Kingston Ltd.* v. *Kinalea Development Corp.*, (1994) 22 C.L.R. (2d) 234,, where his work was for the direct purpose of enabling the owner to proceed with construction. In these cases, the services provided related directly to the lands being liened, construction and actual improvements of the land. The court noted that if the nature of the work done by a surveyor is such that there is no improvement, then the lien would not attach. For instance, if the surveyor determined a boundary between two properties and did nothing more.

(j) **Commercial Cleaning Services:** In *Leslie L. Solty & Sons Ltd.,* v. *Finbur Enterprises Ltd.* (1977), 19 O.R. (2d) 87, the court held that a claim by a company which provided commercial cleaning services fell within the definition of "supply of services" under the Act on the ground that the services were rendered for a carpentry contractor engaged in the construction of the defendant's building project.

The following have been held *not* to fall within the definition of "supply of services":

(k) **Legal Services:** (see *Canario Development Corp.* v. *Fitzsimmon, MacFarlane* (1987), 60 O.R. (2d) 36, 48 R.P.R. 311 (H.C.J.); and *Oliver* v. *Muer Construction Ltd.* (Estate) (See discussion below);

(l) **Snow Removal:** A lien claim for snow removal was disallowed in *G Newman* and in C.*I.B.C.* v. *Repac Const. & Materials Ltd.* (1983), 1 C.L.R. 143 (Ont. M.C.). However, the court in *G Newman* held that if the snow was removed to enable a construction project to continue or proceed, the snow removal would qualify as a service to enable the enhancement of the value of the property and fall within the definition of "supply of services" as set out in subsection 1(1) of the Act; and

(m) **Project Management and Site Supervision:** In disallowing a claim for project management and site supervision fees in *Tamma Construction Co.* v. *Brault* (1995), 24 C.L.R. (2d) 124 (Ont. Div.), the Court relied on the decisions in *697470 Ont. Ltd. v. Presidential Developments Ltd.* (1989) ("697470"), 69 O.R. (2d) 334 (Div. Ct.) and *Franro Property Ltd.* v. *Heritage Glen North Ltd.* (1993), Kirsh's C.C.L.F. 47.15. The responsibilities which the plaintiffs attempted to claim for in 697470 included things such as setting up a sales office, making building permit applications, etc. The rationale for the decision in 697470 was that the work performed was not sufficiently directly related to the construction of the improvement.

(n) **Soil test and Report:** (see *Morton & Partners Ltd.* v. *Deb-Bac Investments Ltd.*, Kirsh's C.C.L.F. 86.3 (Ont. M.C.).

(o) **Towing:** In *S.E. Rozell and Sons Inc.* v. *Groff*, (2002) C.L.R. (3d) 58 (Ont. S.C.J.) the court held that towing services used to place on and remove from a project site an office and storage trailer was not a supply of services contemplated by the Act.

(p) **Telephone Service:** In *S.E. Rozell and Sons Inc.* v. *Groff*, (2002) C.L.R. (3d) 58 (Ont. S.C.J.) it was held that the provision of a telephone line to the project site was not a service envisioned by the Act.

(q) **Overhead Expenses:** Do not fall within the definition of supply of services. *Rudco Insulation Ltd.* v. *Toronto Sanitary Inc.*, (1998) 41 C.L.R. (2d)

Service Providers

In addition to the examples listed above, there are a number of service providers that are commonly involved in construction projects. These providers include architects, building managers, consultants and lawyers and are discussed below.

A. Architects

In Ontario, architects under the *Architects Act*, R.S.O. 1980, c.26, and the employees thereof, have a lien under contracts made on or after November 29, 1997, and under subcontracts made under such contracts. These persons did not have a lien prior to the repeal of section 3(4) of the Act which came into force on November 28, 1997. (See S.O. 1997, c.23, s.4).

In *1246798 Ontario Inc.* v. *Sterling* (1999), 49 C.L.R. (2d) 218 (Ont. S.C.J.) an architects lien was disallowed where the project did not proceed. The court held that the fact that the plans could not be sold to third parties because they were "tailor made" for the project was an irrelevant consideration. Instead, the court reasoned that the value of the owners' interest in the land was not enhanced by the existence of the site plan approval obtained by the architects because the plans and drawings prepared for the construction were the exclusive property of the architects. However, on appeal the Court determined that the supplying of architectural plans did enhance the value of the subject although the planned improvement was not commenced. The owner retained the architects to design a building for land owned by the owner. The architectural services included obtaining site plan approval and the necessary building permits. The owner later terminated the retainer, claiming that the architects did not design a functional building that could be constructed at a reasonable cost. The architects withdrew the application for the building permit, requested the return of the plans from the city, and registered a claim for a lien. The architects' appeal was allowed on the basis that subsection 14(1)(b) of the Act was intended to give a lien to a party supplying plans where the work enhanced the value of the land despite the fact that no actual improvement was made. Work that enhanced the value of the land was presumed to be an improvement, and a lien arose under the Act.

