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In This Issue

In this issue of *Commercial Litigation Brief*, Mark Wiffen begins by discussing some best practices for limiting the potential liability that can arise from a business' use of credit reporting agencies. Glenn Grenier then presents Part 1 in a series of articles about "quirky" construction liens that are not preserved and perfected in the "normal" way. Finally, Adam Chisholm discusses a recent Ontario Court of Appeal decision involving the *Negligence Act* pertaining to contribution and indemnity between tortfeasors.

Credit Reporting: Limiting Potential Liability

Mark Wiffen

For businesses which provide credit to a high volume of customers, the use of credit reporting agencies can be an important part of a comprehensive debt collection strategy, particularly for small amounts where other collection methods are not cost effective. While the law provides certain protections to businesses which report debtors to credit reporting agencies, there are certain risks inherent in the process of publicizing a person's debt in this manner. Although this risk cannot be entirely eliminated, the best practices discussed below can help in limiting the potential liability arising out of credit reporting.

When Can a Business be Liable for an Incorrect Credit Report?

There are, broadly speaking, two areas of potential legal liability for Canadian businesses reporting unsatisfied debts to a credit reporting agency: (1) A business can potentially contravene consumer protection legislation such as the Ontario *Consumer Reporting Act*; or (2) it can be found liable at common law for defamation or other related claims.

While consumer protection legislation varies from province to province, much of its application deals with governing the conduct of credit reporting agencies, rather than governing parties who report debts to credit reporting agencies. These consumer protection statutes do, however, provide that a person may be subject to fines or imprisonment if they knowingly supply false or misleading information to a credit reporting agency. As these provisions are designed to protect consumers from intentionally wrongful acts, they will have limited impact, if any, on parties who report debts in good faith.

Similarly, in order for a debtor to be successful in a claim for defamation or related legal claims, the debtor must prove not only that a credit report was false, but that it was made for malicious purposes. This is because reporting genuine unpaid debts to a credit reporting agency is seen as being in the interests of society, meaning that such reports are protected by what is referred to as "qualified privilege."[1]

As the term "qualified privilege" implies, this protection is not absolute. The privilege does not protect a party who makes a credit report where the dominant purpose is malicious, since there is no societal interest in promoting malicious reporting.[2] Malice is considered to exist where the false report was made because of spite or ill-will, or for an ulterior purpose. Malice can also, however, be found where a party is so reckless as to the truth of what they are reporting, that a judge chooses to infer that they were acting maliciously.[3]

Consequences of Incorrect Credit Reports

If a court finds that a party has made a false credit report maliciously, so as to lose the protection of qualified privilege, that party will be liable for any damages that result from this report. Given the importance of credit in modern society, a party whose credit rating has been wrongfully maligned can potentially suffer significant damages. However, these potentially substantial damages are often, in practice, restricted by a number of hurdles that a plaintiff must overcome in proving damages in a court proceeding.

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For example, credit scores are based on complex formulas which take into account various factors, ranging from the amount of debt being carried to the number of times a credit report has been requested by a third party. A plaintiff must prove, on the balance of probabilities, that the damage they suffered arose from the incorrect credit report, rather than as a result of their otherwise bad credit. In addition, plaintiffs are not entitled to compensation for frustration or inconvenience, unless it is so severe, prolonged and extraordinary that it has resulted in actual psychological injury, and that it would be foreseeable that a person of reasonable fortitude would suffer such psychological injury.[4]

Best Practices for Credit Reporting

In order to avoid potential lawsuits from frustrated debtors, or minimize the negative consequences of such lawsuits, businesses should consider implementing the following practices prior to reporting a debtor to a credit reporting agency:

