CONSTRUCTION LAW LETTER

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CONSTRUCTION DEATH REVIEW

On July 18, 2025, the first report of the Construction Death Review (CDR) was released. The CDR is a process by which the deaths of workers who have died as a result of an accident occurring in the course of their employment at or in a construction project are examined. Through a comprehensive review of each fatality, and an analysis of multiple deaths in aggregate, the Office of the Chief Coroner (OCC) seeks to identify opportunities to enhance health and safety to better protect workers in the construction sector.

This article presents a brief outline of the development of the CDR and explains the review process.

ORIGINS OF THE CONSTRUCTION DEATH REVIEW

Until March 2024, construction deaths resulting from accidents were subject to mandatory inquests. Each death was examined in a quasi-judicial proceeding before a presiding officer and a jury of five Ontarians. At the conclusion of an inquest, the jury was entitled to propose recommendations aimed at preventing further deaths, many of which were directed to the Ministry of Labour, Immigration, Training and Skills Development (MOL), various stakeholder organizations, and, in select instances, individual companies. Though comprehensive, inquests into construction

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CONSTRUCTION
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deaths faced challenges related to timeliness and the practicality of recommendations, highlighting the need for a more responsive and actionable review process.

On March 6, 2024, the *Coroners Act* was amended to require the OCC to conduct annual coroner-led reviews of construction-related accidental deaths. The CDR process was developed collaboratively with government partners, including the Ministry of the Solicitor General and the MOL, and involved consultations with sectoral stakeholders. Engaging diverse perspectives was critical to leveraging the experience and sectoral knowledge to enable a more responsive review process, foster a sense of shared commitment and generate support for the CDR process. The transition to a death review process was also anticipated to lead to timelier reviews at both the individual and systemic levels, and, as a result of a more inclusive and responsive process, to yield more implementable recommendations.

THE REVIEW PROCESS

Purpose

The CDR is established under s. 10.2 of the *Coroners Act*. Under s. 10.2(2), the Chief Coroner may assign one or more coroners (i.e., the "Lead Coroner(s)") to conduct an annual review of all worker deaths in the previous year that were the result of an accident while working at or on a construction project. Section 10.2(4) of the *Coroners Act* defines the scope of the review. The Lead Coroner(s) must:

- Examine the circumstances of each death subject to the review.
- To the extent possible, conduct a systemic examination of the circumstances of all deaths subject to the review.
- To the extent possible, identify any common issues among the deaths subject to the review.
- Develop recommendations for the prevention of further deaths.

Under s. 10.2(5) of the *Coroners Act*, the Lead Coroner(s) may consult with any person who has information relevant to the review or who may be affected by the review and may require information from any person with knowledge about the deceased person or the circumstances around the death, including family members, co-workers, employers, or worker representative organizations. Furthermore, Lead Coroner(s) may obtain records and writings related to the deaths under review. Finally, s. 10.2(6), permits the Lead Coroner(s) to seek assistance from sectoral or subject matter experts in conducting the review.

Timeline

Under s. 10.2(1) of the *Coroners Act*, the CDR is conducted annually and generally includes deaths that occurred in the previous calendar year. Section 10.2(11) further states that a report will be released on or before June 30 of the calendar year following the year in which the deaths were reviewed. For example, a death that occurs in 2025 would be reviewed in 2026 and included in the 2027 report.

Accordingly, the CDR operates on a three-year cycle, as outlined in Figure 1 (see below). These three stages occur concurrently. In most cases, reviews are conducted by the CDR after all other investigations and legal proceedings, including trials and appeals relating to charges under the *Occupational Health and Safety Act*, have been completed.

The legislation acknowledges that many deaths are subject to investigation by the MOL or the police, or to prosecution. To ensure that these processes are uninterrupted, s. 10.2(3) of the *Coroners Act* allows the Chief Coroner to defer the review of a death to a later calendar year if the death is subject to an ongoing investigation, prosecution, or inquest, or if the Chief Coroner determines that it would be inappropriate for the death to be included in the annual review.