B. Building Managers

Case law suggests that building managers may be entitled to a lien under the Act depending on the nature of their services. In *Southdale Towers Ltd.* v. *Carlton Management Group Inc.* (1994), 18 O.R. (3d) 233 (Gen. Div.), a property manager engaged by the owner to lease, manage, maintain and repair the owners buildings was held to be entitled to assert a lien for the supply of services and materials and its fee for work supervising repairs but not for services in renting units, enforcing leases and purchasing and supplying appliances. This case is also noteworthy as it is an example of a court considering different responsibilities which comprise a service, instead of the service as a whole, to determine whether the service falls under the definition provided in the Act. This gives lien claimants additional opportunities to make lien claims by breaking down their responsibilities to the court, even if all of their services would not fall within the definition provided for under the Act.

In *697470 Ont. Ltd.* v. *Presidential Developments Ltd.* (1989), 69 (O.R.) (2d) 334 (Div. Ct.), a claim for a lien by the general manager of the defendant builder, for services in setting up a sales office, in applying for building permits, in negotiating with building trades and with municipal officials, and in assisting site superintendents in decision-making, was disallowed since such services were performed off the job site, and were not directly related to the construction of the improvement.

C. Consultants

Depending on the nature of their services, consultants may be entitled to a lien under the Act. In *Alcorn & Associates Ltd.* v. *634713 Ontario Ltd.*, Kirsh's C.C.L.F. 20.2, the court held that a plan prepared by a planner enhanced the value of the land as it was useful for planning applications, including zoning, official plan change or subdivision, and for financing and investment. Similarly, a report prepared by a second plaintiff which was part of the design and overall plan also enhanced the value of the land. The court held that the services provided by the plaintiffs fell under the definition of "supply of services" in that they were connected with a specific improvement, dealing with the specific site, of use to the owner or a purchaser from the owner. This was held despite the fact that the planned improvement was not ultimately commenced.

In a very recent Ontario case S. was the owner of property that was to be renovated into residential condominiums. K. registered a lien and alleged that she did secretarial, bookkeeping, management and design work for the project and was to get $200,000. The evidence was that K. decorated the model suite and was supposed to have engaged in the sale of units but apparently never did. Before this $200,000 arrangement, she was getting paid $6,000 per year. The court held that the claim was a sham and that there could be no lien for these services if indeed they were ever performed. A second lien was registered by T. for security and janitorial services. T. was S.'s girlfriend and in fact moved in with him at the premises. She testified that she looked after whatever came up. The court held that there was no right of lien for this type of work if any in fact had been done. The court further stated that you cannot lien yourself and T. was a identified so closely with S. that there could be no lien.

All About Construction Ltd. v. *1336555 Ontario Ltd.* (December 6, 2001) O.S.C.J. Flynn J.

Therefore, where the services of consultants are connected with an improvement of a specific site, and as a result, the value of the land is enhanced, a consultant will likely be entitled to a lien under the Act.

D. Lawyers

Case law suggests that lawyers will have great difficulty in claiming a lien under the Act. The claim for lien of lawyers in respect of services performed by them in negotiating the termination of the construction contract was disallowed in *Canario Dev. Corp.* v. *Fitzsimmons, MacFarlane* (1987), 60 O.R. (2d) 36 (H.C.).

Similarly, a claim for lien for a lawyer's services in obtaining severance applications, which substantially improved the value of his client's property, was disallowed in *Oliver* v. *Muer Const. Ltd.* (1985), 12 C.L.R. 1 (Ont. H.C.) ("*Oliver*"). In *Oliver,* a lawyer was retained to handle severance applications pertaining to land owned and further to represent the client before the Ontario Municipal Board regarding an objection to the rezoning of the land. *Oliver* was successful in both tasks but the client filed for bankruptcy before paying his legal fees. *Oliver* then placed a lien on the property. The Court found that no lien existed as the supply of any services must be upon or in respect of an improvement, as defined by the Act, which denotes actual construction or demolition and not just an improvement in the price of the land.

This does not mean that lawyers cannot acquire lien rights. Their services, however, must be directly related to improvements on land and/or construction. *Oliver* was decided on the basis that the legal services in the case were too remote to give rise to a lien as there was no nexus with any planned specific improvement. Further, since a lawyer is unlikely to produce plans, drawings, designs or specifications, construction of the improvement must actually take place for a solicitor's lien right to accrue.

