DON'T Lien On Me!

The *Construction Lien Act* within the context of commercial leasing

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INTRODUCTION

This paper addresses construction lien issues which arise when a tenant undertakes improvements to leased premises, specifically considering ways a landlord can protect itself from liability.

There are two ways that a landlord's interest can become encumbered by a construction lien. One occurs when the landlord falls within the definition of "Owner" as that word is defined in the *Construction Lien Act*.[2] Under the CLA, "Owner" is given a meaning quite different from its usual meaning. This is especially relevant in landlord-tenant situations, since the landlord, the tenant, or both, may fall within the definition. In this paper I have capitalized the word "Owner" to indicate that it is being used in accordance with its definition under the CLA.

The other way a landlord's interest can become encumbered by a construction lien occurs when the contractor notifies the landlord of improvements to be made to the landlord's leased property and the landlord fails to respond within 15 days disclaiming liability.

The two ways that a landlord's interest can become encumbered by a construction lien are discussed in Part 1 of this paper. Part 2 addresses the effect on landlords when a tenant's interest is liened. Part 3 reviews the timelines and procedures regulating the creation, enforcement, and removal of construction liens from title. And, Part 4 discusses some practical considerations for

[1] A special thank you to Brian Parker, associate at Daoust Vukovich LLP, for his help preparing this paper and presentation.

[2] RSO 1990, c C30 [*CLA*]. All statutory references in this paper are to the *CLA*, unless specifically indicated otherwise. Note: the *CLA* does not apply to Federal land and applies differently to land interests of the provincial Crown. This paper only addresses the *CLA* as it applies to non-governmental land interests.

landlords and lawyers, including lawyers' professional responsibility obligations. Before proceeding, it's valuable to briefly explain the nature of a construction lien.

Section 14 of the *CLA* creates a charge upon the interest of an Owner in favour of those who supply services or materials for an improvement to the Owner's land. The statutory charge, known as a "construction lien" is a security interest in the real property for the value of the services or materials provided. Without a construction lien, an unpaid contractor's recourse is for breach of contract against the party who hired them. With a lien, an unpaid contractor has a collateral means by which it may recover unpaid amounts. Namely, the contractor can seek payment from the Owner of the lands improved, regardless of whether a contract exists between the two of them.[3] In the event that the Owner is unable or unwilling to pay the amounts owing, the contractor can enforce its lien by seeking a court order obligating the Owner to pay, or an order that the Owner's interest in the lands be sold and the proceeds used to satisfy the debt.

PART 1 - LIENING THE LANDLORD'S INTEREST

A contractor's lien is said to arise when "the first shovel hits the ground."[4] This lien can attach to the landlord's interest in the property in two ways: A) The landlord falls within the definition of Owner under the CLA, or B) The landlord doesn't respond to a section 19(1) notice within 15 days. This Part addresses both ways that a construction lien may encumber a landlord's interest.

A. LANDLORD AS "OWNER"

Section 1 of the *CLA* defines Owner for the purposes of the act, providing:

> Owner means any person ...having an interest in a premises at whose request and,
>
> a) upon whose credit,
>
> b) on whose behalf,

[3] The *CLA* distinguishes between contractor and subcontractors; the former being those who contract directly with the Owner, the latter being whose who do not have a contract with the Owner, but have a contract with a contractor. For the purposes of this paper, both contractors and subcontractors will simply be referred to as "contractors."

[4] David I. Bristow, Q.C. et al, *Construction Builders' and Mechanics' Liens in Canada* (Toronto: Carswell, a Division of Thompson Reuters Canada Ltd., 2005) at 1-1; *CLA* s 15 provides that a "lien arises and takes effect when the person first supplies services or materials to the improvement."

c) with whose privity or consent, or

d) for whose direct benefit … an improvement is made to the premises…

Essentially, an Owner is a person who satisfies the following three criteria:

1) The person has an interest in the premises improved,

2) The person requested the improvement, and

3) The improvement was made on the person's credit or behalf, or with their privity or consent, or for their direct benefit.

