

**TAB 6**

**Electronic Registration of Liens – Current  
Problems and “Workarounds”**

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**Practice Gems – Construction Lien Essentials**



The Law Society of  
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# **Electronic Registration of Liens – Current Problems and “Workarounds”**

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## TABLE OF CONTENTS

1. INTRODUCTION.....	3
2. THE HISTORY OF ELECTRONIC REGISTRATION IN ONTARIO.....	4
3. USING THE E-REG™ SYSTEM.....	7
4. THE ACKNOWLEDGEMENT AND DIRECTION.....	8
5. ELECTRONIC COMMERCE LEGISLATION.....	9
6. THE LAW SOCIETY PRACTICE GUIDELINES FOR ELECTRONIC REGISTRATION OF TITLE DOCUMENTS.....	10
7. PROBLEMS WITH THE ELECTRONIC REGISTRATION SYSTEM.....	12
a. The Affidavit of Verification.....	12
(i) The Statutory Basis for the Electronic Affidavit of Verification.....	16
(ii) Problems Originating from the Absence of an Affidavit of Verification.....	17
(iii) Proposed Amendment to the <i>CLA</i> Respecting the Affidavit of Verification.....	19
b. Problems under the E-Reg™ System with Preserving Liens that do not Attach to Land.....	21
c. Problems with Liening Condominiums and their Common Elements.....	22
(i) Liening Work Performed on Individual Condominiums Units.....	23
(ii) Liening Work Performed on the Common Elements.....	23
d. “Vacating” and “Discharging” Liens v. “Deleting” Liens Under E-Reg™.....	26
(i) Selecting the Appropriate Statement and Form.....	26
(ii) Problems with the Appropriate Statement and Form.....	27
(e) The E-Reg™ System and Sheltering Issues.....	28
8. CONCLUSION.....	31

## 1. Introduction:

While Ontario's electronic registration system has delivered its promise of speedy access to the registration of title documents, in practice a number of problems unique to construction liens have become evident. This paper reviews Ontario's electronic registration system and e-reg™ on Teraview as they apply to construction liens, and proposes resolutions to the practical problems that have arisen with liens.

Inconsistencies between the *Construction Lien Act*<sup>1</sup> and the requirements and procedures of the e-reg™ system are of concern to both construction lawyers and their clients. The last major review and amendments to the *CLA* came long before the introduction of the e-reg™ system. While the current Act has been amended from time to time since 1983, none of the revisions have addressed the introduction of electronic registration.<sup>2</sup> The *CLA* remains a product of the pre-electronic world.

A majority of jurisdictions in Ontario have adopted electronic registration, and the few remaining paper jurisdictions are scheduled to adopt the e-reg™ system soon. It is therefore time to update the *CLA* to reflect the current realities of electronic registration.<sup>3</sup>

It should be recognized that the e-reg™ system has already been improved in certain respects in response to concerns raised by the construction bar. However, a number of sections of

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<sup>1</sup> R.S.O. 1990, c. C.30, as amended [*CLA*].

<sup>2</sup> The *Construction Lien Act*, S.O. 1983, c.6, the precursor of the current *CLA*, *supra*, came into force on April 2, 1983. While there have been a series of amendments to the *CLA* since its enactment in 1983, it has substantially remained in its original form. For a complete list of amendments to the Act see Harvey J. Kirsh, *Kirsh's Guide to Construction Liens in Ontario* (2<sup>nd</sup> ed.) (Toronto: Butterworths, 1995) at 9-21.

<sup>3</sup> Electronic registration is mandatory in most jurisdictions but remains optional in others. At the time of writing, electronic registration was compulsory in Muskoka, Prince Edward, Algoma, Norfolk, Lambton, Peterborough, Elgin, Kenora, Timiskaming, Nippissing, Thunder Bay, Sudbury, Cochrane, Rainy River, Niagara North, Niagara South, Waterloo, Toronto, Essex, Lanark, Renfrew, Russell, Huron, Perth, Brant, Wellington, Simcoe, Ottawa, Durham, York, Dufferin, Peel, Halton, Hamilton, Middlesex, Stormont, Hastings, Lennox, Bruce, and Haldimand. It was optional in Frontenac, Victoria, Oxford, Kent, Northumberland, Prescott, Parry Sound, Haliburton, Leeds, Grey and Manitoulin. Today, the only areas in Ontario without even the option of e-reg™ are Grenville, Dundas and Glengarry counties. For current information, see [http://www.teraview.ca/ereg/ereg\\_rollout\\_schedule.html](http://www.teraview.ca/ereg/ereg_rollout_schedule.html).

the *CLA* conflict with the electronic system. For example, in some cases the system does not use terminology that is consistent with the terminology used in the *CLA*. The necessity of providing an affidavit of verification with a claim for lien is now in doubt. Lastly, when registering a court order vacating the registration of a certificate of action the lawyer who electronically signs the document is required to make a “sheltering statement” that he or she may not be in a position to make, notwithstanding the terms of the order.