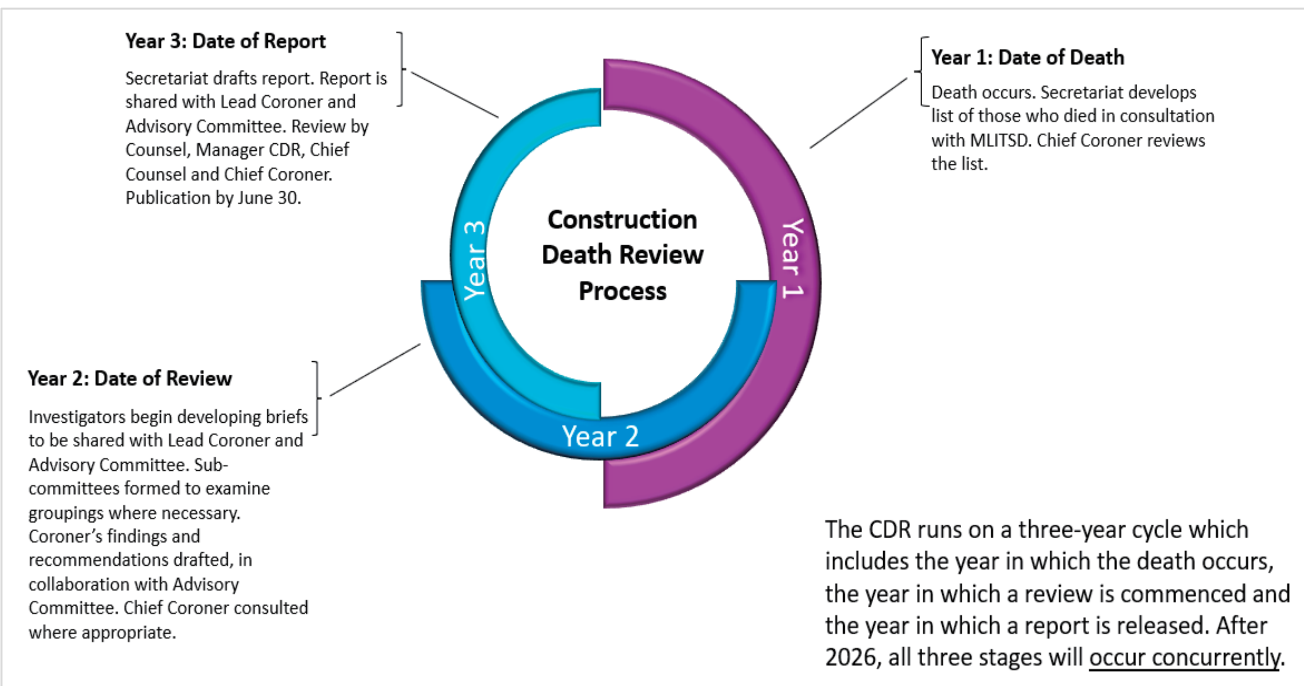

Figure 1: CDR Lifecycle

CONDUCTING A REVIEW

As noted above, s. 10.2(5) of the *Coroners Act* permits the Lead Coroner to consult with any person that has information relevant to the review. To ensure a well-informed review and recommendations, the Chief Coroner directed that a committee of sectoral experts be convened to assist with the reviews. The Advisory Committee, appointed by the Chief Coroner, advises the Lead Coroner(s) on relevant issues. It includes 11 members, representing both the OCC and construction sector stakeholders.

The composition of the Committee is:

- One OCC member (Manager, CDR).
- Two members from the MOL, representing the Prevention Division and the Fair, Safe and Healthy Workplaces Division.
- Three members from Construction Labour Organizations, recommended by the Provincial Labour Management Health and Safety Committee (PLMHSC).
- Three members from Construction Ownership Organizations, recommended by the Infrastructure Health and Safety Association (IHSA), with at least one affiliated with the PLMHSC.
- Two members from Health and Safety Organizations, including representatives from the IHSA and the Workplace Safety and Insurance Board (WSIB).

Additionally, Threads of Life, a non-profit organization committed to supporting families and others affected by a workplace injury, illness, or death, has a standing invitation to provide perspective on issues related to families affected by construction-sector deaths.

Advisory Committee members are invaluable to the CDR. In addition to significant sectoral experience, under the Committee's Terms of Reference, Advisory Committee members are required to have:

- an understanding of and primary focus on the provincial construction sector and its practices;
- access to skills and knowledge necessary to make recommendations on a broad range of issues, from practical to theoretical; and
- an understanding of the existing Health and Safety regime in the province.

Advisory Committee members are appointed for terms of up to three years, renewable for additional terms at the discretion of the Chief Coroner.

To support the CDR process, the OCC has established a Secretariat. Overseen by the manager of the CDR in collaboration with the Lead Coroner(s), the Secretariat includes Legal Counsel, an Executive Lead, a Policy Advisor, an Investigator and a Program Administrator. The Secretariat provides logistic, policy, legal and investigative assistance, ensuring that the CDR operates in accordance with s. 10.2 of the *Coroners Act*.

FAMILY INVOLVEMENT

Family involvement is valued throughout the CDR process and families of deceased workers are encouraged to participate. For instance, family members may be invited to provide information about their loved one, including, but not limited to, a personal statement about their loved one, or information that may be relevant to the circumstances of their loved one's death.

The OCC has developed a process to engage family members throughout the review process. During the review stage, a member of the CDR Secretariat remains in contact with the family to keep them informed about the scheduling and progress of the review, and to explain the purpose and process of the review.

In addition, as noted above, Threads of Life, a Canadian non-profit committed to supporting those affected by workplace injury, illness, or death, holds a standing invitation to provide perspective regarding issues relating to families impacted by construction-sector deaths.

