

# Construction Lien Act - Precedent for the Land Surveyor

By Carl J. Rooth, O.L.S. - Executive Director, AOLS



At the outset, we would like to acknowledge Mr. William H. Card, O.L.S., of Smith & Smith Kingston Limited for his assistance in providing information to our offices to convey to all surveyors the success his company achieved under the *Construction Lien Act*.

In January 1994, Mr. Card contacted our office for assistance in preparing for the court action. The administration prepared a letter "Schedule A" which was an opinion from the administration of the Association of Ontario Land Surveyors in regard to how the Ontario Land Surveyor added to the value of land through the surveying, planning and engineering process.

## Schedule A Re: Construction Lien Litigation and the Ontario Land Surveyor

What is it that the Ontario Land Surveyor does to improve the value of the property in carrying out his or her professional duties?

In developing a parcel of land, the Ontario Land Surveyor (OLS) is quite often the first professional on the ground to investigate the extent of title. Before a parcel of land can be developed, it must be brought under the *Land Titles Act* or the *Certification of Titles Act*. In the *Land Titles Act*, Section 144 R.S.O. 1990, Chapter L.5 describes compulsory registration. If there is no *Land Titles Act* available, the *Certification of Titles Act* must be used for new lands being developed. The next stage of development includes the preparation of plans of subdivisions and, if required, plans under the *Condominium Act*.

While conducting the Land Titles Application Plan or the Application under the *Certification of Titles Act*, the OLS researches all documentary evidence in

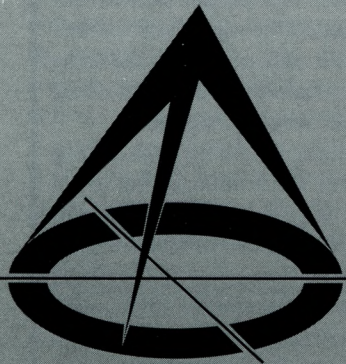
the Registry Office, fellow surveyors' offices and the physical evidence on the ground. Having weighed this evidence as a professional, monuments are set to hold the property corners or boundaries as established. The plan is then completed and circulated to the adjoining owners for notification. After all objections are heard, the plan is then brought forward for registration. This is the **first step** where the OLS has increased the value of the property.

The *Planning Act* under R.S.O. 1990 Chapter P.13, Section 51(2) notes that:

"An applicant under subsection (1) shall provide as many copies as may be required by the Minister of a draft plan of the proposed subdivision drawn to scale and showing, (a) the boundaries of the land to be subdivided, certified by an Ontario Land Surveyor."

This means that the draft plan for the site development of a plan of subdivision or condominium plan must be signed by an OLS. The OLS does sufficient work to certify the boundaries and their relationship to the adjoining lands. Quite often, the OLS provides further topographic information to allow the municipality to review the actual site situation in relation to the proposed design. This is the **second** added value to a parcel of land. Without this certification the development plan cannot proceed through the various municipal approvals.

Section 51 of the said *Planning Act*, Subsection (19) describes that the final plan must be prepared by an OLS. At this point, the OLS lays out the lots, roads, blocks and walkways and in the case of condominium plans, the unit structures and exclusive use areas as instructed by the owner of the lands in accordance with the draft approval. The OLS sets iron



markers in accordance with the Monumentation Regulations under the *Surveys Act* at all of the required corners. This is the **third** area where the OLS has increased the value of the property. There is *no other professional* individual under Statute Law that has the authority to set these survey monuments and prepare the necessary plans for certification of their location.

The last, or **fourth**, area where the OLS improves the value of the property is by construction lay-out services. The OLS in some instances as instructed by the client, developer, or contractor is commissioned to lay out the physical buildings, roadways, and site servicing. In these cases, the OLS sets vertical and horizontal control points to allow the contractor to proceed to build the development in accordance with the site plan approvals. Once again, the OLS is the *first individual* to physically establish these points on the ground in order that construction may proceed; a value that is every bit as important as the actual physical construction that takes place.

The above paragraphs represent four major components where the OLS increases the value of property in the development process. Of course, there are many other aspects which would go hand in hand with development. For example:

- \* development meetings with client, municipality, engineers, architects, lawyers, contractors;
- \* preparation of reports;
- \* reference plans for partial development or mortgage discharges;
- \* easement or strata plans as needed; and,
- \* schedules for subdivision agreements.