When a tenant hires a contractor to improve its leased premises, the tenant will fall within the definition of Owner under the *CLA* and a lien will attach to the tenant's leasehold interest. The landlord may also meet the definition of Owner, in which case a lien will also attach to the landlord's interest in the leased premises. Whether a landlord meets the definition of Owner is a function of the degree of involvement the landlord has in the improvement.[5] Since a landlord has an interest in the leased premises, it will always meet the first criteria of Ownership. Whether the landlord's interest in the leased premises may properly be encumbered by a construction lien depends on whether the landlord satisfies the second and third criteria set out above. As stated by the Supreme Court of Ontario in *Pinehurst Woodworking Co v Rocco*:[6]

> *It has been clear since the decision in Gearing v. Robinson (1900), 27 OAR 384 (CA) that there must be a request, express or implied, from the Owner of the fee simple, combined with one or more of the other factors … to bring the Owner of the fee simple within the statutory definition of "Owner" where the contract for the work is not with him but with a tenant.*

[5] In *Roboak Developments Ltd v Lehndorff Corp,* [1986] OJ No 2681 (SC (H Ct J)) [*Roboak*] the Court used the phrase "by virtue of its involvement" when referring to the decision in *Phoenix Assurance Company of Canada v Bird Construction Company*, [1984] 2 SCR 199 [*Phoenix*].

[6] [1986] OJ No 41 (SC H Ct J (Div Ct)) at 15 [emphasis added] [*Pinehurst*].

i. "Requesting" the Improvement

A request may be express or implied. In *Parkland Plumbing & Heating Ltd. v Minaki Lodge Resort 2002 Inc.*[7], the Ontario Court of Appeal explained that:

> *[t]he absence of direct dealings between the person said to be an Owner under the Act and construction suppliers is only one factor to consider in examining the relationship between the parties. It is not determinative. Were it otherwise, a developer could easily escape its obligations to suppliers…[defeating] the intended protection provided to lienholders under the Act. For this reason, the Courts have recognized that a "request" for work to be done may be inferred from the totality of the circumstances, viewed in light of the substance of the relationship between the parties*[8].

Given the imprecision engendered by an assessment based on the "totality of the circumstances," it's unclear what actions a landlord may take without risking that a Court subsequently find it to have implicitly requested the improvement. In *Roboak Developments Ltd. v Lehndorff Corp.*,[9] the Court held that a landlord's request need not be expressed to the contractor and that the substance, not merely the form, of the relationship must be considered. The general approach outlined in *Minaki Lodge* and *Roboak* provide minimal assistance to a landlord trying to avoid liability. Nevertheless, other cases have provided more specific guidance, namely that:

- Landlord approval of drawings/plans of the improvements is not a request[10]
- Mere knowledge of, or consenting to, the improvement is not a request[11]

[7] 2009 ONCA 256 [*Minaki Lodge*].
[8] *Minaki Lodge* at para 67, citing *Phoenix* at 215-18, *Roboak* at 203-04, and others [emphasis added].
[9] *supra* note 5.
[10] *Pinehurst*; *1276761 Ontario Ltd. c.o.b. GRM Contracting v 2748355 Canada Inc*., [2006] OJ No 4740 (Sup CJ (Div Ct)) aff'g [2005] OJ No 2956 (ONSC) [*GRM Contracting*].
[11] *Roboak* citing *MacDonald-Rowe Woodworking Company v MacDonald* (1963), 39 DLR (2d) 63 (PEI SC).

ii. Credit – Behalf – Privity – Consent – Direct Benefit

Similarly, further guidance regarding what satisfies these elements would be helpful. As of now, the cases provide the following:

- Credit: Simply providing a tenant allowance is not sufficient to meet the credit requirement.[12]
- Behalf: This factor likely requires that the requesting party is acting as the landlord's agent.[13]
- Privity or consent: Approving (or refusing) to consent to the improvement is not the kind of privity or consent required under this factor. A "significant element of direct contractual dealing" is required.[14]
- Direct benefit: The benefit that a landlord may acquire as a result of its reversionary interest in the improved premises does *not* satisfy this factor. Some benefit beyond that incident to a reversioner is required.[15]

iii. Summary: Avoiding "Ownership"

The cases provide some insight as to whether a specific action of a landlord is sufficient to satisfy a specific criterion of Ownership under the *CLA*. Collectively, the cases paint a general picture of what degree of landlord involvement may lead to a finding of Ownership. The cases, however, do not provide a bright-line safety zone for landlords who require some degree of involvement in the improvements made to their leased premises, but want to avoid a potential lien upon their interest.

