Don’t Lien and Walk Away - Registering a builders’ lien is just the first step

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Recently, there has been an uptick in matters relating to failures to enforce builders’ liens. It is important to know the appropriate steps required to enforce a lien, and when those steps must be taken, according to the Alberta *Builders’ Lien Act* (BLA) and other legislation in force. The recent Alberta Court of Queen’s Bench decision of *Chandos Construction Ltd v. Deloitte Restructuring Inc*, 2022 ABQB 78 (*Chandos*), is a cautionary tale that contractors, owners and lawyers, alike, should consider when handling enforcement of builders’ liens.

Many readers will be aware of the legislative deadlines to register a lien. It is important to be diligent with tracking deadlines in relation to not only registering a lien, but also enforcing a lien. By way of background, the time to register a builders’ lien, subject to some nuanced exceptions, is either 45 days, or 90 days on an oil or gas well site project, from the date the last materials, services or wages were provided or the contract was abandoned. Section 43 of the BLA requires a lienholder to commence an action in the Court of Queen’s Bench and register a Certificate of Lis Pendens within 180 days of registration of the lien. As a general rule applicable to nearly all litigation in Alberta, the *Limitations Act* requires a claimant to seek a remedial order within two years from the date it first knew or ought to have known a claim exists.

Regarding registered builders’ liens, often owners or general contractors will take steps to have a lien removed from registration on the lands by posting security with the court while the lien dispute is ongoing. This is typically done by way of a Section 48 application pursuant to the BLA. This may be done for a variety of reasons, including contractual obligations, but primarily for the purposes of financing and progressing the relevant project. Once security is posted with the court to replace the lands that the lien is registered against, the usual 180-day deadline to file a Statement of Claim may no longer apply depending on the language included in the court order. However, in that case, the two-year limitation period would still apply.

In *Chandos*, the parties took the appropriate steps to register a lien and the lien was removed by posting security with the court, but the lienholder failed to enforce the lien in compliance with the two-year limitation period. The lienholder registered a lien in October 2016 and the lien was removed by way of posting security in November 2016. Subsequent to these steps, the parties entered into a contractual interpretation dispute which impacted the lien claim.

Some readers may be aware of the prominent and related case, *Chandos Construction Ltd. v. Deloitte Restructuring Inc*, 2020 SCC 25, wherein the Supreme Court of Canada deemed invalid a contractual provision which required a subcontractor to forfeit 10 per cent of the total subcontract price to the general contractor upon the subcontractor's insolvency or bankruptcy. In 2021, after the lienholder was successful at the SCC in the contractual dispute, it sought to enforce the lien. However, that contractual dispute took over three years at various levels of court and by then the lienholder had run afoul of the two-year limitation period to enforce its lien claim. Accordingly, the application to enforce the lien was dismissed and the security posted with the court was returned.

It is also important to follow all of the requirements set out in the BLA to properly enforce a lien. Failing to do so could result in the claim being challenged. This occurred in a recent case out of British Columbia where an application was brought by the general contractor for an order declaring a lien to be extinguished and for the return of the security posted in court, on the basis that the notice of civil claim was defective. In that case, the plaintiff avoided having its lien extinguished by bringing an application to amend its civil claim, which was consented to by the owner: *Trans Canada Trenchless Ltd v. Targa Contracting (2013) Ltd*, 2021 BCSC 2518. However, without the cross-application and the consent of the owner, the court had determined that the lien claim would be extinguished.

In summary, when proceeding with registration and enforcement of builders' liens it is essential to ensure steps are taken according to legislated procedures and deadlines. Contractors and owners need to be aware of changing timelines and regulations relating to the Alberta Builders' Lien Act that are expected to come into force later this year.

BLG's Construction group has written extensively on the upcoming changes to the BLA. Reach out to any of the contacts below should you have any questions on how the upcoming changes to the BLA or new regulations could affect your business.

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