RECENT REPORTS

The July 2025 report focused on the deaths of 26 workers who lost their lives while working at heights, a potentially dangerous task for construction workers. Though Ontario has a robust health and safety system designed to protect construction workers, for a variety of reasons deaths resulting from falls at heights continue to occur. While the deaths reviewed in the report were the result of an accident, it is important to acknowledge they were all potentially preventable. This report also provided actionable recommendations that, if implemented, will assist the MOL, construction stakeholders, employers, and workers in the sector to make changes to policy and practice to prevent further deaths.

The upcoming 2026 report focuses on 44 deaths across five main groupings: Crush hazard, heavy material or equipment hazard, electrical hazard, elemental exposure, and wall and trench collapse. The report will also consider the deaths of those who were injured many years ago, but whose recent deaths can be traced back to the injury.

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JUDICIAL REVIEW OF ADJUDICATION DETERMINATIONS IN THE ONTARIO DIVISIONAL COURT

In the past year, there have been several decisions of the Ontario Divisional Court which address applications for judicial review of an adjudicator's determination. The first of these, released in January 2024 by the Ontario Divisional Court, set the stage and provided guidance on the circumstances in which judicial review of adjudication determinations may be successful: *Ledore Investments v. Dixin Construction.*

In *Ledore*, the Ontario Divisional Court found that procedural fairness is a valid ground for judicial review and confirmed that this includes the right of any party to an adjudication to be heard on the determinative issues in that adjudication. In the months that followed, there have been several more cases released by the Ontario Divisional Court that have provided further guidance.

CALEDON (TOWN) v. 2220742 ONT. LTD. O/A BRONTE CONSTRUCTION

In *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, Caledon entered into a contract with WSP for design, contract administration and site inspection services relating to the clean-up of wastewater pond (#7), and a second, similar contract with Matrix for another wastewater pond (#14). Caledon subsequently entered into a contract with Bronte for construction works for the clean-up of wastewater ponds #7 and #14. Bronte performed work under its contract with Caledon until the contract was terminated by Caledon. The parties disagreed on what Bronte was owed up to the date of termination, and Bronte delivered a notice of adjudication to Caledon seeking $145,000.

Caledon responded to the notice of adjudication by challenging the jurisdiction of the adjudicator based on the transitional provisions in the *Construction Act*, and, in the alternative, disputing the claim on the merits. In a preliminary jurisdictional ruling (i.e., the "jurisdiction decision"), the adjudicator found he had jurisdiction over the claims, and in a final determination (i.e., the "merits decision"), the adjudicator awarded Bronte $93,445.92.

Caledon sought judicial review of that determination on the basis that the adjudicator lacked jurisdiction to address the claim because the transitional provisions under the Act excluded the improvement at issue from adjudication. Section 87.3 of the Act dictates which version of construction legislation applies to a dispute: the new Act or its predecessor, the *Construction Lien Act*. These are known as the transitional provisions. The adjudication provisions of the Act, which grant adjudicators jurisdiction, only apply where "*a procurement process* <u>*for the improvement*</u> (emphasis added) *that is the subject of the contract was commenced after October 1, 2019*.

THE DIVISIONAL COURT'S DECISION

The Divisional Court confirmed that, under the transitional provisions of the Act, jurisdiction to conduct an adjudication is determined on an improvement-by-improvement basis so that all claims arising from an improvement are subject to the same version of the Act. When a "contract" or "subcontract" is in respect of more than one improvement (as was the case here), however, the Divisional Court held that the "contract" or "subcontract" may be subject to different versions of the Act, with respect to different improvements.

The Divisional Court noted that the contract between Bronte and Caledon was entered into after October 1, 2019, but the central question was whether a procurement process for the contract's subject matter (i.e., the work relating to wastewater ponds #7 and #14, respectively) was commenced before that date. The court found that, under the Act, the concept of "improvement" is tied to the land. Improvement and contract are not co-extensive, as different persons can undertake different work under different contracts, for the same improvement. The question is whether the works are in respect to the same improvement to the same lands.

Accordingly, the Divisional Court found that the procurement process for the contract relating to wastewater pond #7 was commenced before October 1, 2019, and was not subject to the adjudication provisions of the Act by operation of the transition provisions. With respect to pond #14, the Divisional Court concluded that the procurement process for the contract commenced on March 24, 2020. The portion of the contract relating to wastewater pond #14 was in respect to the same improvement, and therefore the adjudication provisions of the Act did not preclude adjudication of any claims in respect of wastewater pond #14.

This decision illustrates the significance of dates of procurement processes as it relates to the application of adjudication under the transition provisions under the Act and underscores the importance of correctly interpreting how that could apply when a "contract" or "subcontract" is in respect of more than one "improvement".

