

Lien Rights: To Assign or Not to Assign (Should you ask the question?)

July 27, 2021

By Michael Swartz,

Assignment of lien is a powerful but underused section of Ontario's *Construction Act*. Assignment allows a party with lien rights to transfer their rights (and rights to any related court lawsuit or arbitration) to a third party. Unlike many other sections of the *Construction Act* that contain detailed and specific rules, the *Construction Act* does not provide much in the way of guidance to parties considering making or taking assignment of a construction lien, except that the assignment must be made in writing. This provides parties with broad latitude to create assignment arrangements that fit their individual needs.

What is assignment of construction lien rights?

Lien rights are a remedy available to those who supply services and/or materials to construction projects in Ontario. A party who has construction lien rights has a unique form of security for claims of non-payment in the form of a charge on the project property and on any holdbacks that are retained from payments on the project, or a charge on any security posted into court to remove the lien from title to the property.

Lien rights arise on the supply of services and/or materials to an improvement to a property and are for the price of the service and/or materials supplied. Construction lien rights are governed by the rules and procedures contained in the *Construction Act*. Subject to certain exceptions, a claim for lien is typically registered on title to the property to which the party with lien rights supplied the services and/or materials.

An assignment is the process by which Party A, who has a claim, account receivable, or some other legal right or benefit (including construction lien rights), transfers that legal right or benefit to Party B. Often, Party B will provide some sort of benefit to Party A in return for the assignment of legal rights, such as a payment of money and/or as part of a settlement. As discussed above, the *Construction Act* specifically allows for lien rights to be assigned to a third party.

Why assign construction lien rights?

Assignment has several benefits for the party with the lien rights. If you have lien rights, the assignment of those rights may be part of a settlement arrangement allowing you to be paid more quickly. Assignment also allows you avoid the time, expense, and risk of litigation. It allows you to move on from the claim, except for any assistance you may agree to provide the party who is taking assignment of the lien rights.

Assignment can also be beneficial for the party taking assignment of the lien rights. In complex disputes with multiple parties and claims, it can simplify and consolidate the dispute by allowing one party to take control of the claims. For example, in construction projects with multiple owners, assignment may allow one owner to clear title to their property while advancing the claim against the other owners. A contractor could also take assignment of claims from its subcontractors and advance the claims together up to the

owner.

Assignment can also be helpful as a means for an insurer or surety to take control of a claim and recover amounts paid out to an insured.

What do you need to do for an assignment?

The only direct rule in the *Construction Act* with respect to assignment is that the assignment must be in writing. Courts have held that this is a requirement for a valid assignment. While this one rule may seem simple, an assignment agreement written on the back of a napkin likely will not be sufficient. There are many considerations that need to carefully be taken into account, including:

- the lien rights are valid and capable of being assigned under the *Construction Act*;
- proper protections are in place for both the party assigning the lien rights and the party taking assignment of the lien rights;
- the assigning party's assistance with any litigation relating to the lien claim is properly addressed;
- the proper steps are taken to ensure the party taking the assignment can advance a lawsuit or arbitration relating to the lien claim, if necessary; and
- where the assignment is part of a settlement, that the terms of the settlement are agreed and properly documented.

For assistance regarding the assignment of lien rights, or with construction liens, disputes, and contracts more generally, please contact [Michael Swartz](#) and [Paul Conrod](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Michael Swartz

Toronto
416.947.5024

Email:
mswartz@weirfoulds.com

Michael Swartz devotes his practice to construction law. He represents clients from across the construction industry, in all aspects of projects and construction-related issues.

Toronto

Email:

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035