The construction industry typically requires counsel to handle liens expeditiously and with certainty. Accordingly, the efficiency of the electronic registration system in handling how liens are registered, discharged, released or vacated from title is of vital importance to both the construction industry and bar. Before reviewing these problems and potential solutions, however, it is useful to know how electronic registration came to pass in Ontario, and to understand how the system works.

## 2. The History of Electronic Registration in Ontario:

The electronic registration of title documents including liens has been in place, in parts of Ontario, since early 1999.<sup>4</sup> The Ministry of Government Services (“Ministry”) began building the Province of Ontario Land Registration Information System (“POLARIS”), in the late 1980s, with the objective of automating Ontario’s land registration system. In the early 1990s, the Ministry, in conjunction with a private sector consortium, established what is now known as Teranet Inc. (“Teranet”). In 2003, the government sold its one-half interest in Teranet, which is now fully owned by the private sector.

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<sup>4</sup> For a comprehensive review of the development of the electronic registration system in Ontario see, Kate Murray, *Electronic Registration and Other Modernization Initiatives in Ontario’s Land Registration System* (Paper presented at the ‘Modernising Irish Land Law and Conveyancing Law’ Conference, Dublin, November 25, 2004), online: <<http://www.lawreform.ie/Kate%20Murray%20Ireland%20Nov%2010%202004.pdf>> (date accessed: January 6, 2009).

Teranet is under contract with the Ministry to automate land registration records. This automation is undertaken on behalf of the Ministry in accordance with agreed upon rules. Teranet, in conjunction with the Ministry, developed the electronic registration software, known as e-reg™ and is the electronic service delivery provider for the land registration system. The Ministry has maintained ownership of the land registration data and the right to further regulate the electronic system. Teranet owns and operates the electronic database.

As of April 2008, automated records are available in 51 of the province's 54 land registry offices.<sup>5</sup> POLARIS will eventually consist of two databases: one for abstracts of title, and one for maps and surveys, with a file for each of the approximately four million parcels of land in Ontario. In addition to being automated, parcels are gradually being converted from the old Registry system into Land Titles. Under the Land Titles system, the province guarantees title, removing the need to search back 40 years at the time of transfer, thus simplifying the process of transfer. Before a parcel can be automated or made accessible for electronic registration, however, it must be converted from the Registry system into the Land Titles system.

Since the introduction of the *Land Registration Reform Act*,<sup>6</sup> the system has been transformed from a traditional paper-based system of real estate recording to a modern electronic land titles system. This Act was passed in 1984. Part I of the *LRRRA* introduced the concept of standardized forms known as POLARIS forms, implied covenants and Standard Charge Terms. Part II established the framework for automating the land registration records authorizing the creation of an automated title index. These initiatives streamlined the document registration process by imposing consistency and simplifying the form and content of the documents that were to be registered.

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<sup>5</sup> Ontario. Ministry of Government Services, Land Registration Information, online: Ministry of Government Services <<http://www.cbs.gov.on.ca>>

<sup>6</sup> R.S.O. 1990, c. L.4, as amended [*LRRRA*].

The *LRRA* was amended in 1994 and Part III was added to the legislation. The legislation set the framework for electronic document registration and provided that registration requirements were to be dealt with by Regulation. There was extensive consultation with users including the Law Society of Upper Canada and the Ontario Bar Association during the drafting of these regulations and during the development of the e-reg<sup>TM</sup> system.

Although Part III of the *LRRA* is not lengthy, it has a significant impact on the way documents are registered in the land titles system. The key concept of this Part of the *LRRA* is that it removed the requirement that a document affecting an interest in land must be in writing and signed. Section 21 of the *LRRA* provides that an electronic document that creates, transfers or otherwise disposes of an estate or interest in land is not required to be in writing or to be signed despite the *Statute of Frauds*<sup>7</sup> or the *Conveyancing and Law of Property Act*.<sup>8</sup>

The result of the decade of initiatives, noted above, is the electronic registration system that exists today, which provides for searches of title and the registration of documents on-line. Under the e-reg<sup>TM</sup> system, property documents are prepared, submitted and stored via an electronic database: it is no longer necessary to prepare liens and most other documents in paper form for them to have legal effect.

Once the system becomes mandatory in a given area, it will in most cases not be possible to register paper documents. In such cases, attendance at the Land Titles Office is not necessary as documents are sent electronically, via e-mail to Teranet. Documents are signed electronically by the lawyer or other professional preparing them. Payments of registration fees (which remain

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<sup>7</sup> *Statute of Frauds*, R.S.O. 1990, c. S.19.