- Contracts should explicitly state that unpaid accounts may be sent to credit reporting agencies. This puts customers on notice as to the potential consequences of non-payment. In addition, if you wish to charge an "administration fee" for the collection of delinquent accounts, this fee should be explicitly set out in the contract, and should be reviewed to ensure that it is, "a legitimate estimate of the costs incurred … in dealing with an individual overdue account."[5]
- Accounts should be manually reviewed prior to being reported, including a full review of the account history and any communications or complaints from the customer. If, for example, a

1 *Cusson* v. *Quan*, [2007] O.J. No. 4348 (C.A.) at para 39

2 *Botiuk* v. *Toronto Free Press Publications*, [1995] 3 S.C.R. 3. at para 79 – Note that qualified privilege may also be defeated if more information is reported than necessary for the purposes. However, given that the amount of information disclosed in a credit report is quite limited, this will not typically be a relevant consideration.

3 *Creative Salmon Company Ltd.* v. *Staniford*, [2009] B.C.J. No. 230 at paras 32–33

4 *Clark* v. *Scotiabank*, [2006] O.J. No. 5581 (Div. Ct.) at para 4; *Mustapha* v. *Culligan of Canada Ltd.*, [2008] S.C.J. No. 27 at para 9

5 *DeWolf* v. *Bell ExpressVu Inc.*, 2009 ONCA 644

payment has been misapplied, or a customer has previously reported that they never received the goods or services for which they are being billed, the risk of being seen as reckless increases.

- Each step in the collection process, such as the sending of notices to a delinquent account holder or the results of a review of an account, should be well documented.
- Once a delinquent account has been reported to a credit reporting agency, any requests to review the account for accuracy should be dealt with promptly, to ensure that any accounts reported in error are caught promptly and before the resulting damage has escalated.

While these steps will not guarantee immunity from lawsuits from disgruntled customers, they will, in conjunction with the qualified privilege afforded to such reports, help to minimize the risks as much as possible.

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Quirky Liens – Part 1

Glenn Grenier

In law, there is the general rule, and then there are the exceptions. This paper, in its entirety, is about the exceptions. More specifically, this article is the first in a series that focuses on some "quirky" construction liens that are not preserved and perfected in the "normal" way, or raise issues that must be considered and dealt with at the preservation stage.

As we will see, sometimes the "quirks" are expressly set out in the *Construction Lien Act*[1] ("CLA") itself. Others are not readily identifiable as "quirky" by reading the CLA, but become so because of other statutory provisions, processes, practices and the case law. We will briefly review the process of preserving and perfecting a "normal" construction lien and then compare and contrast same to construction liens in the context of:

Sometimes the "quirks" are expressly set out in the Construction Lien Act *("CLA") itself. Others are not readily identifiable as "quirky" by reading the CLA, but become so because of other statutory provisions, processes, practices and the case law.*

(i) Crown owned lands, municipal streets and highways and railway right-of-ways;

(ii) general liens;

(iii) condominiums and the common elements thereof;

(iv) leasehold improvements; and

(v) mines.

Part I – "Normal" Liens

The details of what is and is not lienable, as well as details of the essential elements which give rise to a construction lien, are the subject of other treatises and are not intended to be reviewed in detail in this paper. For purposes of this paper and in particular, for reviewing the process of preserving and perfecting a "normal lien," we start with the assumption that a *contractor* or *subcontractor* has *supplied services or materials* to an *improvement* that has been *requested* by an *owner* and that contractor or subcontractor has not been paid for same.[2] In such circumstances, the CLA creates a statutory lien in favour of the contractor or subcontractor upon the interests of the owner in the premises improved for

1 R.S.O. 1990 c. C-30, as amended.

2 Each italicized word has a specific meaning within the context of the CLA.

the price of such services or materials.[3] That lien arises automatically when the work first commences.[4] The lien normally *attaches* to the interests of the owner in the real property. Unless the lien is *preserved*, it will expire.[5]

In the case of a contractor, the lien will expire at the conclusion of the 45-day period next following the earlier of:

a) the date of publication of the Certificate of Substantial Performance (if there is one); and

b) the date the contract is completed[6] or abandoned (colloquially expressed as the "last day worked").[7]

