

**RIGHT TO INFORMATION AND CROSS-  
EXAMINATION UNDER THE *CONSTRUCTION*  
*LIEN ACT* –**

**ENSURING THE SUMMARY NATURE OF THE  
LIEN ACTION**

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## **1. Introduction**

The enactment of the *Construction Lien Act* in 1983 marked a watershed development in the lien remedies in this Province. This statute gave legislative recognition to the proposition that rights are only effective to the extent that people know they have them. The *Construction Lien Act* recognizes this. Part VI of the Act creates a procedure which is designed to make mandatory the disclosure of information on demand to assist in the enforcement of lien remedies under the Act. It penalizes non-compliance. Part VI is located where it is in the statute for a reason. It is meant to follow preservation and precede discharge of such liens. Part VI consists of only two sections, section 39 providing for a “right” to information and section 40 granting a “right” to a single comprehensive cross-examination on affidavits verifying liens.

## **2. Section 39 – The Right To Information**

Section 39 provides as follows:

*Right to information*

39.--(1) Any person having a lien or who is the beneficiary of a trust under Part II or who is a mortgagee may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty- one days, as follows:

*from owner or contractor*

1. By the owner or contractor, with,
  - i. the names of the parties to the contract,
  - ii. the contract price,
  - iii. the state of accounts between the owner and the contractor,
  - iv. a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner, and
  - v. a statement of whether the contract provides in writing that liens shall arise and expire on a lot-by-lot basis.

*from contractor or subcontractor*

2. By the contractor or a subcontractor, with,
  - i. the names of the parties to a subcontract,
  - ii. the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor,
  - iii. a statement of whether there is a provision in a subcontract providing for certification of the subcontract,
  - iv. a statement of whether a subcontract has been certified as complete, and
  - v. a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

*from owner*

3. By an owner who is selling the owner's interest in a premises that is a home, with,
  - i. the name and address of the purchaser, the sale price, the amount of the purchase price paid or to be paid prior to the conveyance, the scheduled date of the conveyance and the lot and plan number or other legal description of the premises as contained in the agreement of purchase and sale, and
  - ii. the date on which a permit authorizing occupancy or a certificate of completion and possession has been issued.

*from mortgagee or unpaid vendor*

(2) Any person having a lien or any beneficiary of a trust under Part II may, at any time, by written request, require a mortgagee or unpaid vendor to provide the person within a reasonable time, not to exceed twenty-one days, with,

- (a) sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement;
- (b) a statement showing the amount advanced under the mortgage, the dates of those advances, and any arrears in payment including any arrears in the payment of interest; or
- (c) a statement showing the amount secured under the agreement of purchase and sale and any arrears in payment including any arrears in the payment of interest.

*by trustee or workers' trust fund*

(3) The trustee of a workers' trust fund may at any time by written request require any contractor or subcontractor to permit the trustee, within a reasonable time after making the request, not to exceed twenty-one days, to inspect the payroll records of all workers who are beneficiaries of the fund, and who have supplied labour to the making of the improvement, and who are employed by the contractor or the subcontractor.

*respecting publication of certificate of substantial performance*

(4) A contractor shall, upon written request whenever made to the contractor by any person, within a reasonable time furnish in writing to the person the date of publication and the name of the construction trade newspaper in which a copy of a certificate of substantial performance has been published under subsection 32 (1).

*Liability for failure to provide information*

(5) Where a person, who is required under subsection (1), (2), (3) or (4) to provide information or access to information, does not provide the information or access to information as required or knowingly or negligently misstates that information, the person is liable to the person who made the request for any damages sustained by reason thereof.

*Order by court to comply with request*

(6) Upon motion, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to the person under this section and, when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a solicitor-and-client basis.