The cases support the position that simply approving plans and providing a tenant allowance, without more, will not bring the landlord within the definition of Owner under the *CLA*. However, a combination of elements which alone do not satisfy individual

[12] *Haas Homes Ltd. v March Road Gym & Health Club Inc.*, [2003] OJ No 2847 (Sup CJ) [*Haas Homes*].
[13] *ibid.*
[14] *Pinehurst*; *Haas Homes*; *Lincoln Mechanical Contractors v Cardillo*, 2011 ONSC 664 [*Lincoln*].
[15] *Pinehurst* at 15; *DBM Heating & Air Conditioning Ltd. v Lark Manufacturing Inc.*, [1990] OJ No 319 [*DBM Heating*] at 3.

criterion for Ownership, when combined may lead a Court to find that the landlord's involvement was significant enough to bring it within the definition.[16]

A landlord who wants to avoid being classified as an Owner is cautioned to avoid direct dealing with contractors and to avoid an active role in the improvement process. As a rule of thumb: the less involvement, the better.

B. SECTION 19 NOTICES

A landlord's interest may also be encumbered by a lien where the landlord receives notice from a contractor of improvements to be made to its leased premises and the landlord doesn't respond to the contractor within 15 days disclaiming liability.[17] Section 19(1) of the *CLA* provides:

> Where the interest of the Owner to which the lien attached is leasehold, the interest of the landlord shall also be subject to the lien to the same extent if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvements to be made.

i. What Constitutes Notice?

The *CLA* provides a form for contractors to use for the purpose of providing notice to a landlord pursuant to section 19(1), as well as a form which the landlord may use in response to disclaim liability.[18] The forms are permissive; notice in another format may still be valid. Courts have considered whether varying degrees of communication and/or landlord awareness of the improvements constitute sufficient notice for the purpose of section 19(1).

In *Pinehurst*, a retail tenant leased space in a shopping centre. The tenant hired a general contractor to make improvements to the premises to ready it for the tenant's use as a

[16] This position is implied by the decision in *Lincoln*.

[17] Section 19(1) requires notice of the improvements "to be made." Notice given after the improvements have been made is ineffective.

[18] These forms are provided in the General Regulation, RRO 1990, Reg 175 (Forms 2 and 3, respectively) and are included in the appendix to this paper.

clothing store. The improvements were completed and the tenant opened for business. Subsequently, the tenant defaulted on payments to the contractor. The contractor registered a construction lien against the entire shopping centre claiming that various communications it had with the landlord, including the landlord's approval of improvement plans, were sufficient to constitute notice under section 19(1) and that the landlord did not provide a response disclaiming liability. The Court disagreed with the contractor, holding that the notice must be sufficiently "arresting" or "attention getting" in order to alert the landlord that the contractor intends to hold the landlord liable for the value of the improvements.[19]

Various contractors have attempted the same argument since *Pinehurst*; they have had varying degrees of success. In *1276761 Ontario Ltd. c.o.b. GRM Contracting v 2748355 Canada Inc.*[20] the Court affirmed the *Pinehurst* approach, commenting further that the notice must be sufficiently "distinct or memorable" to put the landlord on notice that the contractor intends to lien the landlord's interest in the property. The Court also took the opportunity to underscore the requirement that the notice be in writing. Some earlier decisions held that a collection of events may provide sufficient notice to a landlord for the purpose of section 19(1) (referred to as "notice events"). The Court in *GRM Contracting* noted that section 19(1) requires the contractor to give the landlord "written notice," and thereby held that notice events alone are insufficient. The Court, however, recognized the possibility that an incomplete notice in writing may, when combined with notice events, be sufficient for the purposes of section 19(1).[21]

ii. Waiving Liability

After receiving notice pursuant to section 19(1), a landlord may avoid the potential of a lien attaching to its interest by responding to the contractor within 15 days disclaiming responsibility for the improvements. The *CLA* provides a form for disclaimer ("Form 3").