The value of property boundaries is STATUTE CONTROLLED through the Ontario Land Surveyor.

*Carl J. Rooth, O.L.S.*  
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Association of  
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Smith & Smith Kingston Limited have been successful in three actions against Kinalea Development Corporation under Ontario Court (General Divi-

sion) in Kingston, in Frontenac County. The Honourable Madam Justice Helen King MacLeod was presiding and the court files numbers were M3072/91, M3074/91 and M3087/91.

The three original judgements were granted on June 14, 1994, but due to an intervention by the Mortgage Insurance Company of Canada (MICC), Madam Justice MacLeod accepted submissions from both Mr. Card's Counsel, Mr. Douglas MacPherson and Mr. John Scheulderman, Council for MICC, and on September 22, 1994, a confirming judgement was issued by Madam Justice MacLeod.

Court File No. M3072/91

- The Honourable Madam Justice Helen King MacLeod (presiding)
- Smith & Smith Kingston Limited (Plaintiff)
- Kinalea Development Corporation, Canada Trustco Mortgage Company, Bank of Montreal, 920638 Ontario Ltd. in trust, and, Zurich Insurance Company (Defendants)

**Judgement:**

"ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the solicitor for the Plaintiff, and submissions for MICC, the Intervenor,

1. THIS COURT DECLARES AND ADJUDGES that the Plaintiff Smith & Smith Kingston Limited is entitled to a lien under the Construction Lien Act, upon the interest of the owner, Kinalea Development Corporation.

2. THIS COURT ORDERS AND ADJUDGES that the Defendant Kinalea Development Corporation do pay forthwith to the Plaintiff the sum of \$31,474.00 together with prejudgment interest fixed at \$7,697.85 and its costs of this action fixed at \$2,500.00 plus GST.

3. AND THIS COURT ORDERS that the actions against the Defendants Bank of Montreal, 920638 Ontario Ltd. in trust, and Zurich Insurance Company be and the same are hereby dismissed without costs."

Court File No. M3074/91

- The Honourable Madam Justice Helen King MacLeod (presiding)
- Smith & Smith Kingston Limited (Plaintiff)
- Kinalea Development Corporation, Canada Trustco Mortgage Company, Bank of Montreal, and, Castle Building Centres Group Ltd. (Defendants)

**Judgement:**

"ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the solicitor for the Plaintiff, and submissions for MICC, the Intervenor,

1. THIS COURT DECLARES AND ADJUDGES that the Plaintiff Smith & Smith Kingston Limited is entitled to a lien under the Construction Lien Act, upon the interest of the owner, Kinalea Development Corporation.

2. THIS COURT ORDERS AND ADJUDGES that the Defendant Kinalea Development Corporation do pay forthwith to the Plaintiff the sum of \$20,725.87 together with prejudgment interest fixed at \$5,069.09 and its costs of this action fixed at \$2,500.00 plus GST.

3. AND THIS COURT ORDERS that the actions against the Defendants Bank of Montreal and Castle Building Centres Group Ltd. be and the same are hereby dismissed without costs."

Court File No. M3087/91

- The Honourable Madam Justice Helen King MacLeod (presiding)
- De La Fontaine Doors & Trim Inc. (Plaintiff)
- Kinalea Development Corporation, Limestone Quality Contracting Ltd., Royal Life Insurance Company, and, The Mortgage Insurance Company of Canada (Defendants)
- Smith & Smith Kingston Limited (Plaintiff)
- Kinalea Development Corporation, Royal Life Insurance Company of Canada, and, The Mortgage Insurance Company of Canada (Defendants)

## Judgement:

"ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the solicitor for the Plaintiff Smith & Smith Kingston Limited, and submissions for MICC, the Intervenor,

1. THIS COURT DECLARES AND ADJUDGES that the Plaintiff Smith & Smith Kingston Limited is entitled to a lien under the Construction Lien Act, upon the interest of the owner, Kinalea Development Corporation.

2. THIS COURT ORDERS AND ADJUDGES that the Defendant Kinalea Development Corporation do pay forthwith to the Plaintiff Smith & Smith Kingston Limited the sum of \$12,516.00 together with prejudgment interest fixed at \$3,192.16 and its costs of this action fixed at \$3,000.00 plus GST."