<sup>8</sup> R.S.O. 1990, c. C.34. Section 21 of the *LRRA* states as follows: Despite section 2 of the *Statute of Frauds Act*, section 9 of the *Conveyancing and Law of Property Act* or a provision in any other statute or any rule of law, an electronic document that creates, transfers or otherwise disposes of an estate or interest in land is not required to be in writing or to be signed by the parties and has the same effect for all purposes as a document that is in writing and is signed by the parties.

the same as under the paper system) are by means of an electronic funds transfer, and an electronic audit trail leading back to the user who registered each document will be maintained for security purposes.

### 3. Using the E-Reg™ System:

The gateway software to gain access to the electronic registration system is “Teraview” (Teraview 5.4 is now available). Teraview can be installed on any Pentium IV or higher processor. It is recommended that the Teraview software be installed on any of Windows 2000, Windows XP Home or Professional, or Windows Vista Business or Home. There is no Macintosh version of Teraview software.

The Teraview software consists of a “Personal Security Package” (PSP), which has a personal security diskette that contains the user’s encrypted electronic signature, and a password. The password acts as a PIN number to ensure that only registered users are using a particular diskette and signature. Each individual user must have a separately encrypted signature and password. Fees are debited from an account that each lawyer or law firm must set up with Teraview.

Lawyers are the gatekeepers of the electronic system. Non-lawyers such as law clerks can obtain access to Teraview and prepare documents, but only lawyers are permitted to register documents which contain compliance with law statements.<sup>9</sup> Because a claim for lien does not contain a compliance with law statement it can be signed and registered by a non-lawyer. However, a release of lien contains a statement regarding sheltering liens and therefore must be electronically signed by a lawyer. An order to vacate the registration of a claim for lien and a certificate of action, if applicable, contains a statement that the order is of full force and effect,

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<sup>9</sup> O. Reg. 19/99, s. 40 enacted pursuant to the *Land Registration Reform Act*, R.S.O. 1990 C.L. 4.

and affects the lands in question, and therefore must also be signed electronically by a lawyer.<sup>10</sup> To be prudent, it is good practice for solicitors to thoroughly review all documents that are to be registered.

#### 4. The Acknowledgement and Direction:

Although in theory documents are signed electronically, and no paper document needs to be prepared, the e-reg<sup>TM</sup> system is designed to produce an “Acknowledgement and Direction” (“Acknowledgement”) for each form of real estate document. In the case of each registration, the Acknowledgment provides a summary of the intended action to be accomplished and states to the lawyer:

You are authorized and directed to register electronically on my behalf the document(s) described in this Acknowledgement and Direction as well as any other document(s) required to complete the transaction described above.<sup>11</sup>

The Acknowledgement is designed to be printed out and signed by the client, for the protection of the lawyer acting on a matter.

The Law Society of Upper Canada’s “Practice Guidelines” for electronic registration also strongly encourage lawyers to making a practice of having clients sign the Acknowledgement.<sup>12</sup>

While this may lead some practitioners to argue that electronic signatures are not entirely sufficient, the reality is that the Acknowledgement is for the protection of the lawyer.

Improvements in technology have not eliminated the need for a face to face meeting between the lawyer and the lien claimant. In addition to having the client sign the Acknowledgment and

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<sup>10</sup> O. Reg. 19/99, s. 28 and s. 30 enacted pursuant to the *Land Registration Reform Act*, R.S.O. 1990 C.L. 4.

<sup>11</sup> “Teraview 5.3.3. Reference Guide,” October, 2007: Teranet Inc. at pp. 154-55.

<sup>12</sup> Law Society of Upper Canada, “Practice Guidelines for Electronic Registration of Real Estate Title Documents,” online: [http://rc.lsuc.on.ca/pdf/eReg/july08\\_eregguidelines.pdf](http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf) (accessed: January 6, 2009). This Guideline recommends that lawyers have clients sign this form before each electronic document is released for registration. The form contains the client’s approval of the contents of the document to be registered together with the client’s authorization to the lawyer to sign and register the document.

Direction, it remains good practice for a lawyer registering a lien to first explain to his or her client what information the claimant may be cross examined on and also to have the client swear an affidavit of verification.

#### 5. Electronic Commerce Legislation:

Ontario was the first jurisdiction in Canada to pass legislation recognizing electronic signatures and contracts as having the same legal status as documents in paper form with the enactment of the *Electronic Commerce Act*.<sup>13</sup> Since then many Canadian provinces have enacted similar legislation.<sup>14</sup>

The common thread running through all of these pieces of legislation is their recognition of the legally-binding status of electronic signatures and transactions in situations where paper was once the only legally recognized means. In Ontario, amendments to section 21 of the *LRRRA* were the first recognition of the legality of electronic documents. The combined effect of these legislative changes is that documents prepared electronically never need to be printed out or signed physically, except in the case of the Acknowledgement, but even this is only for liability protection for lawyers and failure to do so does not diminish the legality of the electronic documents or the interest they create.

