

Construction Law

June 2015

Construction Bits and Bites

This is the second in a series of newsletters which we have named “Construction Bits and Bites”. The series addresses legal topics of interest to the construction industry in a short, ‘bite sized’ format.

This newsletter describes three types of ‘certificates’ that may be encountered during the life of a construction project.

- * Certificate of Substantial Performance
- * Certificate of Completion
- * Notice of Intention to Register a Condominium

Certificate of Substantial Performance

As the name suggests, a certificate of substantial performance is a document which certifies that substantial performance of a construction contract has been achieved on the date specified. The concept of substantial performance applies only to a contract between the owner and a contractor.

To obtain a certificate of substantial performance, the contractor is required to make an application to the payment certifier for the project or the owner (where there is no payment certifier) to determine whether the contract has been substantially performed in accordance with section 2 of the *Construction Lien Act* (“CLA”). Where there is no payment certifier, the owner and the contractor jointly make the determination. If substantially performed, then the payment certifier (or the contractor and owner jointly) are required to sign a certificate of substantial performance in the prescribed form (Form 6 of the CLA).

The CLA outlines the test to be used to determine when a contract is substantially performed. A contract is substantially performed when,

- (a) the improvement to be made under the contract, or a substantial part thereof, is ready for use or is being used for the purposes intended; and
- (b) the cost to complete the contract, or to remedy known defects, does not exceed
 - (i) 3% of the first \$500,000 of the contract price;
 - (ii) 2% of the next \$500,000 of the contract price; and
 - (iii) 1% of the balance of the contract price.

A certificate of substantial performance must contain the prescribed information, including the name and address of the owner, contractor, and payment certifier, the date on which the contract was substantially performed, and the legal description of the premises, where the lien attaches to premises.

The contractor is required to publish the certificate in the Daily Commercial News. If the contractor does not publish it within 7 days of receiving it, any person is permitted to do so. Publication is essential because it is a trigger date for the expiry of lien rights and, therefore, affects the release of the statutory holdback.

If the payment certifier (or owner) fails or refuses to certify substantial performance “within a reasonable time”, any person may apply to the court for a declaration that the contract has been substantially performed. A failure or refusal to certify the substantial performance of the contract within a reasonable time where there is no reasonable doubt that the contract has, in fact, been substantially performed, exposes the payment certifier (or owner) to liability for damages incurred as a result.

Certificate of Completion of Subcontract

A certificate of completion of a subcontract is a document which certifies that a subcontract has been completed on the date specified. The issuance of this certificate is a precondition to safely releasing a portion of the statutory holdback ‘early’ to a particular subcontractor. Although, permitted under the CLA, this step is not mandatory.

If requested by the contractor, the payment certifier, (or the owner where there is no payment certifier) may determine

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whether a subcontract has been completed. It must be certified complete using the prescribed form (Form 7). There is no requirement that a certificate of completion of subcontract be published to be effective. Instead, within 7 days of the date the subcontract is certified complete, a copy of the certificate must be given to the subcontractor (and the owner and contractor where certification is by the payment certifier).

Provided that the parties have strictly complied with the CLA requirements for certifying the completion of a subcontract, then the owner is permitted to release the portion of the holdback retained for the subcontract work. For this reason, a certificate of completion of subcontract is of particular importance to subcontractors that complete their work in the early stages of a project of long duration (e.g. subcontractors that supply demolition or concrete forming services).

Notice of Intention to Register a Condominium

Although not a 'certificate' *per se* a Notice of Intention to Register a Condominium has similar attributes to the other two certificates. In 2010, a new section was added to the CLA (s. 33.1) that applies to land that is intended to be registered as a condominium corporation in accordance with the *Condominium Act, 1998* (the "Condominium

Act"). An owner must now publish notice of his or her intention to register the condominium at least five and not more than 15 days before the condominium is submitted for approval under the Condominium Act.

The publication is intended to give notice to all suppliers of services or materials to the project that the land will soon be registered as a condominium. This gives an unpaid trade the opportunity to decide whether to register a lien before the lands and premises are divided into separate condominium units and title is transferred to various homebuyers. Under the CLA, a person has a lien upon the interest of the owner in the premises improved. However, the definition of owner specifically excludes a 'home buyer'.

The notice must be in a prescribed form (Form 24), which includes the owner's name and address, legal description of the lands, and if to the best of the owner's knowledge, information and belief, a contractor supplied services or materials to an improvement in respect of the land during the 90-day period preceding the day on which the description is to be submitted for approval, the contractor's name, address and, if known, address for service.

Failure to comply with this new obligation will make the owner liable to any person entitled to a lien who suffers damages as a result.

Pallett Valo LLP Construction Practice

Litigation risk management in the construction industry requires the advice and guidance of experienced construction lawyers. The Pallett Valo LLP Construction Practice has particular expertise in the resolution of all types of construction disputes. Their practical and timely advice assists our construction clients in meeting their day to day challenges.

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This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about Construction Law, contact a member of our **Construction Practice** at **905.273.3300**.

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