## 2.1 Overview

Subsection 39(1) extends its scope to demands for information by any person having a subsisting lien, whether or not preserved or perfected, any beneficiary of a trust created by the Act, any mortgagee, or any trustee of a worker's trust fund. Persons other than these, such as a purchaser, have no such statutory right.<sup>1</sup> Subsection 39(2) applies only to persons having a lien and trust beneficiaries and grants a right to demand and obtain information from mortgagees or unpaid vendors which will be significant in determining priorities under section 78 of the Act or trust remedies under s. 9 of the statute. To protect fringe benefits, which can form a significant part of a worker's compensation, trustees of a worker's trustee fund have the right, under subsection 39(3), to access employers' payroll records. Pursuant to subsection 39(4), any person may obtain particulars of the publication of the all-important certificate of substantial performance. Subsections (5) and (6) set out the consequences for the failure to provide the required information, providing for both civil liability in damages and production by court order with a punitive cost order.

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<sup>1</sup> *Re Seltor Holdings Ltd. and Kettles* (1983), 43 O.R. (2d) 659 (Ont. Div. Ct.).

## 2.2 History

The provision is not new and did not evolve without difficulty. A statutory right to information first appeared in *The Mechanics' and Wage-Earners' Lien Act, 1896*, S.O. 1896, c.35. Section 27 of that Act entitled lien-holders to information from the owner as to the terms of the contract or agreement with the contractor in respect of which the work was done or the materials supplied. The right was limited in that it allowed only a lienholder to request from an owner or its agent the terms of the contract with a contractor and the amounts due and unpaid. Section 28 of the 1896 Act provided for the possibility of a summary application for an order by the Court to an owner or its agent to permit any lien holder to inspect the contract. Section 30 of *The Mechanics' and Wage-Earners' Lien Act, 1910*, c.69, consolidated these two sections into one section under the heading "Information to be given Lien Holder". Lien holders' rights to information remained virtually unchanged until the *Mechanics' and Wage-Earners' Lien Act, 1923*, S.O. 1923, c.30. Section 29(2) of that Act permitted lien holders to demand from mortgagees or unpaid vendors the terms of any mortgage or agreement for the purchase of the lands showing the advances made or the amount owing to the vendor, as well as liability for failing to respond or knowingly falsely stating the terms of the mortgage or the agreement. The subsection entitling the lien holder to inspect a contract was

expanded to include the right to production and inspection of the mortgage or agreement with the vendor.

Significant changes were introduced in the *Construction Lien Act, 1983*, S.O. 1983, c.6. The Attorney General's Committee on the Draft Construction Lien Act stated that the philosophy underlying the new section was to require the disclosure of only that information which facilitated the enforcement of rights under the Act. Confidentiality was considered a central issue and value. Consistent with this policy, production of the entire contract or mortgage was no longer required. These 1983 amendments also, and for the first time, extended the rights to information to beneficiaries of the statutory trust. The 1983 revisions specifically enumerated the type of information that could be requested from an owner, contractor, subcontractor, mortgagee or unpaid vendor. The decision in *Dominion Bridge Co. Ltd. v. Marla Construction Co. Ltd.*,<sup>2</sup> which had held that there was no obligation on a trustee of a labour and material payment bond to advise claimants under the bond of the existence of the bond, was effectively disposed of by the enactment of section 39, which now provides a statutory right to any person “having a lien” or who is a mortgagee or who has a trust claim to demand delivery of a copy of any labour and material payment bond. As it is, this is a lighter provision than in many

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<sup>2</sup> (1970), 12 D.L.R. (3d) 453, [1970] 3 O.R. 125 (Ont. Co. Ct.)

other jurisdictions, which require bonds to be physically posted in some prominent public position.