BLACKSTONE PAVING AND CONSTRUCTION LTD. v. BARRIE (CITY OF)

In *Blackstone Paving and Construction Ltd. v. Barrie (City of)*, Blackstone applied for judicial review of two adjudication determinations on the basis that the City of Barrie had failed to comply with s. 6.4(2) of the Act (relating to the issuance of Notices of Non-Payment (NONP).

The application arose in the context of an ongoing payment dispute between Blackstone and the City of Barrie. Blackstone argued that the city was required to identify all of its reasons for non-payment in its NONP pursuant to s. 6.4(2) of the Act. Blackstone further argued that its non-compliance with this provision of the Act was procedurally unfair, because when Blackstone sought to address what it argued were new issues raised by the city in its responding materials, both adjudicators refused to permit Blackstone the opportunity to deliver reply submissions.

THE DIVISIONAL COURT'S DECISION

The Divisional Court dismissed the application, finding the threshold question for procedural fairness (i.e., whether the procedures followed in the adjudication accorded with the procedures to which the adjudication was subject under the Act) had not been met under the statutory test for judicial review.

The Divisional Court confirmed that the standard of review for questions of procedural fairness is "fairness" or "correctness". Findings of fact are reviewed on a standard of reasonableness and, while this principle applies to factual findings related to procedural fairness issues, the requirements of procedural fairness, considering the facts, as found, are to be assessed on a "correctness" or "fairness" standard, applying the test set out in s. 13.18(5)5 of the Act.

First, the Divisional Court found no error with the adjudicators' determination that any alleged "typographical errors" in the city's NONP (which Blackstone had argued vitiated the NONP) did not amount to noncompliance with s. 6.4(2) of the Act. Further, even if they had, Blackstone had established no prejudice arising from this non-compliance, and the Divisional Court therefore gave no effect to this argument.

Second, the Divisional Court found no error with the adjudicators' reasoning relating to the alleged failure to identify all reasons for non-payment in the NONP at issue. The city claimed that it had merely elaborated on the reasons given in its NONP, which the Divisional Court found that the adjudicators had implicitly accepted. The Divisional Court was satisfied that this implicit finding was available on the record before each of the adjudicators in this case. As a result, the Divisional Court deferred to the adjudicators' findings that there was no breach of s. 6.4(2) of the Act, and it therefore followed that Blackstone had not met the first branch of the conjunctive statutory test for procedural unfairness under s. 13.18(5)5 of the Act.

Third, the Divisional Court found no error with the adjudicators' decision not to permit reply submissions in the adjudications. All parties had agreed on a process for the exchange of materials, and no provision was made in that process for reply submissions. The adjudicators had indicated they did not require reply submissions from Blackstone to dispose of the adjudications, and noted that many of the concerns behind the request for reply submissions were in respect to issues that were not properly before them. The Divisional Court held that the adjudicators' decisions in this regard were not inconsistent with the processes prescribed by the Act, or the process agreed to by the parties themselves.

This decision emphasizes that parties to an adjudication do not have an absolute right to reply submissions under the Act. If parties wish to strengthen the ability to argue they should be permitted to deliver reply submissions, they may wish to make express the requirement that they be permitted to do so in any procedures and/or processes addressed in their contracts relating to the conduct of an adjudication.

TAKEAWAYS

These decisions highlight the challenges that parties may face as they continue to navigate the right to seek judicial review of adjudication determinations. The decisions suggest the Divisional Court is not seeking to broaden the right to judicial review. Parties must establish valid grounds and meet the statutory requirements before they will gain access to the courts and an opportunity to revisit any adjudication determination.

With that said, the decisions also serve as a reminder to adjudicators of the limits of their jurisdiction and the requirement to ensure they adhere to principles of procedural fairness. Adjudicators are not ordinarily permitted to ignore caselaw, nor the parties' right to be heard on material issues before them. It remains to be seen how the Divisional Court will continue to address future applications for judicial review but, in the meantime, parties would be wise to incorporate these lessons as they move forward.

Ontario Divisional Court
Ledore Investments v. Dixin Construction
A.D. Kurke, S. O'Brien, and B. MacNeil JJ.
January 29, 2024

Ontario Divisional Court
Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction
N.L. Backhouse, D.L. Corbett and R. Charney JJ.
August 23, 2024

Ontario Divisional Court
Blackstone Paving and Construction Ltd. v. Barrie (City of)
D.L. Corbett, H.A. McGee and R.M.R. Bell JJ.
August 23, 2024

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A CHEAT SHEET FOR COMMERCIAL LITIGATORS: KEY PROCEDURAL DIFFERENCES BETWEEN LIEN ACTIONS AND OTHER ACTIONS

As a commercial litigator in Ontario, it is more than likely that a construction dispute will come across your desk. While there are many nuances to lien actions that are not caught below, this article will highlight some of the key procedural differences between lien actions and other actions for litigators looking to nail it every time.

