

# CONDUCT OF A LIEN ACTION

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## INTRODUCTION

Well, here we go again, 21 years after the enactment of the *Construction Lien Act, 1983*, still trying to get it right. Still trying to sort this little statute out. Still getting it wrong, mind you, even when we try so hard to get it right. The *Construction Lien Act*, and particularly the 2 year “expiration” section 37, still produces claims. The first reaction of counsel caught by s. 37 is to scramble to salvage what they can by arguing that non-compliant procedure is compliant procedure.

Why is it this way? Why is lien procedure a trap for the unwary? Does it need to be?

First, there should be no “unwary”, and, second, there is no trap. It is all in the statute. The underlying policy of the *Construction Lien Act* can be seen most clearly in four sections: s. 6 (the ‘curative section’ that is really an ‘invalidation section’), s. 35 (statutory right of action in favour of anyone damaged by a grossly excessive or non-existent lien), s. 37 (automatic expiration of stale or abandoned liens and lien actions), and s. 86 (extension of costs liability to solicitors).

Lien legislation is a statutory intrusion on vested property rights. As any student of the law knows, nothing is more zealously guarded by common law than vested rights in real property. The statutory lien remedy challenges this deep-seated value by contemplating the sale of vested property interests in answer for artificially created obligations to non-privies. Liens are extraordinary legal constructs. It should not be surprising that some rigour is required in their enforcement.

The legislation is remarkable in another way. It makes you, the bar, the gatekeepers to this remarkable little statute. It might have

been otherwise. The judiciary might have been the gatekeeper, in which case you would have had to obtain an order affecting the title to real property (like a certificate of pending litigation under s. 103 *Courts of Justice Act*) and show cause before claiming a lien. Under the *Construction Lien Act*, however, you merely have to unilaterally preserve and perfect your client's statutory lien to access all of the powers of the statute. Small wonder the safeguards of s. 6, s. 35, s. 37 and s. 86 are taken seriously by courts. Small wonder that courts are restrictive in granting access to the statute, but liberal once the protection of the statute is warranted.<sup>1</sup>

Where do we see this policy at work? In at least four areas: taking Toronto lien claims to trial; costs orders against solicitors; liening for work done for tenants; and preserving a lien against Crown property. The first two of these areas are neatly addressed by a single case, recently reported, *Pineau v. Kretschmar Inc.*; the latter two topics are dealt with by other speakers.

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<sup>1</sup> There is hardly a "big" case that does not state this somewhat self-evident proposition. See, for example, *Ace Lumber Ltd. v. Clarkson Co.* (1963), 36 D.L.R. (2d) 554 (S.C.C.); *George Wimpey Canada Ltd. v. Peelton Hills Ltd.* (1982), 35 O.R. (2d) 787 (C.A.); *Rudco Insulation Ltd. v. Toronto Sanitary Inc.* (1998), 42 O.R. (3d) 292 (C.A.); *Gillies Lumber Inc. v. Kubassek Holdings Ltd.* (1999), 47 C.L.R. (2d) 1 (Ont. C.A.);

## PINEAU V. KRETSCHMAR<sup>2</sup>

There is a “before *Pineau*” and an “after *Pineau*”. Before *Pineau*, a solicitor facing an expired lien under s. 37 might make two statements, often as an argument: “I didn’t know it was done that way in Toronto”; and, “No worries, section 86 is only for rare cases where there is some wrongdoing on the part of the solicitor, it doesn’t apply to me”. After *Pineau* neither of these statements can be true, and neither of these arguments can be made.

As *Pineau* is still a contested matter in which the present author remains involved, the following remarks are carefully confined to the technical “lien” issues that were dealt with so thoroughly by Master Sandler in his reported reasons. Anyone reading this lien decision would be well-advised *not* to be critical of the solicitors involved. Remember: “it could have been me!”

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<sup>2</sup> [2004] O.J. No. 396 (Master).

In *Pineau*, the plaintiff supplied and installed steam, water and air systems to the defendant's smoke house. The plaintiff preserved a smallish lien in Toronto and issued a statement of claim in Toronto, naming the place of trial as Toronto. All defendants defended. Pleadings were completed by August, 1999. The plaintiff's counsel duly served s. 39 demands. Two defendants responded, two did not. The plaintiff's lawyer encountered problems scheduling discoveries. He returned a motion before a construction lien master in Toronto asking for the following relief:

1. *To have a day, time and place set by the court for a settlement meeting.*
2. *To have a day, time and place fixed by the court for a trial date.*
3. Requiring the defendants Perry/709 to answer the demand for information.
4. Granting leave to have full documentary and oral discovery.
5. To have an inspection of the premises.