[19] *Pinehurst* at 19.
[20] *supra* note 10.
[21] *GRM Contracting* at para 26.

Like the contractor's form, it is permissive. A landlord need not use the form in order to effectively disclaim liability.

The notice-disclaimer system allows the contractor to decide whether it will accept the construction contract, knowing that it may be prevented from liening the landlord's interest in the event the tenant doesn't pay.

iii. Guidance for Landlords

Given that the contractor's right to lien the interest of an otherwise uninvolved landlord can arise in a mere 15 days, landlords are advised to flag any correspondence received directly from contractors regarding improvements to their property. While the Courts have expressly recognized that landlord's, especially those controlling multi-tenanted premises, are entitled to a clear warning of a contractor's intention to lien the landlord's interest,[22] it's possible that the Court may, in a given case, find somewhat cryptic or vague written notice to be satisfactory.

It is recommended that when a landlord receives any documentation from a contractor regarding upcoming improvements to its leased property, the landlord send a Form 3 (or equivalent) to the contractor within 15 days of receiving notice.[23] If the landlord receives sufficient notice and fails to respond in time, an unpaid contractor may lien the landlord's interest in the property for the value of unpaid improvements made to a tenant's premises.

C. GUIDANCE FOR LANDLORD'S WHERE THEIR INTEREST IS LIENED

i. The Nature of the Problem

Even when a landlord has had minimal involvement in the improvements to a tenant's premises and the landlord has sent a disclaimer to the contractor within 15 days of receiving notice of the improvements, the landlord may nevertheless find that an unpaid

[22] *GRM Contracting* at para 34.

[23] Absent evidence to the contrary, a party is deemed to receive notice 5 days after mailing (excluding Saturdays and holidays), *CLA* s 87(2).

contractor has registered a lien against its interest.[24] While the lien may not, at law, entitle the unpaid contractor to look to the landlord for compensation, the presence of the registered claim for lien may disrupt the landlord's ordinary course of business.

Valid construction liens affect the priority ranking of security interests in the property. The landlord's lender/mortgagee may be uncomfortable with the risk that its mortgage be potentially postponed to a construction lien.[25] A discussion of the effect a construction lien has on the priorities of other security interests is beyond the scope of this paper, but suffice it to say that the presence of a registered lien, whether valid or not, may introduce sufficient uncertainty to materially disrupt the landlord's ordinary interaction with its secured lender(s). Section 44(1) of the *CLA* provides a mechanism by which the lien can be removed from title[26] so long as alternate security is posted. This process is often referred to as "bonding-off."

ii. Bond-off & Recover from Tenant

Section 44(1) of the *CLA* provides that any party may make a motion to Court for the removal of a lien from title, and that the Court shall vacate the registration of lien if the person pays into Court, or posts security in, an amount equal to: the total of the full amount claimed as owing under the lien and the lesser of $50,000 or 25% of the lien amount as security for costs.

In essence, this section allows a party to provide substituted property as security for the lien. Once vacated from title, there is no concern that other parties with security in the landlord's real property risk postponement to the lien. The interruption the lien introduced to the landlords ordinary financing activity can be eliminated by providing alternative security to which the lien can attach.

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[24] A person who preserves a lien when they know or ought to know that they do not have a lien is liable to any person who suffers damage as a result, *CLA* s 35. This section is further discussed in this paper with respect to professional responsibility.

[25] See *CLA* s 78.

[26] Known as "vacating" the lien.

A prudent landlord will ensure that the tenant has covenanted to pay all contractors providing services or materials to the leased premises and that the tenant shall not permit a lien to be registered. If the tenant breaches these terms, the landlord should ensure the lease permits it to make a motion to Court under section 44(1) and to charge the tenant for all expenses associated therewith.

