

Landlords and Tenants under the *Construction Act*

A tenant will often retain a Contractor to provide services and materials to its leased premises, in which case liens against the improvement will attach to the tenant's leasehold interest. The liens against a leasehold interest will often not attach to the land itself, which can give rise to limited recovery in the event that the tenant cannot pay. With the *Construction Act* comes changes to how, when and to what extent landlords will be liable to contractors or Subcontractors for their supply of services or materials to tenants.

The Landlord As “Owner” Under the Act

- where a tenant retains a Contractor, the tenant will be an Owner under the *Act* and the lien will attach to the tenant's leasehold interest. There can, however, be more than one “Owner”. The landlord who owns the land, for example, will also be an “Owner” if it meets the *Act's* requirements in that regard. An Owner for the purposes of the *Act* means any person (including the Crown but not including a “home buyer”) upon whose request *and* upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, the improvement is made. If these requirements are met, the lien will attach to the land and the landlord-as-Owner will have all the responsibilities and obligations of an Owner under the legislation;
- given the potential for limited recovery in the event that a tenant is the only Owner of an improvement, Contractors and Subcontractors may wish to determine, before entering a contract or subcontract, the extent to which the person retaining the Contractor owns the actual lands or otherwise meets the *Act's* definition of “Owner”. A title search can be undertaken to determine the former, while a formal written acknowledgement from the landlord that the work is being performed at its request and with its consent will confirm that latter.
- where a landlord refuses to confirm that it meets the requirements of an ‘Owner’ for the purposes of the *Act*, and a Contractor or Subcontractor is concerned about the ability of the tenant who retained him to pay, they might wish to look to additional security in that regard, including the requirement that a labour and material payment bond be posted or that a personal guarantee or other collateral security for the construction debt be given.

Landlord Liable (as Landlord) in some Circumstances

- even if it does not meet the definition of “Owner” under the *Act*, the interest of the landlord may also be attached if the lease (or any agreement to which the landlord is a party that is connected to the lease) calls for the landlord to make a payment for all or part of the improvement. If this test is met, the landlord is liable to lien claimants for 10 percent of the amount of that payment. This is a new pool of funds not previously available to lien claimants. Contractors and Subcontractors can make section 39 requests for information from the landlord to determine if the test is met.

Termination or forfeiture of a Lease

- the *Act* provides that no forfeiture or termination of a lease by a landlord, except for non-payment of rent, “deprives any person having a lien against the leasehold of the benefit of the person's lien”. A landlord that intends to enforce forfeiture or termination of a lease for non-payment must, however, give all those who have registered liens against the premises notice of its intention to do so. Any of those lien claimants may then pay to the landlord the amount of the unpaid rent and add that amount to its claim for lien.