WHEN CAN WORK "IN RESPECT OF" LAND, BUT NOT ON IT, GIVE RISE TO LIEN RIGHTS?

My topic deals with the right to lien when the claimant does not do work at the job site.

Whether a person has lien rights for off-site work depends on a number of factors. The cases often produce opposite results based on the slimmest of factual differences. It is a line drawing exercise in many instances.

The most important factor is the relevant definitions of the lien act in question. It is very difficult to reconcile the cases across Canada into common principles of law - most of the cases turn on the specific statutory wording and the facts of the case. There are, and have been, significant differences in wording amongst the lien acts of the provinces. This has led to contrasting case law throughout the country. In general, the western

provinces have tended to interpret their lien acts more liberally, in favour of the lien claimant.

The key terms to consider are “improvement”, “materials”, “premises”, “supply of services” and the definition of the supply of materials in subsection 1(2).

I have included a copy of these definitions at the end of this paper.

Although I am focussing on the case law dealing with the validity of liens, a similar analysis applies to the availability of trust rights, under section 8 of the Act. See, for example:

Re Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd. (1986) 26 D.L.R. (4th) 422 (B.C.C.A.) and

Re Desourdy 1949 Paving Inc. (2000) 3 C.L.R. (3d) 93 (S.C.J.).

There are a few key cases dealing with the interpretation of the phrase “supply of services” in subsection 1(1) of the Act. They are:

Modern Construction Ltd. v. Maritime Products Ltd. [1963] S.C.R. 347

George Wimpey Canada Ltd. v. Peelton Hills Ltd. et al (1982) 35 O.R. (2d) 787 (C.A.)

Re Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd. (1986) 26 D.L.R. (4^{th}) 422 (B.C.C.A.)

Benny Haulage Ltd. v. Carosi Construction Ltd. [1998] O.J. No. 3003 (Ont. C.A.); (1998) 39 C.L.R. (2d) 175 (Ont. Div. Ct.); (1996) 33 C.L.R. (2d) 47 D.C.O.

In George Wimpey Canada Ltd., the Ontario Court of Appeal denied a lien claimed by a subcontractor for work it did on the roadways in a subdivision. The lien was claimed against the adjoining building lots. The court treated the roads and lots as separate improvements. The court stated

that for off site work to generate lien rights, it must be directed to advance the work project that was being carried out on the very work site (the building lots) that is sought to be charged with the lien.

I think the court took an overly restrictive view in George Wimpey. I have given you some arguments to use, should you need to distinguish that case.

In Modern Construction v. Maritime Products, the Supreme Court of Canada allowed a lien claim to proceed with respect to the total value of work done on two adjoining parcels of land, even though those two parcels were owned by different persons, and only one owner requested the work.

In Kettle Valley Contractors v. Cariboo Paving, the British Columbia Court of Appeal upheld a lien claimed by a subcontractor which supplied a loader and operator to dig gravel from a gravel pit, about three miles from the subdivision in question. The gravel was then used, along with other materials, to make asphalt, which was then trucked to the site by another subcontractor, to make the roads.

The British Columbia Court of Appeal in upholding the validity of the lien stated that the off site work was an integral and necessary part of the actual physical construction of the project.

In Benny Haulage v. Carosi Construction, the Divisional Court of Ontario upheld the validity of a lien claimed by a subcontractor, when the only work done within 45 days of the registration of that lien occurred off site. The court stated that the levelling of soil at a dump site, which had been taken from the work site, physically contributed in a direct and essential way to the construction of the improvement on the work site. The Ontario Court of Appeal refused to grant leave to appeal.

SELECTED EXAMPLES OF THE JUDICIAL TREATMENT OF OFF SITE WORK

Here's a quick review of some cases to give you an overview of how the courts have handled these types of claims.

A lien was allowed to someone who provided security services to the site, to protect the work during the course of construction. See M.W.M. Construction of Kitchener Ltd. v. Valley Ridge Inc. [1993] O.J. No. 2609 (Div. Ct.).