PART 2 – LIENS UPON THE TENANT'S INTEREST

When a tenant undertakes improvements to leased premises, it will fall within the definition of Owner under the *CLA*. Consequently, contractors who supply materials or services to the tenant's premises acquire a lien upon the tenant's leasehold interest therein. While this does not create a lien against the landlord's interest, it nevertheless has implications for the landlord. Primarily, when a tenant's leasehold interest is encumbered by a lien, the landlord is prohibited from terminating the lease, unless the tenant has failed to pay rent and the landlord complies with the requirements set out in subsections 19(3) and 19(4) of the CLA.

A) RESTRICTIONS ON TERMINATION

Subsection 19(2) provides:

> No forfeiture or termination of a lease by a landlord, except for non-payment of rent, deprives any person having a lien against the tenant's interest of the benefit of the person's lien.

Subsections 19(3) and 19(4) provide that when the landlord intends to terminate a liened tenancy for non-payment of rent, the landlord must provide written notice of this intention to all registered lien claimants. Thereafter, lien claimants are afforded 10 days to pay the rent arrears in order to prevent termination. If a claimant does, the lien is preserved along with the lease and the arrears so paid are added to the amount of their lien claim.

There is a dearth of cases dealing directly with subsections 19(2) through 19(4). As a result, the breadth of the restriction on a landlord's right to terminate a lien-encumbered tenancy has not been precisely established.

B) GUIDANCE FOR LANDLORDS WHERE TENANT'S INTEREST LIENED

Generally, a construction lien registered solely against the tenant's interest will not prejudice the landlord's mortgagee. The primary burden which a lien on a tenant's interest imposes on a landlord is the restriction on termination discussed above. There are two methods landlords typically utilize in order to overcome this restriction.

i. "Monetize" the Default

Some lease drafters have sought to limit the restriction on termination imposed by subsection 19(2) by including terms in the lease to the effect that:

a) A lien registered against the tenant's interest is a breach of the lease by the tenant,

b) In such event, the landlord will provide the tenant with a reasonable period to cure the breach (i.e. to remove the lien from title),[27]

c) If the tenant fails to do so, a defined amount of accelerated rent becomes immediately due.

This mechanism converts the presence of a lien from a non-monetary default, for which termination is prohibited by the *CLA*, to breach for non-payment of rent, for which termination is permitted. If the tenant fails to pay the accelerated rent, the landlord takes the position that it is not prohibited from terminating the lease. Once terminated, the lease is at an end as are any liens attached thereto.

Owing to the absence of case law on the applicable sections of the *CLA*, it's uncertain whether this approach would be respected by the Courts. It's arguable that the landlord is running afoul of the spirit of subsection 19(2) and that the "monetization" of the default will be seen as an attempt to circumvent the legislation in order to deprive the contractor of the rights granted by the *CLA*. It would be valuable to have a reported judgment addressing this issue since clauses to this effect are often found in contemporary commercial shopping centre leases.

[27] In keeping with section 19(2) of the *Commercial Tenancies Act*, RSO 1990, c L7.

ii. Bond-Off

The landlord may remove a lien encumbering the tenant's interest by utilizing section 44(1) of the *CLA* as discussed above. Once the tenant's interest is no longer encumbered by a lien, section 19(2) doesn't apply and the landlord can terminate the lease in accordance with its terms.

iii. In Practice – Both Liened

Unpaid contractors rarely register a lien solely against the tenant's leasehold interest. Since enforcing a lien may require the sale of the liened property, it's preferable for the lien holder that the liened property be easy to transfer. Typically, a tenant's right to assign its lease is subject to various restrictions. These, among other restrictions in the lease, effectively reduce the value of a claim for lien against the tenant's interest. A lien against the landlord's interest is much more valuable collateral.

Experienced contractors will often register a lien against both the landlord's interest and the tenant's interest, asserting that the landlord falls within the definition of Owner under the *CLA*.[28] The presence of a lien registered against the landlord's interest may precipitate inquiry from the landlord's secured lender(s), possibly leading to a disruption in the landlord's financing. In these circumstances, the landlord typically relies on its rights under the lease to pressure the tenant to remove the lien, either by paying the contractor or bonding-off. Alternatively, the landlord may choose to bond-off the lien itself and charge the cost of so doing to the tenant as described above. In essence, by registering against both landlord and tenant, the contractor drags the landlord into the fight. In so doing, the contractor receives the benefit of the landlord's rights under the lease as used by the landlord to expedite the tenant's payment of the contractor or to facilitate the availability of court-approved security against which the contractor can pursue its claim.