GENERAL PRINCIPLES

The *Construction Act* (the Act) and its regulations govern the procedure of a lien action. As a starting point, the Act provides that a lien claim is enforceable in an action in the Superior Court of Justice, and that the *Rules of Civil Procedure* and the *Courts of Justice Act* apply to lien actions unless they are inconsistent with the Act.

The Act requires lien actions to be as far as possible of a summary character having regard to the amount and nature of the lien in question.

PLEADINGS

In contrast to the Rules, a statement of claim in a lien action must be served within 90 days after the claim is issued. While the time for delivery of a statement of defence is the same in a lien action as other actions, there is no "notice of intent to defend" in a lien action. An extension of time to deliver a defence is normally obtained through an indulgence from counsel.

There is no right to reply in a lien action. Similarly, a non-party cannot be added by way of a counterclaim or by way of third party claim other than a claim for contribution and indemnity in a lien action.

In keeping with the summary character of lien actions, pleadings can be served in any manner permitted by the Rules, or by certified or registered mail to the recipient's last known mailing address.

JOINDER

The current Act and regulations only allow a lien action to be joined with a claim for breach of contract. A breach of trust claim cannot be joined with a lien action.

Future revisions to the Act, though, may soon allow breach of trust claims to be joined with lien claims. The *Building Ontario for You Act (Budget Measures)* (Bill 216) (which received Royal Assent on November 6, 2024) proposes various changes to the Act which will require revisions to the regulations before the revisions can take effect. Current proposed draft regulations contemplate joinder of breach of trust claims with lien claims. This issue currently remains under review.

REFERENCES

After the delivery of all statements of defence or after the time for delivery of a defence has expired, any party to a lien action can make a motion to the court to have a trial date fixed or for a settlement meeting. A lien action must be set down for trial within two years after commencement of the lien action.

Given the summary nature of a lien proceeding, discoveries and affidavits of documents are not automatic and are considered interlocutory steps in a lien action. Before taking any interlocutory steps that are not provided for in the Act, the parties must seek leave and consent of the court.

TAKEAWAYS

Lien actions offer a variety of opportunities for young litigators interested in getting on their feet and learning new procedure. While the above are only some of the procedural differences between lien actions and other actions, consult the Act, the regulations, and the Rules to determine the proper procedure as the matter proceeds.

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WHY CONDO CORPORATIONS SHOULD REQUIRE CONTRACTOR ACKNOWLEDGEMENT FOR ROOF WORK

When it comes to rooftop maintenance, what happens above can have serious consequences below. Roofs are often damaged not by weather, but by negligence. Dropped tools, sharp debris, or even improper footwear can puncture membranes and lead to leaks that affect multiple units. Even minor damage can lead to major costs.

THE SOLUTION: A ROOF ACCESS ACKNOWLEDGMENT

Boards should consider implementing a Roof Access Acknowledgment — a short, practical document that contractors sign before beginning any work that involves roof access.

***Important*:** This is not a substitute for the actual contract governing the work itself. It is a supplemental document focused solely on protecting the roof area.

The acknowledgment can include:

Conduct expectations: No dragging equipment, use of protective materials under tools, and walking only on designated paths.

Awareness of building protocols: Confirmation that the contractor understands and agrees to follow roof-specific protocols.

Incident reporting: Agreement to report any damage or issues immediately to management.

MAKING IT A PROTOCOL

Boards can formalize this requirement by:

- establishing written protocols for contractor access and maintenance;
- including it in roof access procedures shared with owners and service providers;
- requiring acknowledgment forms to be signed daily or per visit, depending on the nature of the work.

BENEFITS

Reduced Insurance Claims: By requiring contractors to sign daily agreements and follow strict handling procedures, this in turn minimizes the risk of roof damage that could trigger costly insurance claims. This proactive approach can help avoid disputes and delays in coverage.

Lower Premiums over time: Preventative maintenance documented safety practices can lead to lower insurance premiums.

CONCLUSION

Adopting this approach to roof repairs reinforces expectations, reduces the risk of accidental damage, encourages accountability, and clearly demonstrates proactive governance.

A safer roof means a safer community. Roof work may seem routine, but its consequences are anything but. By enforcing daily agreements, and educating contractors on best practices, this sets a new standard for rooftop safety. These efforts not only protect residents and property but also reduce financial risk and enhance legal preparedness.

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IS NON-COMPLIANCE WITH A CONTRACTUAL CLAIMS PROCEDURE FATAL UNDER QUÉBEC CONSTRUCTION LAW?

A series of recent decisions handed down by Québec courts have provided valuable insights into the consequences of a contractor's failure to comply with the claims procedure stipulated in the contract.

Although non-compliance with such a procedure is in principle fatal to the contractor's claim when the contractual terms used are clear and binding in the eyes of the court, some recent decisions have set exceptions to this principle.

