

## construction and commercial real estate bulletin

January 2011

### “open for business” spells important changes for condo developers and the construction industry

On October 21, 2010, the Ontario Legislature passed the *Open for Business Act, 2010*<sup>1</sup> as part of the province’s wider initiative to create a more competitive business climate in Ontario. The Act amends over one hundred pieces of legislation, in a variety of industries, with wide-ranging impacts. Condominium developers, contractors and subcontractors are specifically advised to take note of the important changes that have been made to the *Construction Lien Act*:<sup>2</sup>

- the definition of “improvement” has been broadened to include essential equipment, thereby expanding the kind of work capable of triggering lien rights;
- condominium developers must now publish notice of their intent to register condominium declarations;
- in an effort to reflect the reality and use of the electronic registration system, claims for lien no longer require affidavits of verification; and,
- sheltered liens may now proceed without further court direction where certificates of action, under which such liens are sheltered, have been vacated by court order.

### the definition of “improvement”

The definition of “improvement” has been broadened to include equipment installed on the “land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works.” Previously, the definition required a more direct physical connection with the land for services or materials to be considered in support of an “improvement.”

This amendment is in large part a response to the Ontario Court of Appeal’s decision in *Kennedy Electric Ltd v Dana Canada Corporation*.<sup>3</sup> In that case,

<sup>1</sup> SO 2010, c 16 (the “Act”).

<sup>2</sup> RSO 1990, c C.30 (the “CLA”).

<sup>3</sup> 2007 ONCA 664 (“*Kennedy Electric*”).

the Court of Appeal upheld the trial judge's finding that the installer of a 500,000 tonne assembly line for the manufacture of Ford F150 trucks did not have lien rights on the basis that the assembly line did not constitute an improvement under the *CLA*.

Thousands of bolts attached the assembly line to the building floor. The line spanned across 100,000 of the 160,000 square feet of the building – a building that was constructed specifically for the assembly line. The line was also attached to the building's services. The trial judge nevertheless found that the assembly line was not an "improvement" as that term was then defined in the *CLA* principally because of the equipment's portability.

There would appear to be little doubt that the amended definition captures equipment like the assembly line in *Kennedy Electric* and generally expands the lien rights of essential equipment providers even where installed equipment may be considered portable.

## public notice of intent to register a condominium declaration

Condominium developers are now required to publish notice of their intention to register land "described in a description that is intended to be registered together with a declaration in accordance with the *Condominium Act, 1998*". Notice must be published in a construction trade newspaper (i.e., the *Daily Commercial News*) at least five and no more than fifteen days before the description is provided to the approval authority for final approval under the *Planning Act*.<sup>4</sup>

The purpose of the notice period is to provide unpaid contractors and subcontractors the opportunity to register liens prior to registration of the condominium declaration. A lien registered prior to the declaration may be enforced against the condominium as a whole – i.e., common elements and individual units combined. Following registration of the declaration, however, a separate lien must be asserted against every individual unit to secure the full extent of a lien claimant's rights against the common elements of a condominium, thereby creating significant expense in situations where buildings have many units.

Advance notice of a pending declaration can save unpaid contractors and subcontractors considerable time and money when pursuing their lien rights. A developer who fails to comply with the notice requirement will be liable to lien claimants who suffer damages as a result.

## affidavit of verification no longer required

The obligation to verify a claim for lien by affidavit evidence is no longer required. The requirement has been obsolete in practice since the implementation of the

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4 RSO 1990, c.P.13

electronic registration system for land title documents. The *CLA* has now been updated to reflect this reality.

A corollary of the elimination of the affidavit requirement is an update to the rule permitting cross-examination against lien claimants. Whereas the previous provision permitted the cross-examination of any person who had verified a claim by affidavit, the new provision simply permits the cross-examination of the lien claimant or their agent or assignee.

## sheltered liens

A lien claimant whose lien is sheltered under a certificate of action that has been vacated by court order may now proceed with an action to enforce the lien as if the order to vacate has not been made. The amendment facilitates the vacating of certificates of action without the need for courts to provide further directions in relation to sheltered liens while simultaneously protecting the rights of sheltered lien claimants.

## conclusions

The amendments to the *CLA* affect condominium developers and virtually everyone involved in the construction industry. The “open for business” label to the legislation and the nature of the amendments themselves suggest a legitimate desire to move towards less complication. Time will tell.

The amendment to the definition of “improvement” is already in force. The remaining amendments will take effect upon proclamation from the Lieutenant Governor, which presently remains outstanding.

For more information on this topic, contact one of the lawyers listed below:

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## a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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