### 2.3 Other Provinces

Similar provisions appear in the Acts of the other provinces. British Columbia has a right to information provision in section 41 of its new *Builders Lien Act*, S.B.C. 1997, c.45. In addition to the information that may be requested in Ontario, the British Columbia provision allows the lien holder to require the “terms of the contract”. This, of course, is exactly what Ontario wanted to get away from in its 1983 amendments. The British Columbia statute also expressly includes a reciprocal right for owners to demand contract information from contractors and, where a claim for lien was filed, from subcontractors. From the writers’ point of view, this may be an excellent trade off, however Ontario’s section 40, allowing for a full cross-examination, seems to be better solution because it occurs under oath. Saskatchewan has provisions similar to those of British Columbia in section 82 of its *Builders’ Lien Act*, S.S. 1984-85-86, c.B-7.1. Section 58 of Manitoba’s *Builders’ Lien Act*, R.S.M. 1987, c.B91, is similar to the Ontario provision, as are section 32 of the New Brunswick *Mechanics’ Lien Act*, R.S.N.B. 1973, c.M-6, section 24 of Alberta’s *Builders’ Lien Act*, R.S.A. 1980, c.B-12 and section 32 of the P.E.I. statute, R.S.P.E.I 1988, c.M-4. Section 32 of

the Nova Scotia *Mechanics' Lien Act*, R.S.N.S. 1989, c.277 provides a kind of general right to information without any of the specificity of other similar provincial legislation.

## 2.4 Case Law

There is little case law on point. This seems somewhat anomalous as s. 35(6) allows one of the few interlocutory motions in lien actions in enforcement of these rights. It is either that (a) no one is using s. 39; or (b) that everybody is using it and everybody is complying; or (c) people are muddling through, not caring much what they demand and not paying much attention to what they get in return. In *Maple Leaf Homes & Cottages Inc. v. Zoellner Windows (1982) Ltd.*,<sup>3</sup> the plaintiffs were suppliers of windows and other building materials to the defendants, who incorporated the materials into the products they supplied directly to owners as improvements in the construction of homes. The plaintiffs argued that they did not know to whom the products were sold or the construction sites on which they were used and that they required that information from the defendants.

The plaintiffs requested the following information:

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<sup>3</sup> (1989), 34 C.L.R. 6 (Ont. H.C.).

"Take notice that my client is a supplier of materials, as defined in the Act, and that Zoellner Windows (1982) Ltd. is a contractor, as defined in the Act.

Take notice that we have reason to believe that you may be a person liable for the breaches of trust which apparently have occurred, resulting in the debt owed to Maple Leaf.

Take notice that I require you to provide me with certain information, if it is in your possession, within 21 days of the date of this letter, failing which I will see a court order to compel your compliance, and I will seek costs on a solicitor and client basis. The information I require is as follows:

- a) the names of all parties to any contracts with Zoellner Windows (1982) Ltd. that were initiated in the last six months for the supply of goods or services by Zoellner Windows (1982) Ltd;
- b) the contract price with respect to each contract described in paragraph a) above;
- c) the state of accounts between the parties with respect to each contract described in paragraph a) above;
- d) the names of all parties who provided or agreed to provide services or materials to Zoellner Windows (1982) Ltd. with respect to each of the contracts described in paragraph a) above, and

- e) the state of accounts between Zoellner Windows (1982) Ltd. and the parties described in paragraph d) above, with respect to each of the contracts described in paragraph a) above."

The defendants did not comply with that request and the plaintiffs moved to compel disclosure of the information under s. 39. The Court granted the motion and ordered the defendants to comply with the plaintiff's request for production. Costs of the motion were ruled to be costs in the cause.

More recently, subsection 39(5) was discussed in *Sintra Ont. Inc. v. Metric Contracting Services Corp.*<sup>4</sup> In answer to a request under s. 39(4) of the Act, the defendant sent to the plaintiff a certificate of completion rather than a certificate of substantial performance. Neither the plaintiff nor the defendant took further steps in respect of the request for information, and the plaintiff did not read the construction newspaper nor advise the defendant that the wrong document had been sent. As the defendant did not knowingly or negligently misstate the information, and in the circumstances, its conduct was not such that would entitle the plaintiff to damages under s. 39(5).

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<sup>4</sup> (1999), 45 C.L.R. (2d) 299 (Ont. Master).

### 3. Section 40 – Cross-Examination on Claim for Lien

Section 40 provides as follows:

#### *Cross-examination on claim for lien*

40.--(1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced.