Thus, as demonstrated by the following decisions, the courts have, in certain circumstances, awarded damages to a contractor despite their failure to comply with the contractual claims procedure when it has been shown that: (i) the client has clearly waived this procedure; (ii) the client has breached their obligation to inform or to cooperate with the contractor; or (iii) the client has breached the duty to act in good faith.

FAILURE TO FOLLOW THE CLAIMS PROCEDURE STIPULATED IN THE CONTRACT MAY BE FATAL TO THE CONTRACTOR'S CLAIM

In *David S. Laflamme Construction inc. c. Procureur général du Canada*, the Québec Superior Court re-affirmed the principle that the claims procedure outlined in the tender documents must be followed for the contractor to successfully avail itself of the procedure.

In this case, since the contractor had not complied with this procedure regarding certain aspects of its claim, it was rejected by the Superior Court:

> [Translation of paragraph 120] *First of all, since the cause of action retained is solely that relating to substantially different soil conditions and not that arising from the breach of the obligation to inform, heads of damages 25, 28, 29, 35 and 45 to 48 are inadmissible pursuant to the January 22, 2024 decision on the admissibility of these damages* [paragraph 74]. *Indeed, these claims are subject to the contractual provisions regarding notice periods, which have not been followed and which, for these specific claims, PWGSC had not waived.*

As can be seen from this excerpt, the Superior Court nonetheless opened the door to the possibility of the client waiving the claims procedure provided for in the contract.

EXCEPTIONS TO THE PRINCIPLE:

a) Waiver of the claims procedure:

In another recent decision, *Rochette Excavation inc. c. Zurich Compagnie d'assurance*, the Superior Court addressed the issue of the client's waiver of the claims procedure provided for in the contract.

While recognizing that the client's conduct may constitute a waiver of the claims procedure provided for in the contract, the Superior Court pointed out that this waiver must be "[translation] *clear and unequivocal*" ("*claire et non equivoque*").

Thus, despite the fact that in this case the client, prior to the filing of legal proceedings, had never, raised the contractor's failure to comply with the claims procedure, the Superior Court held that the contractor had not demonstrated such a waiver:

> [Translation of paragraph 118] *In the present case, Rochette has not demonstrated that Zurich has waived its right to invoke the lapse period provided for in clause 10.3 by "establishing that its conduct* [...] *gave rise to a reasonable inference that it had waived that right"* [81]. *This claim is not supported by a preponderance of evidence.*

The Superior Court does not specify the circumstances in which a client may be considered to have waived the claims procedure. However, the following are instances in which the courts have concluded that the contractual procedure has been waived, such as when the client:

- approves invoices for additional work without raising the issue of non-compliance with the claims procedure;
- agrees to pay part of the extra work despite non-compliance with the claims procedure;
- responds to the contractor's claim, for instance, by proposing a settlement, without raising the issue of non-compliance with the claims procedure;
- does not require the contractor to meet the contractual deadline and treats its claims on their own merits.

In the *David S. Laflamme Construction inc.* case cited above, the Superior Court concluded that the "[translation] *final modification of a contract by way of a waiver is only possible if the attitude is reiterated and is intended to vary the contract definitively*". It also recognized that, after waiving its right to avail itself of contractual provisions governing the claims process, the client may reinstate the application of these provisions after giving reasonable notice to the contractor, particularly in the case of long-term construction contracts.

b) Breach of Obligation to Inform

Additionally, in *David S. Laflamme Construction inc.*, the Superior Court ruled on the impact of non-compliance with the claims procedure when it has been established that the client had breached its obligation to inform.

The court recalled that failure to comply with the contractual claims procedure cannot be invoked by the client against claims based on its failure to meet its obligation to inform:

> [Translation – paragraph 53] *The cause of action based on the breach of the obligation to*

> *inform may engage the client's liability despite non-compliance with the contractual notice periods. Indeed, such a fault would likely have vitiated DSL's tender from the outset, since there is reason to believe that DSL would not have bid at the proposed price had it been aware of the additional information on the actual soil conditions, the existence of a crack and the precise location of the rock, all of which were known to PWGSC.* (...).

c) Breach of Obligation of Good Faith

In a recent decision, *PG4 Construction Corp. c. Énergir*, the Superior Court added that the client cannot invoke the contractor's failure to comply with the claims procedure when they have breached their obligation of good faith:

> [Translation – paragraphs 421-423] *Énergir's lack of good faith, which manifested itself in its uncooperative behaviour towards PG4 during the performance of the Contract, must be sanctioned by a fin de non-recevoir which prevents it from invoking the contractual claims procedure stipulated in articles 18 and 26.2 of the General Conditions of the Contract as a defence to the claim.*
>
> *Énergir's conduct did not comply with its obligation to act in good faith in all circumstances. Its conduct is not exclusively silent; it is deceptive in that it encouraged PG4 to implement acceleration measures by leading it to believe that everything would be settled later. This behaviour must be sanctioned.*
>
> *A fin de non-recevoir to the application of the contractual claims procedure is the appropriate remedy in view of* [Énergir's] *failure to comply with its duty of consistency and its breach of PG4's trust*.

