



Commercial Priorities for Real Estate and Business Lawyers 2015

Realty Tax Liens, WSIB Premiums, and Mortgage
Priorities

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February 24, 2015

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This paper reviews priorities in three different real property areas: realty tax liens, WSIB premiums, and mortgage priorities. The intent of this paper is to review the priorities that exist in each of these areas and to consider how the priorities may shift either intentionally or unintentionally. The consideration of priority has been confined to the period of time prior to an event of insolvency; the reversal of priority due to an insolvency event is beyond the scope of this paper.¹

A. Realty Tax Liens

Real property lawyers are drilled, from our early stages onward, to always obtain a tax bill in any purchase, financing, or land swap transaction, and to do so early on in the due diligence process. Municipal tax liens take priority over most other encumbrances so it is best to know if you are stepping into a situation where one is likely to occur. This section reviews the types of payments that are included as real property taxes, the priority of delinquent real property taxes, and the process by which a municipality may sell lands on which delinquent real property taxes are owing as well as the land owner and other encumbrancers' rights during that process.

Real property taxes are governed by the *Municipal Act* or the *City of Toronto Act*, as applicable. This paper refers to the sections in the *Municipal Act*, but please note that in the event you are dealing with real property taxes in Toronto, you should refer to the *City of Toronto Act* which is similar conceptually but different in the details (in which, of course, the devil hides).

What is included in the term “real property taxes”?

The term “**real property taxes**” (hereinafter referred to as “**realty taxes**”) includes taxes levied on real property under the *Municipal Act* and the *Education Act* and any amounts owed under the *Drainage Act*, the *Tile Drainage Act* and the *Shoreline Property Assistance Act* with respect to real property. The term also includes any amounts deemed to be taxes by or under any other Act and any amounts given priority lien status by or under any Act.(ss.371 and 1(3)) This also includes school board fees (s.1(2.2)), development charges² any amount that is given priority lien status (s.1(2.1)), and any loans (including interest) provided by a municipality to any person to pay for the whole or any part of the cost of the person complying with a by-law of the municipality (s.443) and other levies or assessment fees set out by the *Municipal Act*.

Delinquent realty taxes

Due and owing realty taxes form a statutory lien against title to property which lien, pursuant to s.349 (3), is “a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or its agents or through taking no action to register a tax arrears certificate.” No registration is required in order to perfect the lien.

¹ However there are many excellent papers on this subject, for example: Benchetrit, George and Poliak, Maya. “Priority Reversals and Insolvency Proceedings” (LSUC February 24, 2010).

² *Development Charges Act* s. 32

Generally, with respect to any payment received by the relevant municipality on account of realty taxes, the payment is first applied against late payment charges owing in respect of those taxes, according to the length of time the charges have been owing, with the charges imposed earlier being discharged before charges imposed later. Then the payment is applied against the actual realty taxes owing according to the length of time they have been owing, with the taxes imposed earlier being discharged before taxes imposed later (s.347). So, if for some reason a partial payment is made instead of a full payment, you should ensure it is applied in this manner and that you are aware of the amounts remaining outstanding.

In the event there are any unpaid realty taxes that are due and owing and that will not be paid until closing, you will want to ensure that the payment on closing is redirected from the purchase price or the loan amount so that, as purchaser or lender, you have control over the payment process. You will also want to ensure that any redirected funds include all interest, late-payment penalties, and collection charges are updated with the applicable municipality as of the closing date (with additional funds factored in for the actual day of payment, which may occur after closing for logistical reasons).

Municipal tax sale proceedings

In the event realty taxes remain unpaid, municipal tax sale proceedings can begin once taxes have been in arrears for at least three years. The municipality commences the proceedings by registering a tax arrears certificate against the property. The municipality sends a notice of registration of tax arrears certificate to the property owner and all interested parties, as determined by s.374 (1), which states that within 60 days after the registration of a tax arrears certificate, notice of the registration of the certificate shall be sent to:

1. The assessed owner of the land;
2. Where the land is registered under the *Land Titles Act*, every person appearing by the parcel register and by the index of executions for the area in which the land is situate to have an interest in the land on the day the tax arrears certificate was registered, other than a person who has an interest referred to in ss. 379 (7.1) (a) or (b). SS.379 (7.1) (a) and (b) are easements and restrictive covenants that run with the land, including those for the benefit of the Crown in right of Ontario, and any estates and interests of the Crown in right of Canada. Any land sold by the municipality remains subject to these interests; and
3. Where the *Registry Act* applies to the land, every person appearing by the abstract index and by the index of executions for the area in which the land is situate to have an interest in the land on the day the tax arrears certificate was registered, other than a person who has an interest referred to in s. 379 (7.1) (a) or (b) (see 2. above).

In addition, s.374 (2) states that where a notice under s.374 is sent to a person appearing by the records of the land registry office to be the owner of the land, a notice shall also be sent to the spouse of that person.

