

## Construction Bits and Bites – Lien Deadlines

We are pleased to present you with the most recent issue of our *Construction Bits and Bites* bulletin. *Bits and Bites* bulletins include topics of interest to everyone in the construction industry in a concise, “bite-sized” format.

This bulletin reviews the factors that determine the deadline by which a lien must be preserved in Ontario. A lien is preserved by registering it on title to the project lands or giving a Claim for Lien to the Owner. The method of preservation – whether registering or giving the lien – depends upon the type of lien that it is.

### 45 vs. 60 days – ‘old’ Act vs. ‘new’ Act

The *Construction Act* was amended to give a lien claimant 60 days from the happening of certain events to preserve a lien. However, if the Owner started the procurement process for the improvement, or entered into the contract, before July 1, 2018, then the ‘old’ Act still applies and lien rights expire 45 days from the happening of certain events. “Procurement” includes a request for qualifications, quotations, proposals, or a call for tender. To determine whether the ‘old’ or ‘new’ Act applies, the contract between the Owner and a Contractor is the relevant contract.

Since few projects still exist where the procurement process started before July 1, 2018, the balance of this bulletin

If you are a *Contractor*, your lien rights expire as follows:

Where CSP Published	Where No CSP Published
60 days starts from the <i>earlier</i> of: <ul style="list-style-type: none"><li>the date the CSP was published; or</li><li>the date the contract is completed, abandoned, or terminated</li></ul>	60 days starts from: <ul style="list-style-type: none"><li>the date the contract is completed, abandoned, or terminated, whichever occurs first</li></ul>

A contract is substantially performed when (a) the improvement to be made under the contract, or a substantial part of it, is ready for use or is being used for the purposes intended; and (b) when said improvement is capable of completion or, where there is a known defect or correction,

assumes that the ‘new’ Act applies, and the lien period expires 60 days from the happening of certain events.

### When does the 60-day Period Start?

When the 60-day clock starts ticking depends on a few factors.

The first factor is whether the lien claimant is a Contractor or anyone other than a Contractor. “Contractor” means a person hired directly by the Owner, or the Owner’s agent. “Contract” means the agreement between the Owner and the Contractor. Anyone not hired directly by the Owner is called a Subcontractor, and “Subcontract” has a corresponding meaning.

The second factor is whether a Certificate of Substantial Performance (“CSP”) of the contract between the Owner and the Contractor has been published. Only contracts are certified as substantially performed. Subcontracts may be certified as complete, but the procedure for doing so is rarely used. A published CSP affects the lien rights of everyone.

at a cost of not more than, 3% of the first \$1,000,000 of the contract price, 2% of the next \$1,000,000 of the contract price, and 1% of the balance of the contract price. Where the Owner and Contractor agree not to complete a portion of the improvement expeditiously, that portion may be

deducted for the purposes of applying the monetary formula.

A contract may be deemed to be complete before it is 100% complete. The *Construction Act* provides that a contract is deemed completed and services or materials are deemed to be last supplied when the price of completion, correction of a known defect or last supply is not more than the *lesser* of:

- (a) 1% of the contract price; and
- (b) \$5,000.

For example, where the contract price is greater than \$500,000, the contract will be deemed to be completed when the cost of completion, correction of a known defect or last supply is less than \$5,000.

If you are *not* a *Contractor*, your lien rights expire as follows:

Where CSP Published	Where No CSP Published
<p>60 days starts from the <i>earlier</i> of:</p> <ul style="list-style-type: none"> <li>the date the CSP is published;</li> <li>the date of your last supply;</li> <li>the date the contract is completed, abandoned, or terminated; and</li> <li>the date your subcontract is certified complete</li> </ul>	<p>60 days starts from the <i>earliest</i> of:</p> <ul style="list-style-type: none"> <li>the date of your last supply;</li> <li>the date the contract is completed, abandoned, or terminated; and</li> <li>the date your subcontract is certified complete</li> </ul>

## Conclusion

Lien deadlines are strictly enforced. At the end of the applicable 60-day period, the lien expires and it is no longer capable of being preserved.

When preserving a lien, unless there is absolute certainty, it is most prudent to assume that the ‘old’ Act applies and comply with the shorter 45-day period. Consulting a construction lawyer early, when the possibility of preserving

a lien first arises, is always a good course of action. There may be opportunities to avoid preserving the lien, but only if there is sufficient time to canvass alternative options.

## Next Bulletin Topic

We hope this *Construction Bits and Bites* bulletin was helpful. Look out for the next bulletin which will review the types of services and materials which are lienable in Ontario.



**Matthew J. Greco**  
Lawyer



**Anna Esposito**  
Lawyer

## Pallett Valo 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.

Contact Matthew J. Greco  
Email: [mgreco@pallettvalo.com](mailto:mgreco@pallettvalo.com)  
Phone: 289.294.1076

Contact Anna Esposito  
Email: [aesposito@pallettvalo.com](mailto:aesposito@pallettvalo.com)  
Phone: 289.805.4465



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