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<sup>13</sup> *Electronic Commerce Act*, S.O. 2000, C. 17.

<sup>14</sup> The *Uniform Electronic Commerce Act* was adopted by the Uniform Law Conference of Canada on September 30, 1999, and recommended for implementation by governments in Canada. See for example, Saskatchewan has passed its implementing legislation, *The Electronic Documents and Information Act*, S.S. c.E-7.22; Manitoba has passed its implementing legislation, *The Electronic Commerce and Information Act*, C.C.S.M. c.E55; Nova Scotia has passed its implementing legislation, *The Electronic Commerce Act*, S.N.S.2000 c.26; Yukon passed its implementing legislation, the *Electronic Commerce Act*, S.Y. 2000, c.10.

## 6. The Law Society Practice Guidelines for Electronic Registration of Title Documents:

In 1996, the Law Society of Upper Canada and the OBA established the Joint committee on electronic registration of title documents to consider the impact of electronic registration on conveyancing practice and to make recommendations to the Law Society as to procedures and standards of practice. In June 1997, the Joint Committee presented a report<sup>15</sup> to Convocation which recommended the adoption of certain practice guidelines with the understanding that these guidelines would evolve as electronic registration was implemented.

On June 28, 2002, after years of consultation and amendment, Convocation approved six practice guidelines which included amendments to the *Rule of Professional Conduct*.<sup>16</sup> The guidelines aim to assist lawyers to adapt their practices to electronic registration. They promote risk management and they encourage lawyers across the province to develop consistent practices when completing transactions that require the electronic registration of title documents.

Although the *Practice Guidelines* are not mandatory they include the following directions for law firms and practitioners:

- while partners and associates/ employees at one firm may use the same Teranet account, every person wishing to use the e-reg<sup>TM</sup> account must obtain their own encrypted disk and password;
- since the knowledge of, and control over movements of members of law firms rests with the firm, law firms must ensure that appropriate safeguards are implemented to protect encrypted disks and to prevent password sharing;
- where lawyers practice in association and there is no intended joint and several liability, they should not subscribe to e-reg<sup>TM</sup> under the same account;

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<sup>15</sup> Canadian Bar Association, "Electronic Registration: The Final Report of the Joint Committee on Electronic Registration of Title Documents", (Toronto: Law Society of Upper Canada, June 1997).

<sup>16</sup> Law Society of Upper Canada, "Practice Guidelines for Electronic Registration of Real Estate Title Documents," online: [http://rc.lsuc.on.ca/pdf/eReg/july08\\_eregguidelines.pdf](http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf) (accessed: January 6, 2009); and the Law Society of Upper Canada, *Rules of Professional Conduct*, as amended March 31, 2008, Rule 5.01 (3), (4) & (6).

- where a clerk, assistant or paralegal electronically signs a document, the lawyer who has given approval authority or whom the individual is working under has ultimate responsibility for the content of the document;
- non-lawyers are not entitled to approve documents containing compliance with law statements;
- law firms are required to notify Teranet of changes in the status of their lawyers in the event of suspension, disbarment, etc.;
- lawyers practicing in the area of real estate should equip themselves with the proper hardware and software and not rely on public computer terminals at the local Land Titles Office to meet obligations to the client;
- the Law Society strongly recommends that the appropriate form of Acknowledgement and Direction be printed out on paper and signed by the client prior to documents being registered electronically. Obtaining the Acknowledgement and Direction is particularly important for construction lawyers, given section 86 of the *Construction Lien Act*<sup>17</sup>, which can make a solicitor personally liable for costs on a solicitor and client scale, for knowingly registering a lien where it is clear that the claim is excessive or without foundation;
- lawyers acting for mortgagees are reminded that they should comply with section 4 of the *Mortgages Act*<sup>18</sup> which requires delivery of a true copy of the mortgage to the mortgagor. The mortgagee's lawyer should print out a copy of the electronic charge as registered and deliver it to the mortgagor (or his or her solicitor) within 30 days of registration. Where the charge contains a guarantor, it would still appear necessary for the guarantor to sign a separate paper form of the guarantee to bind the guarantor to the covenant;
- lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based or should ensure that publicly available information to fully support the statements is and remains available. The lawyer may require the supporting information to respond to claims made against the lawyer in consequence of such statements; and
- lawyers need not look to, nor request evidence behind registered compliance with law statements and should rely upon the provisions of the *Land Titles Act*<sup>19</sup> as to the sufficiency of title once certified.

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<sup>17</sup> R.S.O. 1990, c.C.30, s.86. See also section 35 of the *CLA*.

<sup>18</sup> R.S.O. 1990 c. M. 40.

<sup>19</sup> R.S.O. 1990 c. L. 5.