[28] Regard to s 35 may be warranted in such cases.

PART 3 - TIMELINES & PROCEDURES

A. PRESERVATION, PERFECTION, AND EXPIRY

A lien arises when the contractor first supplies services or materials to the premises.[29] Unless specific steps are taken, the lien will expire; that is, the security interest will be lost and the unpaid contractor will lose its collateral means for recovering the unpaid amounts. In order to avoid expiry, a contractor must preserve and then perfect the lien, both within strictly-enforced timeframes provided in the *CLA.*

i. Preservation (i.e. Registration on Title)

A lien will expire unless it is "preserved" within 45 days next following the earlier of:

a) The date the certificate or declaration of substantial performance is published,[30]
b) The date the contract is completed,[31] and
c) The date the contract is abandoned.

A lien is preserved by registering a document on title setting out the nature of the claim. This document is known as a "claim for lien," the requirements of which are listed in section 34(5).

ii. Perfection (i.e. Commence an Action)

Without further action, a preserved lien will also expire. In order to avoid the expiry of a preserved lien, the contractor (now referred to as a "lien claimant") must "perfect" its lien. Perfection requires the lien claimant to do two things:

[29] *CLA* s 15; see s 1(2) and 1(3) regarding materials placed on land in the vicinity of the premises at the instruction of the "owner."
[30] See *CLA* s 32 for rules governing certification or declaration of substantial performance. Where there is no declaration or certification of substantial performance or the services and materials are provided after the declaration or certification only items (b) and (c) above are applicable. See CLA s 31(4) when a contractor supplies services or materials both before and after the declaration or certification of substantial performance.
[31] Note: These rules are slightly different for subcontractors, see *CLA* s 31(3) for full detail. Note also that a contract may be "deemed complete," see *CLA* s 2(3).

1. Commence an action to enforce the lien,[32] and
2. Register a certificate of action on title to the liened premises.

Both must be done within 45 days next after the last day on which the lien could have been preserved.[33] Once perfected, the lien is valid for a 2 year period, during which time the lien claimant proceeds with the action in Court. If two years elapse and an order has not been made regarding the lien, or the claim has not yet been set down for trial, the lien expires.[34]

B. REMOVING THE LIEN

"Vacating a lien" refers to removing the lien documents from the title registry. Vacating a claim for lien and/or vacating a certificate of action does not affect the rights granted to the lien claimant by the *CLA*. For example when a party bonds-off a lien, the lien is simply vacated; the documents are removed from title, but the lien claimant's rights persist in relation to the substituted security. Conversely, "discharging a lien" brings an end to the lien claimant's rights under the *CLA*.

i. Expired Liens: When a preserved lien has not been perfected in time, any person may make a motion to Court for an order vacating from title the registration of the claim for lien.[35] Similarly, when a perfected lien has expired, any person may make a motion to dismiss the action and vacate from title the registration of both the claim for lien and the certificate of action.[36]

ii. Bonding-Off: As discussed above, a party that wants to vacate an unexpired claim for lien (and certificate of action, if the lien has been perfected) may do so by providing alternative security to which the lien can attach.[37] Where the Court is satisfied by the

[32] See *CLA* ss 53, 54.
[33] A lien may also be perfected by "sheltering," see s 36(4).
[34] s 37.
[35] s 45.
[36] s 46.
[37] ss 44(1), 44(6).

alternate security, it will make an order vacating the claim for lien and any corresponding certificate of action.[38]

iii. **Discharging a lien:** A discharge may be made on motion to the Court or with consent of the lien claimant.[39] A discharge of lien is irrevocable. A discharged lien is incapable of being revived.[40]