A lien was allowed to someone who connected a portable kitchen, temporarily moved onto the site, to the water and sewer systems, and to another firm who supplied storage tanks and propane to operate the stoves in the kitchen and heat the temporary sleeping accommodations. This was in connection with the construction of a new plant. See Alberta Gas Ethylene Co. v. Noyle [1980] 2 W.W.R. 507 (Alta. C.A.).

A blacksmith who sharpened the tools used in a mine was entitled to a lien - Davis et al v. Crown Point Mining Co. (1901) 3 O.L.R. 69 (Div. Ct.), but a company that rented a drill sharpener to another, to sharpen tools used in the making of a mine, was denied lien rights. See Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al [1940] 2 D.L.R. 472 (N.S.S.C.).

The cases have gone both ways with respect to whether an architect who prepares drawings or plans, but does no on site supervision of the construction, is entitled to a lien.

However, if the architect also supervises or directs the on site construction, most cases have held that he or she is entitled to a lien.

If the improvement does not go ahead, then an architect or other similar consultant should have lien rights due to clause (b) in the definition of supply of services.

Another argument that lien rights exist for work done “off site” arises by virtue of the wording in section 20 of the Act - the general lien section. I submit that a subcontractor who is hired to supply services or materials to, say, two of 10 lots in a subdivision, under a contractor who has a “general contract” for the 10 lots, could lien any of the 10 lots, even lots to which it did not supply.

Although lien rights generally arise for on-site supervision of the construction, lien rights were denied for off-site construction management involving things such as permit applications, negotiating with trades and assisting site supervisors in 697470 Ontario Ltd. v. Presidential Developments Ltd. et al (1989) 69 O.R. (2d) 334 (Div. Ct.). The court held that the work was not so directly related to the construction of the improvement on the land, as to entitle the plaintiff to a lien.

A "developer" who was hired by the owner to acquire a property, tend to zoning and planning matters, engage professional consultants and arrange financing, was not entitled to a lien. See Hett et al v. Samoth Realty Projects Ltd. (1977) 76 D.L.R. (3d) 363 (Alta.C.A.).

It is important to determine whether a lien claimant is considered a material supplier or a supplier of services. It is generally easier to obtain a lien, if you are a supplier who does not attend the job site, if you supply materials rather than services. The case of Lemax Industries v. Bradon Industries (1992) 130 A.R. 355 (Q.B.) contains a helpful discussion to consider in determining whether a lien claimant is a supplier of materials

or services. Pursuant to an order from a subcontractor, Bradon bought uncoated pipe from another firm. Bradon then cut the pipe into specified lengths and coated the pipe with a chrome carbide material. The court concluded that Bradon's contract was essentially to supply materials, as the cutting and coating of the pipe was incidental to the supply of the material. The court stated that Bradon's contract was for the supply of coated pipes and washers, not for the coating of pipes and washers. The court noted that if Bradon had been able to secure the required washers and pipes, properly coated, from some oneelse, it would have fulfilled its contract by providing such material. The court further stated that if Bradon's customer had obtained uncoated pipes from someone else and taken them to Bradon to be coated, Bradon might be considered to have supplied services. The court, therefore, concluded that Bradon did not "supply services", but if the cutting and coating was a service, it was not the supply of services within the meaning of the Alberta Builders Lien Act because the service was not directly connected to the process of construction.

In the case of Redheugh Construction Ltd. v. Coyne Contracting Ltd. (1996) 29 CLR (2d) 39, the British Columbia Court of Appeal

allowed a subcontractor to include in its lien claim, an amount for "administrative

costs" which didn't arise from physical work on the job site. The court held that those administrative services directly contributed to the improvement. The administrative work included negotiations by the subcontractor with its general over certain extras. The court also stated that other types of administrative costs (for example, an employee's wages who works only at the head office), which aren't directly related to the construction at the improvement, cannot be included in a lien claim.