In the case of any other person (i.e. a subcontractor or supplier), the lien will expire at the conclusion of the 45-day period next following the earliest of:

a) the date of publication of the Certificate of Substantial Performance (if there is one);

b) the date the subcontract is completed or abandoned; and

c) the date set out in a Certificate of Completion of Subcontract[8] issued pursuant to section 33 of the *CLA*.[9]

Assuming the lien *attaches* to the premises (most liens do attach and the ones that do not are considered "quirky" herein and will be dealt with later), then the lien is *preserved* by registering the lien against title to the property.[10] Prior to the advent of the electronic registration system, this was done by completing a Claim for Lien (Form 8) and Affidavit of Verification (Form 9) and registering the Claim for Lien on title.[11]

The CLA creates a statutory lien in favour of the contractor or subcontractor upon the interests of the owner in the premises improved for the price of such services or materials. That lien arises automatically when the work first commences.

Following the advent of the electronic land registration system, the Claim for Lien is now in electronic form and is completed as such. It does vary in appearance and with respect to some of the wording from Form 8 but, generally speaking, the information required is the same and is still the required information set out in subsection 34(5).[12] The electronic form does not provide for an Affidavit of Verification, but it does contain a verification statement. Cases have held that a reading of the *Land Registration Reform Act*[13] ("LLRA") which implemented the electronic registration system, covers the affidavit of verification requirement of the CLA by way of certain deeming sections.[14] However, until that proposition is tested and confirmed in the Court of Appeal, cautious lien practitioners still tend to have their clients complete an Affidavit of Verification at the same time the electronic form is prepared and keep same on file in case it is asked for by the solicitor for the

3 *CLA*, s. 14.

4 *CLA*, s. 15.

5 *CLA*, s. 31.

6 See *CLA*, s. 2(3) which stipulates when a contract (not a subcontract) is deemed to have been completed.

7 *CLA* s. 31(2).

8 R.R.O. 1990, Reg. 175, as amended s.2 (7) and Form 7.

9 *CLA* s. 31(3).

10 *CLA* s. 34(1)(a).

11 *CLA* s. 34(1) and (6) together with R.R.O. 1990, Reg. 175, s.2(8) and (9).

12 Every claim for lien shall set out,
(a) the name and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which those services or materials were supplied;
(b) a short description of the services or materials that were supplied;
(c) the contract price or subcontract price;
(d) the amount claimed in respect of services or materials that have been supplied; and
(e) a description of the premises,
(i) where the lien attaches to the premises, sufficient for registration under the Land *Titles Act* or the *Registry Act*, as the case may be, or
(ii) where the lien does not attach to the premises, being the address or other identification of the location of the premises.

13 R.S.O. 1990 c. L 4.

14 *LLRA* s. 24 – See *Petroff Partnership Architects* v. *Mobius Corp.* (2003), 29 C.L.R. (3d) 277 (Ont. Master); followed in *1230027 Ontario Inc.* v. *Jones* (2005), 54 C.L.R. (3d) 232; additional reasons 58 C.L.R. (3d) 63 (Ont. S.C.J.).

owner (as is often the case).[15]

Giving written notice of the preservation of a lien is not strictly required where the lien attaches. It is normal to give such notice, even before the lien is registered, so as to increase the owner's "notice holdback" requirement[16] and as a practical matter to let all parties know about the lien as a first step in making demand and getting the lien claimant paid. But, strictly speaking, separate notice (apart from registration) is not required to preserve a "normal" lien that attaches.