C. COURT POWERS

A lien claim is enforceable in the Superior Court of Justice. When judgment is given in the lien claimant's favour, the Court may order that the party liable pay the claimant, or that the liened interest in the property be sold to satisfy the debt.[41] A party may request that the Court appoint a trustee to act as receiver-manager for the purpose of *inter alia*, finishing the construction project, preserving the premises, and/or selling the liened property.[42]

PART 4 - PRACTICAL CONSIDERATIONS & PROFESSIONAL RESPONSIBILITY

A. WITHHOLDING TENANT ALLOWANCE

Sufficient protection to a landlord from lien claims often requires terms in the lease whereby the tenant covenants to pay all contractors and not permit any liens to be registered in respect of improvements to the leased premises. Landlords are well advised to ensure their leases contain such clauses so they can look to the tenant for compensation when a lien arises, regardless of whose interest the lien attaches to.

Some landlords incentivize a tenant to fulfil these covenants by withholding the tenant allowance until all liens arising from the tenant's improvements have expired. Withholding the allowance until such time may provide the requisite motivation to ensure the tenant doesn't leave unpaid contractors who can potentially create a problem for the landlord.

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[38] s 44(1).
[39] ss 41, 47.
[40] s 48.
[41] s 62.
[42] s 84.

B. DEADLINES

Courts have traditionally been resistant to construe the provisions of the *CLA* strictly. The legislation is considered to be remedial and Courts generally give the provisions a liberal interpretation, especially those dealing with enforcement of the rights conferred by the act.[43] Also, the *CLA* contains a curative provision, specifically enumerating sections which need not be strictly complied with.[44]

However, the Courts have not applied a liberal approach to the timeframes and deadlines in the *CLA*. Claimants are required to show that they fall squarely within the class of persons on whom the *CLA* confers rights; this requires meeting the deadlines for preservation and perfection.[45] Essentially, the gate to obtain rights under the *CLA* is tightly regulated, but once a person has established that they are entitled to those rights the person will not be deprived of them by failure to comply strictly with technical aspects of the legislation.

The same strictness which applies to the preservation and perfection of a lien is likely to apply to a landlord's disclaimer under section 19(1). The notice-disclaimer mechanism in section 19(1) affords contractors the opportunity to decide if they will accept the contract with the knowledge of whether they are entitled to secure payment against the landlord's interest. When a contractor provides notice to the landlord and the landlord fails to respond within the 15-day period, arguably the contractor has brought itself within the class of persons entitled to lien the landlord's interest pursuant to the *CLA*. Following this line of reasoning, a disclaimer response provided by the landlord after the expiry of the 15-day period is likely ineffective.

Lawyers whose clients are subject to the strict deadlines of the *CLA* are reminded of Rule 3.1-2 of *The Rules of Professional Conduct*.[46] Rule 3.1-1(e) provides that a "competent lawyer" performs all functions conscientiously, diligently, and in a timely manner. The *Time*

[43] *Local 353 IBEW Trust Funds v 799857 Ontario Inc.* [2004] OJ No 2620 (ONSC), citing Harvey J. Kirsch, *Kirsch: A Guide to Construction Liens in Ontario*, 2d ed (Toronto: Butterworths, 1995) at 4.
[44] *CLA* s 6 which excludes ss 32(2), 32(5), 33(1), and 34(5) from a requirement of strict compliance. See *Williams & Prior Ltd. v Taskon Construction Ltd.* [2003] OJ No 498.
[45] *Clarkson Co. Ltd. v Ace Lumber Ltd.*, [1963] SCR 110 DLR (2d), citing Ritchie J. in *Timber Structures Inc. v CWS Grinding & Machine Works* (1951), 229 Pac. (2d) 623.
[46] Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2014.

Management Practice Management Guideline[47] published by the LSUC recommends that lawyers utilize a tickler system to remind them of important dates. A lawyer may consider implementing such a system regarding deadlines arising under the *CLA.* A competent lawyer should also advise landlord clients of the necessity to flag notices from contractors improving their leased property. This professional obligation is also captured under Rule 3.1-2 which requires a lawyer to know the relevant legal principles and communicate them to their clients.