Thus, in this case, the contractor was awarded more than $15 million in damages for the additional work covered by its claim, even though he had been shown that he had not complied with the procedure set out in the contract and that the client had not waived it.

The Superior Court's decision is currently under appeal, and the Court of Appeal is expected to consider this exception.

PRACTICAL TIPS

Failure to comply with the claims procedure can have drastic effects, depriving the contractor of its right to submit a claim.

For the contractor, it is therefore imperative to document any issues encountered (e.g., site conditions differing from those indicated in the tender documents) and to ensure that it complies with the notice periods stipulated in the contract, in order to preserve its rights.

The contractor should also ensure that it files its claim according to the most conservative interpretation of the notice periods stipulated in the contract. In the *Rochette Excavation* case, the contractor had submitted its claim within 120 days of the provisional acceptance certificate. However, the court concluded that the provisional acceptance of the work had in fact taken place several months earlier. Therefore the contractor's claim did not comply with the notice period stipulated in the contract.

Upon receipt of a notice of intent to submit a claim, the client should establish the date on which the issue was encountered to determine whether the deadline was met. If the contractual deadline was not met, it may be advisable for the client to notify the contractor in writing. Failure to raise the issue of non-compliance with the claims procedure could in fact be interpreted by the courts as a waiver of that procedure, as discussed above.

Québec Superior Court
David S. Laflamme Construction inc. c. Procureur général du Canada
Lukasz Granosik, J.C.S.
November 5, 2024

Québec Superior Court
Rochette Excavation inc. c. Zurich Compagnie d'assurance
Marie-Hélène Montminy J.C.S.
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Quebec Superior Court
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Enrico Forlini, J.C.S.
November 13, 2024

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A PRIMER ON LIENS UNDER THE B.C. *BUILDERS LIEN ACT*

A claim of lien under British Columbia's *Builders Lien Act* (BLA), provides protection to contractors, subcontractors and workers who provide work or materials to a construction project. The BLA allows these people to file a claim of builder's lien against the property to which they contributed. This statutory lien is a powerful tool which can have serious consequences for the property owner and create significant barriers for further project development. This article reviews the central principles of BLA liens, including how they can be registered against title and some of the ways they can be removed.

The lien against land is only one aspect of the BLA. The builder's lien holdback and trust (and the holdback lien) are important parts of the scheme created by the BLA.

WHAT IS A BUILDER'S LIEN AND WHEN IS IT USED?

The builder's lien is a charge registered against title to a property to secure payment for work performed or material supplied in relation to an "improvement", a broadly defined term that encompasses most construction projects. To file a lien, a person must be a "contractor", "subcontractor" or "worker" as defined in the BLA and must file the claim of lien at the land titles office for the district in which the improved land is located. The claim of lien is registered against the land in, on or under which the "improvement" is located.

The amount that can be claimed is the contract price for the work or material that has been supplied but remains unpaid, which includes applicable taxes. Claims for profit, overhead or administrative costs that are directly connected to the work performed can sometimes be included in the lien amount, such as where the contract does not specify an exact price or provides for extra compensation (e.g., a "cost-plus" contract). The amount claimed should never be speculative, as the claimant will ultimately need to demonstrate entitlement to the amount claimed. It is an offence to make a knowingly false statement in a claim of lien.

A claim of lien is often filed at or near the completion of a subcontract or the project itself, since this is when disagreements over payment often arise. However, a claim of lien can be registered at any time during construction up until the end of the statutory deadline for filing. The BLA imposes a deadline of 45 days after either issuance of a certificate of completion, completion, abandonment or termination of the head contract, or abandonment of the project itself. Additionally, s. 88 of the *Strata Property Act* sets a deadline for filing a builder's lien against a newly built strata lot: 45 days after conveyance of the lot.

The claim of lien creates an incentive for the property owner to pay contractors, or to help address disputes among contractors and subcontractors about alleged unpaid amounts, because property typically cannot be sold or transferred until any liens are removed. A claim of lien filed by an unpaid subcontractor also incentivizes contractors to address disputes, including because many construction contracts impose a condition requiring the contractor to remove liens filed by its subcontractors.

REGISTERING A CLAIM OF LIEN

The right to file a claim of lien arises under s. 2 of the BLA when the price for work or material provided by contractors, subcontractors or workers remains unpaid. However, while that section says these persons "*have a lien*", additional steps are required for the right to a lien to crystallize.

First, the lien claimant must file a claim of lien in the prescribed form, as set out in BLA s. 15. When the claim of lien is filed with the land titles office it becomes a registered encumbrance on title. As noted above, filing must occur within 45 days of a triggering event: issuance of a certificate of completion, completion, abandonment or termination of the head contract, abandonment of the project, or conveyance of a strata lot.

