October 2002

Builders' Lien Rights for Architects and Engineers: Real or Illusory?

By Michael Morgan

In a recent decision of the B.C. Court of Appeal, the extent of lien rights given to architects and engineers under the *Builders Lien Act* (the "Act") was considered. The Court held that despite the 1998 additions to the Act whereby architects and engineers were expressly identified as potential lien claimants under the Act, such lien rights are contingent upon the commencement of construction of an improvement. If an architect or engineer performs preparatory or planning services for a project that does not materialize, no lien rights will accrue. This outcome may contradict what architects and engineers believed their rights were as a result of the 1998 additions to the Act.

The Decision

In *Chaston Construction Corp. and Werner Forster Architects v. Henderson Land Holdings (Canada) Ltd.*, the Plaintiffs, an architect and a project manager, performed substantial preparatory and pre-construction services for a proposed Brew Pub at the International Village Marketplace in downtown Vancouver. The Plaintiffs, who were retained by a tenant, were not paid for their services and therefore filed a lien against title to the International Village Marketplace. The Brew Pub was not built. The only work performed on site was work done by the owner of the International Village Marketplace (the Defendant), although some of this work was performed based on the drawings submitted by the Plaintiffs. For example, the concrete slab was reinforced to accommodate the brewery tanks.

The trial judge had dismissed the Plaintiffs claims against the owner. The Court of Appeal allowed the appeal and held that the Plaintiffs were entitled to a lien but only because the owner had performed some work on site and the Plaintiffs had performed services in relation to that work. The Court determined that architects and engineers are only entitled to a builders' lien if construction of an improvement actually commences.

Interpreting the Additions to the Act

The Act came into force on February 1, 1998. For the first time, architects and engineers were expressly included as potential claimants under the Act. At the time, it was believed this specific inclusion meant architects and engineers could lien for services performed regardless of whether an actual improvement was constructed. The Court of Appeal in *Chaston* held that the lien rights afforded architects and engineers do not extend that far. The Court stated that the new provisions in the Act were limited in scope and were not intended to provide protection for architects or engineers for pre-construction work regardless of whether construction of the improvement ever commenced. The Court was particularly concerned with the potential harsh

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effects of a broader interpretation of the additions to the Act on non-contracting owners such as landlords (e.g. if there is no improvement to the land, non-contracting owners should not have their land subject to a lien). This concern was present despite the protection afforded such non-contracting owners through the filing of a Notice of Interest pursuant to the Act that provides such owners are not liable for liens unless they expressly request the improvement to be undertaken.

In interpreting the new provisions in the Act, the Court clearly stated that if construction on an improvement actually commences, an architect and engineer will be entitled to a lien for both pre-construction services and on site supervisory services they may perform. However, if no construction commences, architects and engineers will not have lien rights because there is no "improvement" in relation to which work could have been performed.

The Court in *Chaston* made a further determination that is of significance to head contractors and/or project managers who are not architects or engineers. The Court determined that the definition of "services" in the Act does not require that such services be performed by a person recognized or accredited by a particular professional body or association in order for that person to be entitled to a lien. Therefore, if an individual provides services that are similar to services that an architect or engineer commonly provide to a project, such services are potentially lienable under the Act.

The Effect of the Ruling

The practical result of *Chaston* is that the protection given architects and engineers may be illusory as the nature of the work performed by architects and some engineers is such that a majority of their work is performed prior to construction. Therefore, if lien rights do not exist until construction commences, architects and engineers will be performing work without the certainty that they will have lien rights. If construction does commence, the lien rights will effectively be retroactive to the date work was first performed by an architect or engineer. If construction does not commence, the architect or engineer will have no lien rights despite the fact the majority of its work may have been completed. This is in sharp contrast to the perceived protection given to architects and engineers by the additions to the Act.

Possible Responses to the Ruling

There are two potential responses by architects and engineers to this ruling:

1. Lobby the Provincial Legislature for further reform to the Act; or

2. As work for a proposed project progresses, insist that at least some preparatory construction on site be undertaken before further work will be performed. For obvious reasons, this may or may not be possible or effective depending on the nature of the proposed project. Specific advice should be sought on the effectiveness of proceeding in this fashion.

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