



OBA • ABO

Ontario Bar Association

Submission

**Proposed Amendments to
*Construction Lien Act***

February 20, 2007

About the Ontario Bar Association

Established in 1907, the OBA (formerly the Canadian Bar Association - Ontario) is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents 17,000 lawyers, justices, law professors, and law students. This submission is being made on the advice and expertise of the Construction Law Section of the OBA, which represents over 300 lawyers practicing in this field of law.

The OBA is a member-driven association. As ‘the voice of the legal profession’, the OBA is the largest legal association in Ontario, representing lawyers through its 35 Sections whose membership is based on areas of expertise. The Sections infrastructure at the OBA furthers the educational, advocacy and professional needs of lawyers. No other legal organization in Canada has the scope or depth of expertise in influencing legislative reform and contributing to legal education.

The OBA is governed by an elected Council (221 members) and Executive (20 members). Both Council and Executive represent lawyers from across the province and from all practice areas.

The OBA Council meets quarterly and the OBA Executive meets monthly to discuss issues and initiatives that reflect the interests of Ontario lawyers and the justice system.

Construction Lien Act

The *Construction Lien Act*, R.S.O. 1990, c. C.30 (“*Act*”) came into being in 1983, replacing the prior *Mechanics’ Lien Act*, which had originated in the 19th century. When the new *Act* was drafted in the early 1980’s the electronic registration of documents in Ontario’s land registry system was unheard of and unforeseen.

While the present *Act* has been amended from time to time since 1983, none of the revisions have addressed the advent of electronic registration. The *Act* is the product of a pre-electronic world; most of the province is now registering construction liens and other documents under the *Act* in electronic format.

With all of Ontario expected to adopt “e-reg” within the next year, the time is now right to update the *Act* to reflect the new reality of electronic registration. Several sections of the *Act* clash with the e-reg system, and this needs to change.

Unless these “bugs” are ironed out, the potential for error and confusion is significant. Construction projects require liens to be handled expeditiously and with certainty. If not, the flow of funds down the construction pyramid to the tradespersons and suppliers who depend on this sector of the economy are disrupted, completion of projects can be delayed and the costs to finish the work inflated.

Banks will not advance funds to major construction projects if even a small lien is registered on title. A \$20 million advance can be held up by a \$5,000 lien. Therefore, it is critical that the electronic registration system permits liens to be vacated quickly when necessary.

The efficiency of the electronic registration system in handling construction lien matters is of vital importance to the construction industry, a significant sector of Ontario’s economy.

As a start, the Ontario Bar Association believes the following issues need to be addressed by amendments to the legislation:

1. The requirement of section 34 (6) of the *Act* that a claim for lien shall be verified by an affidavit of the person claiming the lien, and how that requirement conflicts with the requirements of section 24 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4; and
2. The ability of a lien claimant to “shelter” under the certificate of action of another perfected claim for lien, and the ramifications when a party seeks to vacate the registration of that certificate of action from title.
3. The suggested amendments are provided on the following pages.

Proposed Amendments to the *Construction Lien Act*

Sections 34 (6) and 40:

s.34(6) A claim for lien shall be verified by an affidavit of the person claiming the lien, including a trustee of the workers' trust fund where subsection 81(2) applies, or of an agent or assignee of the claimant who is informed of the facts set out in the claim, and the affidavit of the agent or assignee shall state that the agent or assignee believes those facts to be true. **This affidavit must be sworn before a claim for lien may be preserved, but it need not be registered.**

s.40(1) Any person who has verified a claim for lien that has been preserved is liable, **if requested, to produce the original affidavit of verification and provide a copy of it to any person entitled to participate in the cross-examination on the claim for lien, and** to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced. R.S.O. 1990, c. C.30, s. 40 (1).

Regulation 175:

2(9) An affidavit of verification of a claim for lien under section 34 of the Act may be in Form 9. R.R.O. 1990, Reg. 175, s. 2(9).

Land Registration Reform Act, R.S.O. 1990, c. L.4 s 24:

Supporting evidence

24(1) If a document is submitted in an electronic format and is required under any Act to include an affidavit, a declaration, a statement or any other written evidence, the evidence shall be in an electronic format approved by the Director of Land Registration and shall be included in a manner approved by the Director of Land Registration, 1994, c. 27, s. 85 (3); 2000, c. 26, Sched. B, s. 11(7).

Written evidence not required

(2) If an electronic document includes evidence in an electronic format in accordance with this section, the evidence shall be deemed to comply with the requirement to submit the affidavit, declaration, statement or other written evidence under the applicable Act despite the fact that the evidence is not in writing and has not been signed by the parties required to provide the evidence.

(3) Nothing in this section derogates from a registrant's obligation to provide an affidavit, declaration, statement or other written evidence in a form that may be required by the *Construction Lien Act*.

Section 44(9), Rule 4 of the CLA:

Rules

44 (9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

4. Any person with a subsisting preserved claim for lien registered on title which is sheltered under a certificate of action the registration of which has been vacated pursuant to an order under subsections (1), (2) or (3) may proceed to enforce its claim for lien as if the certificate of action remained on title, in accordance with section 47(2).