Cancellation price

A cancellation price is defined in s. 371(1) as an amount equal to all the tax arrears owing at any time in respect of land together with all current real property taxes owing, interest and

penalties thereon and all reasonable costs incurred by the municipality after the treasurer becomes entitled to register a tax arrears certificate and may include:

1. legal fees and disbursements;
2. costs of preparing an extension agreement;
3. costs of preparing any survey required to register a document; and
4. reasonable allowance for costs that may be incurred subsequent to advertising under s. 379.

Prior to the expiration of the one year period set out in s. 379 (1) (being one year following the date of the registration of the tax arrears certificate, the “**One Year Period**”), any person may have the tax arrears certificate cancelled by paying to the municipality the cancellation price as of the date the payment is tendered (s. 375 (1)). S.375 (3) states that if the cancellation price is paid by a person entitled to receive notice under s. 374 (1) or an assignee of that person, other than the owner of the land or the spouse of the owner, the person has a lien on the subject land for the amount paid and this person’s lien has priority over the interest in the land of any other person to whom notice was sent under s. 374.

SS. 379(1) and (2) state that if the cancellation price remains unpaid 280 days after the day the tax arrears certificate is registered, the treasurer shall, within 30 days after the expiry of the 280-day period, send a final notice to the persons entitled to receive notice under s. 374 that the land will be advertised for public sale unless the cancellation price is paid before the end of the One Year Period.

Public sale

If, at the end of the One Year Period, the cancellation price remains unpaid and there is no extension agreement, the land can be offered for public sale by public auction or public tender, in the treasurer’s discretion, and otherwise in accordance with the Act and Regulation 181/03

S.379 explicitly states that the treasurer is not bound to inquire into or form any opinion of the value of the land before conducting a sale and the treasurer is not under any duty to obtain the highest or best price for the land, so a tax sale is an extremely undesirable occurrence for any land owner.

S.353 (4.1) sets out the order in which the proceeds of the sale of the property are distributed, in the event that on the day before the date of registration of a notice of vesting there are liens or other encumbrances registered against the title to the land in favour of the Crown in right of Ontario or any execution or warrant in favour of the Crown respecting the land appearing in the appropriate index of executions.

In the event there are no such liens or encumbrances, then s.380 governs the order in which the proceeds are distributed - (i) to pay the cancellation price; (ii) to all persons, other than the owner, having an interest in the land according to their priority at law; and (iii) to the land owner.

Provincial Land Tax Act

Note that where land is situated in territory without municipalities, the land is liable for assessment and taxation under the *Provincial Land Tax Act* and s. 12(3) states that any amount

collectible thereunder is “a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person, and the lien and its priority are not lost or impaired by any neglect, omission or error of the Crown or its agents or through taking no action to register a notice”.

B. Landlord’s liability for unpaid WSIB insurance premiums

This section provides a precedent lease clause for protecting landlords against the possibility of unpaid WSIB insurance premiums, reviews the need for such a clause, and provides information relating to the process of obtaining a clearance certificate.

Precedent clause

When acting for a Landlord, it is advisable to ensure that the lease includes a clause such as this one:

Prior to commencing the Tenant’s Work [or any other alterations on or to the Leased Premises], the Tenant shall, at its sole cost and expense, have delivered to the Landlord clearance certificates issued under the Workplace Safety and Insurance Act (Ontario) in respect of the Tenant’s general contractor and each sub-contractor performing work in connection with the Tenant’s Work (collectively, the “Clearance Certificates”). The Clearance Certificates shall be valid for the entire time during which the relevant contractor or sub-contractor is performing work on the Leased Premises. The Tenant shall be responsible for ensuring that all of the Clearance Certificates are up-to-date and that none of them lapse for the entire period of time during which any of its contractors or subcontractors are carrying out work on the Leased Premises on the Tenant’s behalf.

WSIB insurance premiums and landlords

Under s. 141 of the *Workplace Safety and Insurance Act* (“**WSIA**”), a person who directly retains a contractor or subcontractor to perform construction work is liable for her contractors’ and subcontractors’ (collectively referred to herein as “**contractors**”) unpaid Workplace Safety and Insurance Board (“**WSIB**”) insurance premiums owed in relation to the construction being performed.

While an employer clearly has the obligation to ensure that WSIB premiums are paid, a landlord also has liability for WSIB premiums where its tenant is employing a contractor. S. 142 of the WSIA states that where a contractor is entitled to a lien under the *Construction Lien Act*, (so, where a contractor has provided services or materials for an improvement to the premises owned by a landlord, even if such premises have been leased to a tenant) the owner of the premises at which such services or materials have been provided by a contractor (the landlord) has a duty to see that the employer of such contractor submits the applicable WSIB premiums. If the owner fails to do so, the owner is liable to make those payments to the WSIB as if it was the contractor’s employer and WSIB is entitled to enforce this obligation against the property owner as if the owner was the contractor’s employer.