#### *Who may participate*

(2) There shall be only one examination under subsection (1), but the contractor, the payer of the lien claimant, and every person named in the claim for lien who has an interest in the premises are entitled to participate therein.

#### *Notice*

(3) Any person intending to examine a person under subsection (1) shall give at least seven days notice of the examination specifying the time and place for the examination to,

- (a) the person to be examined or the person's solicitor;
- (b) every other person named in the claim for lien as having an interest in the premises;
- (c) the contractor; and
- (d) the payer of the lien claimant.

#### *Application of rules of court*

(4) The rules of court pertaining to examinations apply, with necessary modifications, to cross-examinations under this section.

### **3.1 Overview**

The right to cross-examination on an affidavit verifying a claim for lien is now available as of right. Earlier statutes had made the right available only upon motion and proof of necessity. The section is intended to permit claims to be tested before trial and to allow the removal of liens on reduced security as well as the discharge of such liens at an early stage upon proper, conclusive evidence. The person who has verified the claim for lien is the witness on the cross-examination. The wording of section 40 does not appear to limit the scope of the cross examination to the affidavit of verification itself.

### **3.2 History**

Section 40 of the current statute has its origins in *The Mechanics' Lien Act, 1968-69*, section 38(10), which became section 42(10) of the 1980 *Mechanics' Lien Act*. Section 38(10), for the first time, allowed any party to an action or other interested person, at any time, to apply to a judge or a master for directions, including directions as to the cross-examination of a lien claimant or its agent on the affidavit of verifying the claim for lien. This provision was of limited use

in practice because it was believed that the subsection could only be used after an action had been commenced: see *Re Pecco Cranes (Canada) Ltd.*<sup>5</sup> The ability to cross-examine as of right was added by section 40 of the *Construction Lien Act, 1983*, S.O. 1983, c.6 and is continued in section 40 of the current statute.

The Attorney-General's Committee heeded the reasoned decision of the Court in *Dominion Elevator* and stated that the purpose of Section 40 is to provide a means of verifying claims for lien and allow people named in the claim for lien that have an interest in the premises and also the contractor to obtain information regarding the claim for lien. Leave of the Court is no longer required, nor is it necessary that an action have been commenced, in order to cross-examine on the affidavit of verification.

The contractor and the payer of the lien claimant are entitled as of right to participate in the examination. Any person named in the claim for lien as having an interest in the property is also entitled to participate in the examination. Therefore, since the contractor and payer of the lien claimant are specifically named as participants to the cross-examination, a mortgagee's right to participate can only arise if the lien claimant named the mortgagee as a person having an interest in the premises. If the mortgagee is not named as an "owner"

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<sup>5</sup> [1973] 3 O.R. 737 (Ont. Master).

in the claim for lien, then presumably the mortgagee is not entitled to participate in that cross-examination.

Only one examination may be conducted. Section 40 is also of importance when dealing with a sheltered claim for lien. Since a sheltered lien claimant does not have a pleading, the Section 40 cross-examination may provide defendants in such a claim their one clear right to ascertain the nature of the sheltered lien in advance of trial.

### 3.3 Case Law

In *AMCA International Ltd. v. Ellis-Don Ltd.*,<sup>6</sup> the defendant conducted a most thorough cross-examination under s. 40. After 13 full days of cross-examination, there was still no admission which would have helped the defendant. The plaintiff brought a motion to terminate the cross-examination. Master Sischy commented on the purpose and limits of s. 40 as follows:

The right to cross examine, on the affidavit of verification is contained in section 40(1) of the Construction Lien Act, it does not take the place of an examination for discovery and,

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<sup>6</sup> (1990), 42 C.L.R. 227 (Ont. Gen. Div.).

unlike an examination for discovery in a lien matter, may be conducted as of right, without leave of the court.