## Note:

*As stated at the beginning of the article, MICC intervened and a confirming judgement was issued on September 22, 1994. The confirming judgement file number is M3087/91.*

Madam Justice MacLeod issued the following **Reasons for Judgement**.

"The issue to be determined is whether or not the plaintiff, a surveying company, in these three actions is entitled to a registered lien pursuant to the *Construction Lien Act*, or whether the claim should be for a personal judgement.

This matter proceeded to trial before me on June 14, 1994. The defendants did not appear. On June 22, 1994, I granted the Mortgage Insurance Company of Canada leave to intervene in these actions as an added party and to be entitled to make submissions by way of legal argument as to the issue of whether the lien attaches and the quantum and interest of the judgement.

Section 14(1) of the *Construction Lien Act* provides as follows:

'that a person who supplies services or materials to an improvement for an owner, contractor or sub-contractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.'

I am satisfied that the plaintiff surveyor qualifies within the meaning of s.14(1) of the *Act* as a lien claimant on the facts of these three actions. The plaintiff supplied services to an improvement for the owner and comes within the definition of 'construction' on any land, building, structure or works as defined in the *Act*. It is also clear from the definition of 'supply of services' that the supply of design, plan, drawing or specification can enhance the value of the owner's interest in the land.

The plaintiff in these cases performed services that were directly related to the actual construction of the improvements. Without the surveyor's work, construction could not have taken place by the owner. The plaintiff had to be on-site to do work necessary to ensure compliance with zoning by-laws and in several instances, construction plans had to be altered to ensure the buildings would fit within the lot size available. I accept Mr. Card's evidence in all three cases that construction by the owner could not have taken place without the surveying work done by representatives of the plaintiff. The survey work performed in these cases was a necessary element to the construction of the improvements on the owner's properties.

Whether or not a lien attaches on behalf of a surveyor depends on the particular facts and the nature of the actual work performed. The caselaw is clear that if the services performed relate to the actual improvement, then the lien attaches. If the nature of the work done by a surveyor is such that there is no improvement, then the lien would not attach. An example of the latter would be where a surveyor determines a boundary between two parties and does nothing more.

In these cases, the services provided related directly to the land to be liened and were not notional in nature. The work performed was for the direct purpose of enabling the owner to proceed with construction. Construction did actually take place in these cases, but I do not find that to be a determinative factor. All aspects of the plaintiff's work were directly related to the construction process. I do not accept MICC's submissions that some parts of the work were less related to the improvements than others. The plaintiff was expected to do a complete job, which it did, and the full amount of the work done is what the court must consider.

MICC also disputes the court's authority to award pre-judgement interest in a construction lien matter. Section 130 of the *Ontario Courts of Justice Act* reserves to the court discretion whether it will allow pre-judgement interest and discretion as to what rate of interest it will allow. These actions were commenced in August of 1991. The plaintiff is entitled by an exercise of my discretion to reasonable pre-judgement interest for work it has done and for which it has not been paid. Pursuant to the *Courts of Justice Act*, I award pre-judgment interest as calculated by the plaintiff in the draft Judgements submitted.

These Judgements will be effective as at June 14, 1994 and post-judgement interest as prescribed will accrue from that date. I find therefore that plaintiff in these three actions has met the onus upon it and is entitled to claims for lien and judgements shall issue on that basis, as submitted by the plaintiff.

The plaintiff is entitled to its fixed costs as follows:

- (a) in action number M3072/91 the sum of \$2,500.00 plus GST;
- (b) in action number M3074/91 the sum of \$2,500.00 plus GST;
- (c) in action number M3087/91 the sum of \$3,000.00 plus GST.

DATED at Kingston, Ontario, this 22nd day of September, 1994.

*Madam Justice Helen MacLeod*

## **A Word of Caution**

If you are doing construction lay-out services leading to development of a parcel of land, Madam Justice MacLeod's reasons may give you incentive to use the Construction Lien Act when you have not been paid. You must consult with your solicitor and it may be beneficial to speak with your insurance adjustor. Quite often an action on your part will bring about a counter-claim. You should exhaust all possibilities before reverting to litigation. Iron-clad contracts, work change orders and payment schedules are imperative on any construction site.

*CJR*