C. EXAGGERATED OR IMPROPER CLAIMS

Section 35 of the *CLA* imposes liability on a person who preserves a lien in an amount which the person knows or ought to know is grossly excessive, or where the person knows or ought to know that they don't have a lien. Such a person is liable for damages resulting from the exaggerated or improper lien. The purpose of the section is to deter persons from abusing the procedures provided by the *CLA*.[48] When a contractor liens a landlord's interest, but has no genuine belief that it is entitled to a lien thereon, the claimant may be in violation of section 35. In *Brian T. Fletcher Construction Co. v 1707583 Ontario Inc*.[49] the Ontario Superior Court stated:

> *The ability to register a lien and encumber a stranger's property provides a creditor with security for an alleged debt before proving entitlement. This is an extraordinary power. Unlike certificates of pending litigation no court approval is required to register or maintain the encumbrance until entitlement is adjudicated by the court. With such power comes responsibility. A lien claimant faces sanctions under section 35 of the Construction Lien Act if this power is abused.*

In *Lo Faso v Kelton & Ferracuti Consultants Ltd.*[50] the Court imputed the knowledge of the contractor's solicitor to the contractor. This imputation seems to imply that a lawyer who registers a lien upon the landlord's interest knowing (or ought to know) that the landlord's interest is not properly subject to a lien, may be exposed to a claim in professional negligence for

[47] Law Society of Upper Canada, online < http://www.lsuc.on.ca>.
[48] *Rideau Valley Constructors Ltd. v Visa Construction Co.*, [1995] OJ No 1801 (Ct J (Gen Div)) at para 42.
[49] [2009] OJ No 5978 (ONSC) at para 24.
[50] [2008] OJ No 2461 (ONSC).

any resulting damages awarded against its client. Lawyers are encouraged to ensure they do not register a claim for lien against an interest to which their client's lien does not properly attach.

CONCLUSION

Construction liens are a statutorily created security upon the Owner's property for the value of services or materials supplied. When a tenant improves its leased premises, the landlord's interest may become encumbered by a lien. This may result in liability for the landlord and/or an interruption in the landlord's interaction with its secured lender(s).

Landlords with tenants undertaking improvements to their leased property are advised to 1) include provisions in their leases whereby the tenant covenants to pay all contractors in a timely manner, 2) withhold tenant allowances until all potential liens have expired, and 3) reply with a waiver to all notices received directly from contractors regarding upcoming improvements to the landlord's leased property.

Landlords are further advised to play a passive role in the tenant's improvement of its leased property. An overly involved landlord may be stuck with the bill if the tenant unexpectedly goes bankrupt.

By following these recommendations, a landlord who allows a tenant to improve its leased premises can significantly reduce exposure to the inconvenience and potential liability arising from a construction lien.

APPENDIX

FORM 2
NOTICE TO LANDLORD UNDER SUBSECTION 19 (1) OF THE ACT

Construction Lien Act

TO: .....

the landlord of .....
(*address of premises*)

FROM: ....., a contractor, who has entered into a contract with your tenant, ... to supply services or materials to make the following improvement to the above named premises:

(*describe improvement to be made*)

This contract was entered into on .....
(*date*)

(*Use A, B or C as appropriate*)

A. A copy of the contract is enclosed.

B. The contract is oral and the following are the details of the contract:

C. You may inspect a copy of this contract at .....
(*place*)

..... between the hours of ..... and every .....
(*days of week*)

Date: ....
(*contractor or agent*)

.....
(*address for service of contractor*)

WARNING: Subsection 19 (1) of the *Construction Lien Act* provides as follows:

19.—(1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.

RRO 1990, Reg 175, Form 2.

FORM 3
NOTICE TO CONTRACTOR UNDER SUBSECTION 19 (1) OF THE ACT

Construction Lien Act

TO: . . . . , contractor.

FROM: . . . . ,

the landlord of: . . . .
(*give address of premises*)

The landlord of the premises assumes no responsibility for the improvement to be made by you under a contract dated . . . .

between you and . . . . , a tenant.
(*name of tenant*)

Date: . . . .
(*landlord or agent*)

RRO 1990, Reg 175, Form 3.