E. Hi-Tech Service Providers and Indirect Service Providers

Although there are not many examples of lien claims by hi-tech service providers, there is no doubt that such claims will become more common in the future. Examples of such service providers include computer installation, access card service installation, surveillance camera installation, and other related security services.

Such lien claims may be challenged on the basis that such equipment is removable and therefore, does not enhance the value of property. In favour of such liens, it may be argued that this type of service, e.g. installation of high tech equipment, is a long-term investment, and although such equipment may ultimately be removed, it is not easily transferable to other buildings, and increases the value of a building for use by tenants/owners. As such, this type of equipment can be analogized to pipes or windows, which could be removed, but are generally only of use in the building in which they were installed.

A claim in respect of security services was allowed because the services were provided at the request of the contractor, exclusively for the project, and because they were necessary to protect the interests of the owners and lien claimants.

> *G.C. McDonald Supply Ltd.* v. *Preston Heights Estates Ltd. (No. 2)*, (1992) 1 C.L.R. (2d) 153 Additional reasons 1992 1 C.L.R. (2d) 153N; Affirmed 1993 Document 472/92 Divisional Court

<u>What Losses Can be Claimed Under the ***Construction Lien Act***</u>

By the lien claimant

The damages claimable through a lien are limited to the actual value of the services or materials supplied under s. 14(1) of the Act, and these generally do not include a claim for damages: *Landis & Gyr Powers Ltd.* v. *Megatech Contracting Ltd.* (unreported, October 2, 1992, Ont. Gen. Div.). However, a lien claimant can join a claim for breach of contract with a lien claim under s. 55(1) of the Act, so that the contractual damages sought can be tried at the same time as the lien claims, with a personal judgment being the remedy for the contractual claims above and beyond the amounts secured by a lien.

The recent Ontario decision in *Stucor Construction Ltd*. v. *Brock University*, [2001] O.J. No. 4060 (S.C.J.) stated that a lien claim can include a claim for delay where the damages sought were the result of work done or increased costs as a result of a delay, because in that sense the claim would be for services or materials actually supplied to the job site This was expressly distinguished by the court in *Stucor* from a claim for potential lost profits on another job, although these propositions must be taken with some reservation, as they were only expressed as grounds not to reduce the claim for lien on a motion to reduce the quantum and post security in court.

There is varying Ontario authority on whether a lien claimant can assert a claim for unjust enrichment or restitution with a lien claim where there is otherwise no contractual relationship between the parties. The Master held that a lien claimant could not in *Con Drain Co. (1983) Ltd.* v. *Ronto Development*

Corp. (1995), 26 C.L.R. (2d) 23 (Ont. Master), but a judge held to the contrary in *Can-Am Gold Enterprises Inc.* v. *Etobicoke (City)* (1995), 22 C.L.R. (2d) 111 (Ont. Gen. Div.).

Against the lien claimant

Section 55(2) of the Construction Lien Act permits any claim to be made by a defendant in a lien claim action by counterclaim against the lien claimant, whether related to the work performed or not.

However, there are limits to the operation of a set-off. For example an owner cannot set off any damages sought or awarded in a counterclaim against the hold back: *Len Ariss & Co.* v. *Peloso*, [1958] O.R. 643 (C.A.).

Set-offs can include amounts paid for legal fees and bonding premiums in removing the liens registered by trades subordinate to a lien claimant, and can also include the loss of interest on funds withheld due to a lien: *Majestic Contractors Ltd.* v. *N.C.L. Contracting Ltd.* (1994), 121 Sask. R. 175 (Q.B.).

A counterclaim can include a claim for punitive damages: *Johnson & Associates Ltd.* v. *Wade* (unreported, January 18, 1994, Ont. Gen. Div., Rosenberg J.).

A counterclaim can also include the damages under section 35 of the *Construction Lien Act* for improper registration of a claim for lien: *Disal Contracting Ltd.* v. *Salamon Holdings Inc.* (1997), 35 C.L.R. (2d) 200 (Ont. Gen. Div.). Some cases have held that an absence of malice or a good faith belief by the lien claimant and its solicitor that a lien is valid will be defences to such a claim: *Garret* v. *Ayr Ventures Inc.* (1995) 18 C.L.R. (2d) 300 (Ont. Gen. Div.) and *Woodmere (Credit Valley) Ltd.* v. *Sacevich* (1994), 18 C.L.R. (2d) 171 (Ont. Gen. Div.). However, other cases have held that mere negligence on the part of the lien claimant in registering a claim for lien can meet the requirements of s. 35 of the Act: *Rideau Valley Construction Ltd.* v. *Visa Construction Co.* (unreported, June 14, 1995, Ont. Gen. Div.).