The motion was heard in Toronto by Master Saunders. He was handed a draft order prepared by counsel, more or less as above. Master Sandler summarized this order as follows:

[para 24:] Paragraph 1, as drafted, provided for a settlement meeting to be held on Friday, September 22, 2000. (No place was specified.) This paragraph was crossed out and initialed by Master Saunders (since, as I have noted, masters do not, as a matter of practice, order settlement meetings in Toronto lien actions).

Paragraph 2 provides that "the trial of this action shall be held in the week of October 30, 2000 or such subsequent date as may be agreed to be between counsel or ordered by this court". (sic) There had been no judgment of reference obtained so this provision could not have been an order under s. 60(2) fixing a first trial date before a master. And, the action had not yet been set down for trial before a judge so it was not on any trial list. And, further, a master has no jurisdiction to make an order that deals with the scheduling of trials on the Toronto judges' trial list. Such an order can only be made by a judge, usually the Trial Scheduling Court judge, once the case has been set down for trial as outlined above. There is

nothing in the supporting affidavit, sworn by the plaintiff Robert Pineau, that supports this request to schedule either a settlement meeting or a trial date. I believe however that this is the procedure that is used in Brampton lien actions, and I believe such orders are often made by Brampton judges for Brampton actions.

The rest of the provisions of this order of Master Saunders deal with the demand for particulars request, and for documentary and oral discovery, and provides that all discovery was to be completed by August 31,2000. All these provisions are routine and regular but are usually dealt with by the master conducting the reference. There was no such master in this case.

Kretschmar's counsel did not appear on this motion, but the other defendants' counsel did. No-one objected to the form of order. The order was duly issued and entered. Everyone thought that they had done the job and protected against s. 37 expiry.

The plaintiff died.

The plaintiff's widow changed counsel. New counsel duly obtained an order to continue, after some to-ing and fro-ing.

The two year period expired. One of the defendant's counsel watched this date come and go. They had an internal memo prepared which expressed the view that the Master Saunders order was probably sufficient to stop the s. 37 period.

Believing the Master Saunders order to be sufficient, plaintiff's new counsel then returned a motion before a motions court judge in Toronto:

- (a) to set a date for a "settlement conference" (a similar request for a "settlement meeting" had been refused by Master Saunders on May 8, 2000);
- (b) to set a date(s) for oral examinations for discovery of the parties;

- (c) to restore this action to the trial list (it never had been on any trial list).

In the course of attending the court house on University Avenue to get this order, plaintiff's counsel happened to engage in an informal discussion with a lien master (not Master Sandler or Master Saunders). The lien Master made some gratuitous observations at the time and left a memorandum in the file, which Master Sandler summarized as follows:

[para. 52:] [The] "memo to file" indicates that he reviewed the judge's order, and Master Saunder's order, and pointed out [...] that the judge's order was not in the form of a judgment of reference (Form 16) as required by s. 58 of the Act and Regulation s. 2(16). He also was aware of and made reference to Master Saunder's order which he described as an "order for trial" (his quotations), indicating his reservations about this "order". [The master] advised solicitor [...] that unless there was a pre-existing judgment of reference, it would be necessary to have the judge's order amended to conform with Form 16. Once that had been done, the solicitor could then obtain a first "construction lien pre-trial" order from

[...] - s. 60(2) - and serve a notice of trial on all parties - s. 60(4) - all in accordance with the Construction Lien Act. The master further advised that at this "first construction lien pre-trial", directions could be made for the continuation of the trial and opportunities for settlement could be canvassed. But, the lien had, in fact, expired on June 19, 2001 (as I have so held) but [the Master] didn't have all the information about this lien claim before him to be aware of this and to tell the solicitor that this had happened. The master couldn't have known that the lien had expired. Nor was that question before the master. The master was just being asked to follow up on the said judge's order and he refused (quite properly), and gave some guidance to the solicitor as to what could be done to regularize the proceeding.