Once a lien is *preserved* it must be *perfected* or else it will automatically expire. A preserved lien must be perfected prior to the end of the 45-day period next following the last day the lien could have been preserved as described above (i.e. pursuant to section 31 of the CLA). To perfect a lien, the lien claimant must commence an action to enforce the lien in the Superior Court of Justice[17] and register a Certificate of Action against title to the property (again, assuming the lien attaches).[18] Once these steps have been taken, the lien is valid for two years from the commencement of the action.[19]

Once a lien is preserved *it must be* perfected *or else it will automatically expire. To perfect a lien, the lien claimant must commence an action to enforce the lien in the Superior Court of Justice and register a Certificate of Action against title to the property.*

An alternative to perfecting the lien as described above is to have the lien *shelter* under another perfected lien with respect to the same improvement.[20] Sheltering carries its own risks and uncertainties which, again, could be the subject of a paper of its own. Most experienced practitioners prefer not to rely on sheltering if they can avoid it and will simply perfect the lien by commencing an action and registering a Certificate of Action.

Next issue: "Liening Crown Lands"

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15 It should be noted that counsel in *1230027*, who was unsuccessful in having the lien dismissed on the basis there was no sworn affidavit of verification, suggested that that law was uncertain as Master Sandler's earlier decision in *Petroff* was not binding and the issue was still unsettled. The motions Judge rejected that suggestion, finding that the law was in fact settled authoritatively by *Petroff*.

16 *CLA* s. 24.

17 *CLA* s. 36 and 50.

18 *CLA* ss. 36(3)(a)(b).

19 *CLA* s. 37(1).

20 *CLA* ss. 36(4).

"No, It's Their Fault, Really"

Adam Chisholm

Traditionally, a negligent person could count on other participating parties to be held responsible for their share of the blame. Either the plaintiff would claim against both tortfeasors, or one defendant could request contribution and indemnity from the other. However, a recent Ontario Court of Appeal decision suggests that the courtroom seat beside an allegedly negligent party may now sit cold and empty.

Generally speaking, the law is that any tortfeasor who negligently caused or contributed to an indivisible injury may be fully liable for it on a "joint and several" basis. This is in the interest of making the plaintiff whole. If the plaintiff wants full recovery for the entirety of his/her damages, a wrongdoer cannot hide behind the involvement of others.

The *Negligence Act*, R.S.O. 1990, c. N.1 (the "Act") includes rules pertaining to contribution and indemnity between tortfeasors. This legislation mandates that each tortfeasor is responsible for the entirety of a plaintiff's loss. However, it also makes clear that one wrongdoer can pursue another wrongdoer for his/her fault in the claimed negligence.

Sometimes, the interests of an aggrieved plaintiff may not revolve around being made whole. Especially in a class action proceeding, a plaintiff may instead prefer to seek a smaller amount of damages from a single defendant. For one reason or another, be it cost, delay or relationships, the plaintiff may want to restrict its claim to one particular party, even if it means collecting less in damages.

The Ontario Court of Appeal has recently issued a decision that addresses exactly this situation. In *Taylor* v. *Canada (Minister of Health)*, 2009 ONCA 487, 95 O.R. (3d) 561 (C.A.), the Court held that so long as a tort victim limits his/her claim to the specific fault of a particular defendant, no right to contribution and indemnity by that defendant from other wrongdoers will arise.

Sometimes, the interests of an aggrieved plaintiff may not revolve around being made whole. Especially in a class action proceeding, a plaintiff may instead prefer to seek a smaller amount of damages from a single defendant.

Kathryn Taylor began a class action alleging that she suffered damage resulting from the surgical implantation of a device in her jaw. Ms. Taylor chose only to claim against the Attorney General for the Ministry of Health's negligent regulation of the devices. The Attorney General responded by bringing a third-party claim against the dental surgeon and hospital that had been involved in the operation.

The doctor and hospital resisted the third-party claim against them. Because Ms. Taylor had claimed against the Attorney General only for, "those damages that are attributable to its proportionate degree of fault," the doctor and hospital felt they could not be held responsible for such damages.

