

Not as Simple as Clicking Submit, Your Claim for Lien Isn't Registered Until Certified

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Overview

Until last year's decision in *Gay Company Limited v. 962332 Ontario Inc.*, 2023 ONSC 6023 ("*Gay Company Limited*"), many construction law practitioners may have believed that the "registration" of a claim for lien is complete once one submits the requisite forms to the Land Registrar and the instrument appears on the parcel register. They might have assumed that once they submit an application to delete construction lien for registration, the lien is irrevocably discharged in accordance with section 48 of the Construction Act (the "Act").

As it turns out, the meaning of "registration" is more nuanced than some may have assumed.

As set out in *Gay Company Limited*, "registration" of an instrument requires: (i) certification by the Land Registrar and (ii) non-withdrawal prior to certification. This means that a claim for lien may remain on title for up to 51 days (depending on how quickly the Land Registrar certifies the instrument) without the "registration" being complete. Until the Land Registrar certifies an instrument, a lien claimant may withdraw the claim for lien from title without losing lien rights (or the lien being discharged) within the meaning of section 48 of the Act.

Although the "certification" period in *Gay Company Limited*, worked in the favour of the lien claimant, lien claimants and their counsel should be weary of relying on this decision to modify established best practices. First, while the Land Registrar has up to 21 days to review and certify an instrument, the Land Registrar may certify the instrument earlier. Second, if a party vacates a lien that is not certified or withdrawn, and the lien is subsequently discharged, then the lien claimant could incur substantial indemnity costs and other damages.

The Case

In *Gay Company Limited*, Justice P.W. Sutherland grappled with the interplay of the Act, the *Land Titles Act* ("*LTA*"), and the *Land Registry Reform Act* ("*LRRRA*") to determine whether the lien claimant had discharged its lien within the meaning of sections 41 and 48 of the Act by submitting a request to withdraw "a claim for lien" and an "application to delete the claim for lien."

The relevant facts are as follows:

- The lien claimant, 962332 Ontario Inc., registered a construction lien for \$737,327.52 ("the First Claim for Lien"). The claim for lien identified the lien claimant as 962332 Ontario Inc., trading as Liberty Metal **Fabrications**
- The correct name was 962332 Ontario Inc., trading as Liberty Metal **Fabricators**
- A Second Claim for Lien was registered for with the correct name
- At the time the Second Claim for Lien was registered, the law clerk registering the lien also inadvertently registered an application to delete the First Claim for Lien
- A few days later, the law clerk emailed Teraview to explain the typographical error and error in registering the application to delete the First Claim for Lien. The law clerk asked to withdraw the First Claim for Lien and to withdraw the Application to Delete the First Claim for Lien

- In response, the Land Registry Office confirmed (i) the withdrawal of the First Claim for Lien and the application to delete the lien, and (ii) the certification of the Second Claim for Lien

Positions of the Parties

The key issue in dispute was the meaning of "registration" under section 41 the *Act*. The section states that a preserved or perfected claim for lien that attaches to the premises may be discharged through the registration of an application to discharge a lien on title. However, the *Act* lacks a definition of "registration" and fails to outline a process or mechanism for registering documents on title. Consequently, the court examined the legislation governing the land registry system, namely the *LTA* and *LRRRA*.

The plaintiff took the position that the lien claimant had lost its lien rights. Specifically, the plaintiff argued that (i) there was no requirement for certification by the Land Registrar to complete "registration", (ii) the lien claimant had discharged its lien claim by registering an application to delete the lien and, therefore, (iii) under section 48 of the *Act* the lien could not be revived.

The lien claimant, the defendant to the motion, maintained that the registration of the application to delete construction lien was incomplete as the Land Registrar had yet to certify it. Under the *LTA*, the registration process requires that the Land Registry Office certifies an instrument to complete registration. Since the Land Registrar had not yet certified the First Claim for Lien and the Delete of the First Claim for Lien, the registration was not complete, and the withdrawal was proper.

Legal Analysis

There were two issues before the court:

- 1) What is the meaning of "registration" under the *LTA*, and
- 2) Whether the application to delete complied with registration under the *LTA*.

First Issue: What is the meaning of "registration" under the LTA?

Both parties acknowledged the *Act* does not define "registration". Therefore, the Court applied the modern approach to statutory interpretation, which requires consistency between statutes – in this case the *Act*, the *LTA*, and the *LRRRA*.

The Court concluded that the Land Registrar must certify an instrument to complete registration.¹ The Court provided the following reasons:

- First, the *LTA* provides a clear and unequivocal methodology to register and withdraw instruments on title to property registered under the Land Titles system.
- Second, the *LTA* methodology aligns with the Parcel Register format. The Parcel Register contains seven columns. Those columns set out the registration requirements, including a column for certification. An instrument is not registered, and may be withdrawn, where that column indicates it is not certified.²
- Third, the *LTA* and *LRRRA* provide a consistent methodology to register an instrument: in both, the Land Registrar must certify an instrument to complete registration.³

¹ *Gay Company Limited*, para 53.

² *Gay Company Limited*, para 50.

³ *Gay Company Limited*, paras 52-53.

- Fourth, a party that has sent an instrument to be registered may withdraw that instrument before registration is completed; that is, before the Land Registrar has certified the registration.⁴

The Court determined that it would be inconsistent, and absurd, to attribute a meaning to “registration” in the *Act* that departed from that of the *LTA* and the *LRRRA*. Justice Sutherland applied the presumption of consistent expression, which presumes the legislature uses language consistently so that the same words have the same meaning within a statute or between other legislative instruments.⁵ In doing so, he found the legislature intended for “registration” to have the same meaning in the *Act*, the *LTA*, and the *LRRRA*.⁶

In short, the Court agreed with the lien claimant, holding that the meaning of “registration” under the *Act* requires the Land Registrar to certify an instrument to complete registration. Prior to certification, the registration of the instrument remains incomplete.

Second Issue: Whether the application to delete complied with registration under the LTA?

There was no factual dispute that the First Claim for Lien and the Delete of the First Claim for Lien were not certified. The Land Registrar received and certified the Second Claim for Lien.

Therefore, the Court concluded that the First Claim for Lien or the Delete of the First Claim for Lien were not registered, the lien claimant had not discharged its lien, and section 48 of the *Act* did not apply.

Take Away: Continue to Take All Due Diligence When Registering a Claim for Lien

The plaintiff raised a concern that adopting the registration process set out in the *LTA* would expose owners and contractors to the risk of incurring unnecessary costs associated with vacating a lien that was uncertified and later withdrawn.

In response, Justice Sutherland noted that, in these rare circumstances, remedies are available to the owner or contractor. His Honour noted that a party who vacates a claim for lien that is subsequently withdrawn can rely on section 86 of the *Act* to seek costs on a substantial indemnity basis. In addition, the owner or contractor may claim for damages due to the conduct of the lien claimant, such as the tort of slander on title.

In short, the Court in *Gay Company Limited* cautions parties against submitting a claim for lien for registration, only to later withdraw it before certification.

Although the decision does not identify the potential impact of section 86 on counsel, it is important to remember that section 86(1)(b) allows parties to seek costs on a substantial indemnity basis against counsel who represent a party to the action, where “it is clear that the claim for a lien is without foundation, is frivolous, vexatious or an abuse of process [...] or prejudiced or delayed the conduct of the action.”

⁴ *Gay Company Limited*, para 49.

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para 44.

⁶ *Gay Company Limited*, para 54.