The supply of trucks or similar transportation equipment to simply deliver to the site the goods of another, has generally not been capable of supporting a lien (see Peterson Truck Co. v. Socony-Vacuum Exploration Co. (1955) 17 W.W.R. 257 (Alta. C.A.) and Slack Transport Ltd. v. General Concrete Ltd. et al (1983) 37 O.R. (2d) 137 (C.A.), leave to appeal to the Supreme Court of Canada refused on June 7, 1983. In the Slack Transport case, the Court of Appeal held that the mere delivery to the work site of construction materials, by supplying transport trucks and drivers, was too tenuous and insufficiently direct a connection with the construction activity itself, to constitute performing a service in respect of an improvement within the definition of the supply of services under the

Ontario Act. The court also held that the delivery of product (concrete slabs) to the work site by the lien claimant did not constitute the "placing of material on the land" within the meaning of subsection 1(2) of the Act. The court stated that placing of material requires, as a minimum, the notion of putting something in an arrangement or in a location where it belongs, in relation to the construction project. The lien claimant in this case did not load or unload the concrete slabs. However, if the lien claimant sells the goods and delivers them to the site, the lien has generally been upheld. See Soo Mill & Lumber Co. v. 499812 Ontario Ltd. et al (1985) 17 C.L.R. 306 (H.C.J.).

The majority of the case law denies lien rights to a material supplier who supplies materials to a contractor or subcontractor in bulk or on a revolving account, rather than in respect of a specific improvement.

These types of cases should be read in conjunction with a close review of the applicable statutory provisions, since some of these cases would be decided differently under the current definition of "supply of services" in subsection 1(1) of the Ontario act.

THE PRINCIPLES THAT EMERGE:

1. In interpreting the terms of the Act, one should also look at the words used in the balance of the Act and the object of the Act. The Ontario Court of Appeal has said that, generally speaking, the object of mechanics lien legislation is to prevent owners of land getting the benefit of work done at their instance, on their land, without paying for it.

1. In order to generate lien rights, the work off site must be an integral and necessary part of the on site work. See the Kettle Valley and Benny Haulage cases. In Hansen v. Canadian National Railway Co. et al (1982) 131 D.L.R. (3d) 642 (Sask. Q.B.), the court stated that the test is whether the services were "a reasonably direct and significant contribution to the improvement".

2. The Supreme Court of Canada in Clarkson Company Ltd. et al v. Ace Lumber Ltd. [1963] S.C.R. 110 stated that "while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in

> determining whether any lien claimant is a person to whom a lien is given by it". The rationale was that the act abrogates the common law by conferring special privileges on its beneficiaries. Presumably, this approach to interpretation would also apply to those claiming the benefits of the trust provisions of the act.

I found one case which openly ignored that pronouncement. In South Side Woodwork (1979) Ltd. v. R.C. Contracting Ltd. [1989] A.J. No. 111, Master Funduk relied upon the Alberta equivalent to section 10 of the Interpretation Act of Ontario, in resisting the "blind application" of that principle. Section 10 states that every act shall be deemed to be remedial and shall receive such fair, large and liberal interpretation as will best ensure the attainment of the object(s) of the act.

As well, in an Ontario Court of Appeal decision decided before Clarkson Company, [Read v. Whitney (1919) 64 O.L.R. 377], the Court stated "by statute imposed injunction we are bound to give effect to the act as a remedial enactment".

Whenever I read a lot of cases, I look for memorable quotes. In the South Side Woodwork case, Master Funduk provided one that I found enjoyable. On page 6 of the decision, Master Funduk was, in the context of his review of the cases, discussing the principle of stare decisis. He stated:

> ***"Any legal system which has a judicial appeal process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder. I am bound by decisions of Queen's Bench judges. I do not overrule decisions of a judge of this court. The judicial pecking order does not permit little peckers to overrule big peckers."***

DEFINITIONS

"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.

"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.

"premises" includes,

)a. the improvement,

)b. all materials supplied to the improvement, and

)c. the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made.

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

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

(b) 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.

Definition of 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 that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or

in any event, incorporated into or used in making or facilitating directly the making of the improvement.