



Canada and the U.S.:

Differences in Construction Law

Constructions Liens are a Provincial jurisdiction:

- The *Mechanics Lien Act*, *Construction Lien Act* or *Builders Lien Act*. Each province has its own deadline to preserve the registration of a claim for lien and perfect a claim for lien by starting a law suit. Some provinces differentiate between supply of materials and labour when determining expiry of lien rights. While some lien periods are similar, there is no national uniform standard.

Trust Claims:

- Most provincial lien statutes create a statutory trust which provides for personal liability for any officer/director or anyone in care or control of a company where the company is in receipt of monies but fails to pay a lien claimant. The breach of trust imposes a strict liability even on funds not received for the purpose of paying subtrades. At a minimum the statute of limitation for breach of trust is 15 years. Under the lien acts, a trust claim and a lien claim may not be advanced in the same pleading.

Canadian Construction Documents Committee (“CCDC”):

- For large projects, it is common that the parties will enter into a standard form contract. The CCDC has developed a series of licensed standardized contracts for a variety of situations, including a stipulated price contract where there is an owner and general contractor; and a design build contract in the cases where there is no general contractor. The CCDC contract is often modified through a series of negotiated supplementary conditions.

Commercial General Liability Insurance:

- Commercial General Liability Insurance is a standard requirement for most contractors. Commercial General Liability policy typically covers consequential damages caused by the contractor. Economic losses are typically excluded from the policy. If a contractor wishes to obtain errors

and omissions insurance to cover their own negligent work, they would either obtain a performance bond or a errors and omissions policy. However, some Commercial General Liability policies may be extended to cover negligent work by the contractor.

Tendering:

- Substance has priority over form in the tendering process. The Courts have imposed strict terms on what constitutes a tender and compliance with a tender. Suits involving tendering in bad faith, including the acceptance of a non-compliant bid are growing in Canada as the Courts are grappling with creating a standard as compared to a Request for Proposal or the Hybrid tender process.

Pre-Lien Rights:

- The right to lien can only arise once labour and materials have been supplied to the project. One cannot pre-lien a project and there is no requirement that you must issue a notice of intention to lien in order to preserve lien rights before work is undertaken. Conversely, lien rights cannot be waived as a matter of law, and any provision that purports to waive a lien right is void.

Owner:

- Under lien legislation, an owner is not the same as the registered owner of the property. An owner may be a party who has care and control of the project, directs the work on the project or has privity of contract with the contractor. The significance is that an owner is directly liable to the contractor for all of the work performed under the contract. A lender or non-registered owner who takes an interest in a construction project must be careful to ensure that their involvement does not cross this threshold.

Holdback:

- Under lien legislation in Canada, 10 per cent of the value of labour and materials applied to the project must be held back from each progress payment for the benefit of sub-contractors to the payee. There are no set-off rights as against a party claiming a holdback. The holdback is known in the United States as a "Retainage."

Bonds:

- There are three primary bonds in a construction project. The first is a performance bond, posted by the contractor as principal to the owner as obligee, typically for a value equal to 50 per cent of the contract. Upon

being declared in default by an owner, the performance bond may be called on. A labour and material payment bond is posted by the contractor for the benefit of sub-trades. A sub-trade may claim on the bond if there has been a failure of payment by the contractor and for which the contractor has no legitimate rights to deny payment. A claim under a labour and material payment bond typically must be made within 180 days of last supply. A lien bond is posted by any party to pay the amount of a lien into Court, plus 25 per cent as security for costs for the value of the lien in order to clear title. The lien claimant will then have a charge against the funds in Court to the extent of liability of the party posting the bond.

Government Projects:

- As lien acts are provincial, they bind the provincial crown but not the federal crown. Typically, provincial property is not subject to a registered claim for lien, but written notice of the lien must be delivered to the relevant crown authority in order to bind the holdbacks that may be due. It is important to determine therefore, the party with whom you contract and who the registered owner of the lands are, in order to determine whether or not they are subject to a registered lien or a written lien. Some federal undertakings like railroads and certain power producers are exempt from having liens registered against their lands. All municipal lands are subject to a registered claim for lien. Native lands are exempt from registration if they are reserved.

Trial by Judge:

- In Canada, trial by jury is exceptional in civil cases. Law is made by Judges and most jurisdictions have specialized construction Judges or junior Judges to deal with complicated matters arising in construction law.

Partnering:

- The CCDC documents typically contain partnering language whereby disputes may be resolved by an arbitrator or project consultant early and frequently throughout the progress of the project.

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