Second, the lien claimant must "perfect" their claim of lien by commencing a lawsuit that seeks enforcement of the lien. If this is not done within one year of filing, the lien is extinguished under BLA s. 33(5). However, the owner of the property subject to the builder's lien may reduce the one-year time limit to 21 days by serving a notice to commence an action under BLA s. 33(2). Taking this step forces the lien claimant to begin their lawsuit to enforce the lien within 21 days of receiving the owner's notice. These deadlines force the lien claimant to move litigation forward and resolve disputes over unpaid amounts and help prevent property owners and construction participants from becoming deadlocked.

Removing a Builder's Lien

As a counterbalance to the powerful lien tool, the BLA provides owners and others with several ways to remove liens from title. We discuss a few of the options below.

Section 24 of the BLA provides a quick way to remove a builder's lien from a property. The property owner—or a contractor, subcontractor or any other person liable on a contract in connection with the improvement—may apply to the court to post money as security for the lien claim. The court generally also accepts certain other forms of security such as lien bonds or letters of credit. The claim of lien is then removed from the legal title to the land, but the dispute can continue over the claimant's entitlement to the lien and the proper amount of the security. The process under s. 24 can be further expedited where the lien claimant consents to the replacement security.

The purpose of s. 24 is to allow the owner to dispose of the land and deal with it as normal while preserving the contractor's, subcontractor's or worker's security. Since property owners are often required to maintain their title free of all liens in order to transfer the property or obtain project financing, they are incentivized to clear the title to land as quickly as possible. Posting security for the disputed amount under s. 24 allows the payment dispute to continue separately while the construction project or conveyance moves ahead.

A claim of lien can also be removed by way of a court application under BLA s. 25. Section 25(1) allows applications to remove a claim of lien where one of the following applies:

- the lien claimant failed to comply with the deadlines for filing either the claim of lien or the lien enforcement action, described above;
- the lien claimant's action to enforce the lien has been dismissed or discontinued; or
- the debt has been paid.

Section 25(2) allows applications to cancel claims of lien that do not relate to the correct parcel of land or that are vexatious, frivolous or an abuse of process. However, it can be difficult to establish that a lien is vexatious, frivolous or an abuse of process, even where the amount claimed is demonstrably inflated. However, in one such case, *Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.*, the Court of Appeal issued an Order cancelling a claim of lien for over $3 million as an abuse of process because the lien claimant had no arguable case to support the amount of its claim, despite being asked repeatedly for an explanation as to the claim amount.

British Columbia Court of Appeal

Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.
D.C. Harris, L.A. Fenlon and S.A. Griffin JJ.A.
November 28, 2023

Eugene Meehan K.C.
Editor, Supreme Advocacy

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS v. GESTION GILLES LAURENCE LTÉE, et al.

The Respondents, Gestion Gilles Laurence ltée and Gestion Daniel Sauvé inc., purchased lands located in a city with the goal of developing them later. To do so, they first wished to build streets. They therefore signed, with the city, a memorandum of understanding in which they undertook to build the streets, at their own expense, and to transfer them to the city free of charge once built. To build those streets, the developers contracted with general contractors duly licensed by the Régie du Bâtiment du Québec. The Director of Criminal and Penal Prosecutions, charged them with having violated s. 46 of the *Building Act* of having acted as a building contractor by carrying out or having carried out construction work without holding a licence for that purpose.

At trial, the presiding justice of the peace found the Respondents were contractors within the meaning of s. 7 of the Act and presumed as such within the meaning of s. 8. The exception specified in s. 49 regarding owner-builders did not apply to the Respondents. The Respondents were convicted of the offences as charged. On appeal, the Québec Superior Court judge found the trial justice committed overriding errors in law. The Respondents did not act as contractors because the work was not carried out "for another person" at the time of the alleged offences. The presumption in s. 8 did not apply because there was no sale or exchange. Furthermore, the Respondents could benefit from the exception in s. 49 because they had dealt with duly licensed contractors.

The Québec Court of Appeal was divided on the issue. The majority was of the opinion the appeal should be dismissed. The Respondents acted for themselves and not for the city. Since they were owner-builders, s. 49 of the Act exempted them as such from the obligation to each hold a contractor's licence for that work. The dissenting judge was of the opinion the appeal should instead be allowed. The Respondents never intended to continue to have in their possession those works in order to enjoy them as owners; they had that work carried out "*for another person*", which corresponds to the definition of "contractor" in s. 7 of the Act. The application for leave to appeal to the Supreme Court of Canada, though, was dismissed.

Quebec Court of Appeal
Director of Criminal and Penal Prosecutions v. Gestion Gilles Laurence Ltée, et al.
Stephen W. Hamilton, J.C.A.; Sophie Lavallée, J.C.A.; Frédéric Bachand, J.C.A.
January 29, 2025

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CITATIONS

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