The usual object of such examinations is to attack the substance of the lien and show, for instance, that the lien has not been registered within the time allowed by the Act, or that there is error on the face of the lien which would make it voidable. A less common, and most challenging object of such examinations is the attempt, as here, to obtain admissions which would reduce the amount of security required to vacate the lien.

In determining an application for a reduction in security, only clear and unequivocal admissions will be sufficient to allow such an application to succeed. This cross examination has to date, occupied 13 days, and transcripts of the cross examination have been made available to me. In these 13 days of examination there is nothing approaching a clear admission which would assist defendant, and I see nothing which would suggest that any such admission will be forthcoming.

It is understandable that the defendant would wish to reduce the security required to vacate this lien, which is for approximately 45 million dollars, and the defendant should, in the circumstances, be granted wide latitude to pursue this goal. However, this examination has clearly gone beyond acceptable limits, and is amounting to an examination for discovery without giving the plaintiff the benefit of a review of documents produced for discovery.

While I hesitate to say that there has been a deliberate abuse of process here, the effect of this lengthy and unfruitful examination is an abuse of process and I am, therefore, granting the motion and terminating the examination.

It is important to note that, pursuant to section 44 of the Act, a motion may be brought at any time to reduce the security required, whether before or after the lien has been vacated, and the defendant will have further opportunity to achieve this goal. I would suggest that the defendant press towards production of documents and obtain leave for discovery. If the defendant obtains any useful admissions during discoveries a motion can be brought at that time for a reduction in security. In addition, the defendant has the ultimate remedy of costs provided for in section 88 of Act, should it ultimately be proved that the lien was inflated.

In *Eurocor Ltd. v. Vernich*,<sup>7</sup> Austin J., as he then was, made similar observations:

The right to cross-examine the person verifying a lien was created by the new Construction Lien Act, S.O. 1983, c. 6, s. 40. According to the Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, 1983:

The purpose of the section is to provide a means of verifying claims for lien.

Section 40(2) provides that there shall only be one examination under the section but "the contractor, the payer of the lien claimant, and every person named in the claim for lien who has an interest in the premises are entitled to participate therein."

As indicated in the Report, the section was designed to give all interested parties an early opportunity to obtain more information about the claim. The claim for a lien being a creature of statute, the owner would be interested in the date the work commenced, the

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<sup>7</sup> [1995] O.J. No. 2315 (Ont. Gen. Div.).

date the contractor last worked on the project, any documents to verify those dates and any other information relevant to the validity of the claim for a lien. Other contractors, subcontractors and suppliers, some of whom would be concerned about sheltering under the claim for lien in question, would be interested in similar matters.

It was held that the right to cross-examine should not replace the examination for discovery, for which leave would be required.

In *Plaza Electric II Ltd. v. CMGC Management Inc.*,<sup>8</sup> the Court made clear that evidence obtained under s. 40 is not subject to R. 30.1 of the Rules of Civil Procedure. Counsel for the plaintiff had objected to further use of a cross-examination because such use was not sanctioned by R. 30.1. The Court disagreed:

As to [counsel's] objections, first of all a careful reading of rule 30.1 shows that the rule applies only to evidence and information obtained under Rules 30, 31, 32, 33, 35 and 60.18 of the *Rules of Civil Procedure*. The evidence of [...] was obtained pursuant to section 40 of the *Construction Lien Act* and it is therefore not subject to rule 30.1.

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<sup>8</sup> (1996), 35 C.L.R. (2d) 306 (Ont. Gen. Div.).

#### 4. Conclusion

These two provisions of the Construction Lien Act provide access to a powerful procedural remedy without which many of the other, substantive remedies provided for by the *Construction Lien Act* would be less meaningful. The fact that there is little case law interpreting these sections should not be taken as a reflection on their importance. Courts have repeatedly reaffirmed that the *Construction Lien Act* was designed to bring line disputes to a speedy resolution. Sections 39 and 40 are instrumental tools in achieving that aim. Courts will not hesitate to enforce the rights granted in Part VI and will also not hesitate to impose the costs sanctions provided for in Part VI on parties obstructing a summary process.