A Superior Court Judge then issued the following order that day:

"1. This Court Orders that a settlement conference under section 60(2) of the *Construction Lien Act* ... shall be convened by the Master in Toronto on a date and at a time to be fixed by the Registrar."

"2. This Court Orders that examinations for discovery of all of the

parties in this action shall be completed by no later than July, 2002."

"3. This Court Orders that this matter be referred to the Master in Toronto for the purposes of re-scheduling a pre-trial hearing date and re-scheduling a trial date."

All counsel approved this judge's order as to form and content. All counsel consented.

The plaintiff changed counsel once again.

Plaintiff's new counsel attended before yet another master in Toronto, *ex parte*, and obtained an order fixing a first trial date for November 28, 2003 at 1:30 p.m. Everyone attended before Master Sandler on the return date of this "Notice of Settlement Meeting", and when they did the wheels very quickly came off the wagon.

Can you spot the errors? (Hint: there are 5 of them).

I can do no better than quote from the extensive (113 paragraph) reasons for decision of Master Sandler:

1. Asking a Toronto construction lien master to order a settlement meeting

Lien masters in Toronto do not, as a matter of practice, order settlement meetings under s. 60(1) of the *Construction Lien Act*, because the first “pre-trial”, which is supervised by the lien master, is considered a more effective procedure than an unsupervised settlement meeting under s. 61. Master Saunders crossed out this paragraph of the draft Order.

2. Asking a master to fix a day for trial, without obtaining a judgment of reference

Master Saunders allowed this part of the Order, even though without a judgment of reference, a lien master has no jurisdiction to make such an order under s. 60(2) fixing a day, time and place for the trial

of a lien action. Also, a master has no jurisdiction to make an order that deals with the scheduling of trials on the Toronto judges' trial list. Such orders can only be made by judges.

3. Failing to properly comply with s. 37(1)

This was perhaps the biggest mistake of all in *Pineau*. Under s. 37(1) of the *Act*, if within two years after the date of issuance of the statement of claim, the action, or an action in which the lien may be enforced, has not been set down for trial, or an order has not been made fixing a trial date under s. 60(2), the lien expires, and a motion may then be brought, without notice, to declare the lien expired under s. 46.<sup>3</sup> A judgment of reference under s. 58(1) is not an order fixing a trial date. In order for the clock to stop ticking for the purposes of s. 37(1), an order under s. 60(1) is required.

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<sup>3</sup> See for example *B.R. Davidson Mining & Development Ltd. v. Lac Des Iles Mines Ltd.* [2003] O.J. No. 3966, where the lien claimant, B.R. Davidson, did not set its action down for trial, and no order was made fixing a trial date, within two years of the commencement of its lien action. The B.R. Davidson \$2.4 million lien was declared expired, the owner's letter of credit was returned for cancellation, the lien action was dismissed without prejudice to continue a separate civil action and substantial costs were ordered to be paid by B.R. Davidson.

4. Ignoring previous Court orders and asking for the same relief again

Paragraph 1 of the Order again ignores the fact that settlement meetings are not used in Toronto. It further ignores the proper procedure for settlement meetings and the fact that where such meetings are conducted, they are not conducted by masters. There is no "Registrar" who has the authority to schedule a master's work, and finally, paragraph 1 ignores the fact that Master Saunders struck out any reference to holding a settlement meeting in his Order of May 8, 2000.

5. Filing with the Court materials that are not used or required in Toronto construction lien actions

Pre-Trial Memoranda and Briefs are used and required for settlement conferences in case managed actions under Rule 77, which rule does not apply to construction lien actions, and for pre-trial conferences in non-case managed actions under Rule 50, which rule also does not

apply to construction lien actions. They are not used or required in Toronto construction lien actions.

Then the other shoe dropped. The master invited submissions on costs. This became complex. A mortgagee defendant had simply added their full solicitor/client bill to the mortgage debt and had been paid. The defendants sought this from the plaintiff. The plaintiff sought all of this from its former solicitors. The former solicitors opposed. They lost. Substantial costs were fixed and awarded against them. The main argument on the solicitors' behalf was that the respective defendants' solicitors either consented to or participated in all the missteps prior to and including the November 28 hearing. With regard to the expiry under s. 37, it was argued that counsel for the defendants should have known that the lien had expired on June 18 and should have moved shortly thereafter (late June or July or August) to have the lien declared expired under s. 37 and 46 of the C.L.A. If this had been done, then the lien action would have been dismissed, and none of the subsequently incurred costs would have been incurred. Indeed, it was argued, this was the "least

expensive course” under s. 86(2) and no costs beyond this could be awarded by statute.<sup>4</sup> Finally, it was argued that s. 86 was a complete code, R. 57<sup>5</sup> was inconsistent and therefore did not apply, and that s. 86 required real misbehavior.