The motion brought by the third parties to dismiss the claim against them was granted. The judge held that the claim against the Attorney General was, "limited to damages for which it would have no right to contribution from any person who may have caused or contributed to the damages suffered." The Attorney General appealed to the Court of Appeal.

In a seemingly narrow view of when rights to indemnity or contribution arise, the Court of Appeal stated, "contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages." The Act only comes into play if a defendant is required to pay more than its share of fault for a negligent act.

The Court also allowed apportionment of fault to persons who are not parties to the litigation on the basis that the Act speaks of attributing fault to "persons," and not "parties." Therefore, as Ms. Taylor claimed solely against the Attorney General, the Attorney General is still able to argue that the doctor and hospital bear fault, despite not being parties to the action.

The Court did not feel that the Attorney General's concerns about production and discovery from non-parties could be addressed at the appellate level in this case. It was suggested that the Attorney General should be entitled to production of documents from, and examination of, the other tortfeasors even if they are not parties to the litigation. However, it is unlikely that this language will be read as binding upon lower courts because the final say on procedural protections was referred back to the case management judge.

The decision stated that it makes "good sense" to allow apportionment of damages to non-parties. At another point, it was suggested that such rules promote the streamlining of litigation and settlement.

The Court stated "because Ms. Taylor has limited her claim to those damages attributable to Health Canada's fault, Health Canada can have no claim over against the doctor or the hospital for the damages claimed by Ms. Taylor and the other class members." The mention of the "other class members" suggests that the Court was motivated by an unmentioned desire to preserve negligence actions in class proceedings. In *Taylor,* the class action claim against the Attorney General is for negligent regulation. If the class action involved each plaintiff's surgical team as third parties, the litigation would likely become unmanageable. Thus, it appears that access to the courts for class members has provided incentive to permit negligence claims to proceed without the presence of indemnifying parties.

However, a few potential problems may arise. Multiple actions may now be filed (even if later consolidated) for the same tort: one for each party's share of blame. Motions may now be more commonly brought by third parties arguing that the scope of the plaintiff's claim does not cover them. Perhaps the largest problem with allowing segregation of actions along presumed lines of fault is that tortfeasors who are not parties to litigation have no motivation to be involved in the litigation, or acknowledge any blameworthiness at all. The single defendant must offer a comprehensive defence without the benefit of other tortfeasors justifying and defending their own actions.

While *Taylor* may in some cases restrict contribution and indemnity claims against third parties, it does not speak to other, independent causes of action. For example, a retailer may be sued independently by a plaintiff for negligence. However, if that retailer has been supplied a faulty product, there may be an issue of breach of contract, upon which the retailer could file a claim against the supplier. Such a claim, not based in negligence, may effectively sidestep the need for contribution and indemnity.

Ultimately, whether a right to contribution and indemnity between tortfeasors exists will depend entirely on how a plaintiff chooses to draft his/her claim. Defendants must review all negligence claims to determine if the plaintiff has limited his/her claim.

Ultimately, whether a right to contribution and indemnity between tortfeasors exists will depend entirely on how a plaintiff chooses to draft his/her claim. Defendants must review all negligence claims to determine if the plaintiff has limited his/her claim to, "those damages that are attributable to its proportionate degree of fault." If so, a tortfeasor will not be able to pull another chair to the litigation table unless they have another form of entitlement independent of the negligence claim.

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News

Stephanie White Joins Lang Michener

Stephanie White

We are pleased to announce that Stephanie White has joined the Ottawa office of Lang Michener as an associate in the Commercial Litigation and Family Law Groups. Her practice focuses on civil and commercial litigation and family law matters.

Lang Michener Appointments to the Canadian Bar Association, BC Branch

Joan Young

Lisa Ridgedale

Joan Young and **Lisa Ridgedale** have been elected to the Canadian Bar Association, BC Branch, Provincial Council. Joan Young was elected to the Provincial Council where she joins Lisa Ridgedale who also serves as a representative for the Vancouver County.

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