

## Supplying to New Home Subdivisions

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Suppliers of services or materials to several lots in a new home subdivision, or other multiple location premises, are faced with certain issues, which don't arise where the supply is to a single location.

### What is a General Lien?

Where an owner enters into a single contract for improvements on more than one of its premises, any person supplying services or materials under that contract may choose to have the lien follow the form of the contract and be a general lien against each of the premises for the price of all services and materials. The lien claimant's contract need not be with the owner in order to claim a general lien.

### What Conditions Must be Met?

In order to claim a general lien,

- there must be a single owner for all of the premises;
- there must be a single contract for the supply of services or materials to each of those premises; and
- the contract must not contain a provision that liens shall arise and expire on a lot-by-lot basis

### What are the Advantages of a General Lien?

Without a general lien, keeping track of lien expiry dates when supplying to many lots in a subdivision can be a nightmare. This is because the lien rights for the supply of services or materials to a particular lot expire 45 days after the last supply to **that** lot. The lien rights in respect of each lot will likely expire at different times, thus necessitating the registration of multiple liens. The general lien allows the supplier to register one lien on title to all of the premises for the price of all services supplied within 45 days of the last supply.

### What is a Lot-by-Lot Expiry Provision?

Not surprisingly, builders do not like general liens. By including certain wording in a contract, an owner can take away the right to claim a general lien. Therefore, a

builder's form of contract should be scrutinized carefully for any language which provides that liens shall arise and expire on a lot-by-lot basis.

The opportunity to review the contract is readily available where the supplier contracts directly with the owner. However, the general lien is also available to sub-contractors and material suppliers under that contract. If the main contract provides for the lot-by-lot expiry of liens, the sub-contractors or material suppliers also lose the ability to claim a general lien.

### Warning – Gillies Lumber v. Kubassek

Until October 1998, most construction lawyers believed that if someone registered a general lien, and it was ultimately found not to be a general lien (because one or more of the criteria were not met), then the lien would still be valid as against specific premises for the amount supplied within the preceding 45 days to those specific premises. The Court of Appeal of Ontario in *Gillies Lumber v. Kubassek* said "NO".

Gillies supplied lumber to four housing projects. Gillies registered a general lien on title to all four premises alleging that it supplied to one owner under one contract. It was found, rightfully, that Gillies was not entitled to a general lien because there were in fact four separate contracts with four different registered owners.

However, part of the Gillies lien would have still been valid if treated, to that extent, as a specific lien against certain properties because Gillies had supplied lumber to one or more of the premises within the 45 day period preceding the registration of the lien. The Court of Appeal held that Gillies registered the wrong type of lien and therefore the entire lien must be discharged.

## What is a Home Buyer Exemption?

A lien cannot be registered against the interest of a “home buyer”. A home buyer is protected from liens if,

- the home is a single family residence, a duplex or a condominium unit;
- the home buyer is a person (as opposed to a corporation);
- no more than 30% of the purchase price is paid prior to the conveyance; and
- the home is not conveyed until it is ready for occupancy;

## Right to Information

The *Construction Lien Act* provides a mechanism for obtaining information so that a lien claimant can determine among other things whether a purchaser qualifies as a homebuyer. Any person who is supplying, or has supplied, services or materials to an improvement may request that an owner who is selling a home, provide the following information:

- the name and address of the purchaser
- the sale price
- the amount of the purchase price paid or to be paid prior to transfer of title
- the scheduled closing date
- lot and plan number or other legal description of the property
- date on which a permit authorizing occupancy or a certificate of completion and possession has been issued

The owner is required to provide the information within a reasonable period of time not to exceed 21 days. If the owner does not comply, a court order may be obtained to compel delivery of the answers. In addition, an owner who does not provide the information, or knowingly

misstates the information, can be liable for any damages sustained by reason thereof. Often it is not possible to obtain the information prior to the lien expiry date and, in that case, a decision must be made whether to register the lien without the benefit of that information.

The same mechanism is in place for finding out if a contract contains a provision which takes away the right to claim a general lien. Any person who is supplying or has supplied labour or materials to a project may ask the owner or the contractor to advise whether the contract provides that liens shall arise and expire on a lot-by-lot basis.

The purpose of this Bulletin is to provide information which may be of interest to those in, or associated with, the construction industry. It does not contain a full analysis of the law nor does it constitute an opinion of Pallett Valo, LLP or any member of the Firm on the points of law discussed. It is not a substitute for legal advice.

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