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<sup>4</sup> Section 86(2): “Where the least expensive course is not taken by a party, the costs allowed to the party shall not exceed what would have been incurred had the least expensive course been taken.”

<sup>5</sup> Rule 57.01(1) reads as follows:

In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
  - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
- (i) any other matter relevant to the question of costs.

The Court rejected all of these arguments. The Master held that the defendants' solicitors in no way contributed to the numerous mistakes.

With regard to the s. 37 point, Master Sandler held as follows:

[para. 22:] If this were the usual case of a lien plaintiff simply not getting an order fixing a trial date or not setting the action down for trial within the s. 37 two-year period, with the lien then expiring, then I would agree with [counsel for the solicitors]... But the present case is quite different, with a unique set of facts....

On any motion under s. 46, [the defendant's lawyer] would have been faced with para. 2 of Master Saunders' order. It would have been argued by the plaintiffs that this was an order "for the trial of an action" within s. 37 (1) 1. and s. 60 (1). It did not exactly fix "a day, time and place for trial" but it came close. [The defendant's lawyer] knew that there was no judgment of reference to a master but the case could still be tried before a judge-(see s. 62 (1)(a) of the C.L.A.)-and, as I have said, it was not unreasonable for [the defendant's lawyer] not to know that a Toronto master had no jurisdiction to fix a trial date on the Toronto non-jury (or

jury) trial list. It is a formidable task for a lawyer to have to come to court and argue that a previous order in the case made by a judge or master was made without jurisdiction and is without legal effect. But that is exactly what [the defendant's lawyer] would have had to argue, before the very Master who had made the order. No wonder [the defendant's lawyer] was reluctant to do so.

The Master also made a forceful, precedent-setting point regarding the s. 86 / R. 57 argument:

[para. 56:] Secondly, I do not see rule 57.07 (1) as being inconsistent with s. 86 (1)(b)(i) or (ii). Sections 86 (1)(b)(i) and (ii) are focusing narrowly on the lien aspects of an "action, application, motion or settlement meeting" and are dealing with the situation where the lien itself clearly is without foundation, or is grossly excessive, or has expired, and the solicitor knows this, and yet participates in its preservation or perfection or at the trial of such a lien claim. This provision is obviously designed to inhibit solicitors- (and other agents who are not solicitors-see s. 67 (5))-from pursuing clearly improper lien claims or claims for clearly grossly excessive amounts. This is because of the significant harm that can be done to

property owners if such liens are registered against their lands. The Construction Lien Act procedures are a major statutory interference with the common law rights of property owners and they are not to be used indiscriminately or for an improper purpose.

[...]

¶ 58 On the other hand, rule 57.07 (1) focuses broadly to deal with the costs of an action generally. Even though the lien is properly claimed and for a proper amount, the action to enforce it-(see s. 50 (1) and s. 53 (1))- may be handled negligently causing costs to be incurred, or some costs may be incurred without reasonable cause, or some costs may be wasted by undue delay, negligence or other default, and if such costs are caused by a solicitor, he or she can be the subject of an order under rule 57.07 (1)(a), (b) or (c).

¶ 59 It is my view that s. 86 (1)(b), both (i) and (ii), and rule 57.07 (1) are not inconsistent, but rather are mutually reinforcing of one another, and can stand together to cover all the different scenarios that can arise in the problematic conduct of a lien action. I therefore find that rule 57.07 (1)(c) applies to the facts of this case and it authorizes the court to make the order requested by Mr. Perlis, i.e., to order the various former solicitors,

personally, to pay the costs to which the defendants are found to be entitled.

The substantive s. 37 decision was appealed. This appeal was not pursued. The costs decision was appealed. This appeal was not pursued. *Pineau* stands. It states the law on these points.

Under the heading “food for thought”, consider the following:

1. Does *Pineau* enlarge the personal liability of solicitors for costs in lien actions beyond that contemplated by the legislature in s. 86 of the *Construction Lien Act*? S. 86 is not remedial, but punitive. Only remedial provisions get large and liberal interpretations. Punitive provisions get restrictive interpretations. S. 86 is coercive of conduct and, as such, should it not be read restrictively so as to achieve only the purposes intended?

2. Is a solicitor's personal liability for costs under s. 86 now absolute? Will all expirations under s. 37 and motions under s. 46 result in costs awards against solicitors personally under s. 86, because all such expirations and motions are, virtually by definition, errors on the part of solicitors (in *obiter*, in argument, this proposition was debated). Perhaps so; perhaps not. As s. 86 was initially conceived by the Attorney General's Advisory Committee, something in the nature of 'misbehaviour' appears to have been contemplated:

The Committee has provided the court with a power to award costs against a solicitor, where he has been guilty of misbehaviour. A solicitor is an officer of the court as well as an advocate. He is under a duty to protect the legal system from abuse. Where he *knowingly participates* in the prosecution of an invalid or grossly exaggerated claim, or *personally causes a prolongation of the resolution of a dispute*, he is in breach of his duty to the court.

It is interesting in *Pineau* to note that as all counsel went along with what was done, it could not be said (a) that anyone knew of the errors, or (b) that anyone prolonged the resolution of the dispute.

3. Was the master correct in his application of s. 67 (3) of the *Construction Lien Act* to import Rule 57 of the Rules of Civil Procedure into lien actions, holding that R. 57 is not inconsistent with the lien statute? The master held that far from being inconsistent, s. 86 of the *Construction Lien Act* and r. 57.07 of the Rules of Civil Procedure mutually reinforce one another, and stand together to cover all scenarios that can possibly arise in the problematic conduct of a lien action. Note that Rule 57, on its face at least, would appear to be broader in scope and its threshold test is less specific than s. 86. Without reasonable cause" in R. 57 seems a lower threshold than 'knowing participation' in s. 86; and "negligence" in R. 57 also seems a lower threshold than "knowing participation" in s. 86. Furthermore, disallowance

of costs between solicitor and client, and an order that cost paid by the client be repaid by the solicitor are possible remedies under R. 57, but do not appear to be contemplated by s. 86. Is this not an inconsistency within the meaning of s. 67 (3)?

4. Does the master's interpretation of s. 86 (2) of the *Construction Lien Act* (requiring parties to take the "least expensive course", or be limited to the costs of the "least expensive course") create a double standard: out-of-town solicitors are held to a different standard than Toronto solicitors; defendants' solicitors are held to a different standard than plaintiffs' solicitors? Simply as a matter of policy, should the 'least expensive course' not require some affirmative conduct on the part of the defendants in a lien action, not just a passive "going along for the ride"?

5. Do you agree with the master's interpretation and application of s. 46<sup>6</sup> of the Construction Lien Act? Like the point above, do you think that the defendant in a lien action should have an *equal* responsibility to enforce their rights (like their accrued rights under s. 46) promptly? Should they not have to exercise their rights promptly or forego costs incurred in the interim? There would seem to be no principled basis for giving s. 46 differing interpretations depending upon the degree of privity of contract between the moving party and the expired lien claimant.

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<sup>6</sup> 46(1) Where a perfected lien that attaches to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to enforce that lien and vacating the registration of a claim for lien and the certificate of action in respect of that action.

(2) Where a perfected lien that does not attach to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to realize upon that lien.

(3) A motion under subsection (1) or (2) may be brought without notice, but no order as to costs in the action may be made upon the motion unless notice of that motion was given to the person against whom the order for costs is sought.

(4) Where an action is dismissed under subsection (1) or (2), the court shall order that,

- (a) any amount that has been paid into court under section 44 in respect of that action be returned to the person who paid the amount into court; and
- (b) any security that has been posted under section 44 in respect of that action be cancelled.

The bottom line, though, is: *Pineau* is “it”. Heed the case. Brace yourself for the costs argument based on *Pineau* should you ever miss a s. 37 expiration period.

## CONCLUSION

As the exasperated master indicated in *Pineau*, “it’s all there. The whole procedure”, meaning that it is all in the *Construction Lien Act*. If you fail to familiarize yourself with the *Act*, the one section you are likely to become familiar with is s. 86.