A person who fails to comply with the requirement to remit WSIB insurance premiums is guilty of an offence which could result in the WSIB pursuing any of the following actions:

- levying an administrative penalty;

- creating a benefit-related debt;
- negotiating a settlement approved by Regulatory Services;
- starting a civil action to recover money or property; or
- liening real property.

In the event the WSIB chooses to proceed with a lien against a property, the amount owing must be set out in a certificate filed with the Superior Court of Justice or with the Small Claims Court pursuant to s.139, which is entered in the same way as an order of that court and is enforceable as such. S.145 states that, provided:

- (a) notice of the lien is filed by way of writ of seizure and sale in the office of the sheriff for the area in which the affected property is situated; and
- (b) a copy of the writ is delivered by the sheriff or by registered mail to the proper land registrar,

the amount set out in that certificate is, after municipal taxes, a first lien upon all of the property of the employer used in connection with the industry with respect to which the employer is required to make payments under the insurance plan. Please note registration of this amount as a lien is not required in order to obtain this priority.

Clearance Certificates

Obtaining a valid clearance certificate relieves the owner of its liability under s.142. A valid clearance certificate will show that a contractor is registered with the WSIB and has her accounts in good standing. Before a clearance certificate is issued for a newly registered contractor, or to a principal for a newly registered contractor, the contractor must make an advance payment for the amount determined by the WSIB. By issuing a clearance certificate, the WSIB waives its right to hold a principal liable for unpaid premiums and other amounts the contractor owes the WSIB, for the validity period of the certificate.³ If a contractor is involved in a dispute, it can post a letter of credit, representing the disputed amount, and a clearance certificate can then be issued.⁴ If the contractor has payment obligations owing to the WSIB, the

³ Ontario WSIB Operational Policy Manual: Clearance Certificate in Construction (January 2, 2014) <http://www.wsib.on.ca/WSIBPortal/faces/WSIBManualPage?cGUID=14-02-19&fGUID=835502100635000491&_afLoop=11650319756069325&_afWindowMode=0&_afWindowId=71s1ccz34_98#%40%3FcGUID%3D14-02-19%26_afWindowId%3D71s1ccz34_98%26_afLoop%3D11650319756069325%26_afWindowMode%3D0%26fGUID%3D835502100635000491%26_adf.ctrl-state%3D71s1ccz34_114>

⁴ Ontario WSIB Operational Policy Manual: Clearance Certificate (January 2, 2014) <http://www.wsib.on.ca/WSIBPortal/faces/WSIBManualPage?cGUID=14-02-04&rDef=WSIB_RD_OPM&fGUID=835502100635000491&_afLoop=11670565435565325&_afWindowMode=0&_afWindowId=71s1ccz34_132#%40%3FcGUID%3D14-02-04%26_afWindowId%3D71s1ccz34_132%26_afLoop%3D11670565435565325%26_rDef%3DWSIB_RD_OPM%26_afWindowMode%3D0%26fGUID%3D835502100635000491%26_adf.ctrl-state%3D71s1ccz34_177>

owner or employer may be liable for the unpaid premiums and other outstanding amounts, up to the value of the labour portion of the contract(s) between the contractor and the principal.

A clearance certificate should be requested before the work begins, and kept up-to-date until all work on the contract is completed. A clearance certificate is valid for up to 90 days. If a contractor in good standing needs a clearance for longer than this and if the electronic account is set-up to provide for this, the certificate can be automatically renewed. Owners, employers, and contractors must keep clearance certificates or copies of certificates for at least three years from the date they obtained them. (s.141.2(9))

Please note that a clearance certificate only protects an owner against financial liability for a contractor's unpaid WSIB premiums and not for liability for workers' illness or injury, if either of becomes an issue.⁵

Residential owners who renovate their homes do not need to obtain clearance certificates. The exception and the corresponding definitions are set out in s. 12.2(10) of the WSIA.

While a clearance certificate clause is sure to form only a small part of any lease you are negotiating, it is a part that should hopefully result in little or no push-back from the tenant but result in an important layer of protection for the landlord where its tenant is employing contractors.

C. Mortgage Priorities

This section examines mortgage priorities in three different contexts: mortgages as against other mortgages, mortgage and leases, and mortgages and construction liens. In each of these areas, I provide an overview of applicable legislation or legal principles and address issues that can arise within those frameworks.

This section focuses on priorities in a title-based framework. I note that, while searching title does provide a great deal of necessary information in relation to mortgages, it doesn't provide information relating to claims that can arise pursuant to legislation (including liens and deemed trusts), court orders (such as for administrative charges or professional charges, interim financing, or critical supplier charges), or other super-priority interests (including garnishment). For example, mortgages take priority over deemed trusts, provided they are registered before the deemed trust arose, however the priority is only up to an amount determined by a legislated formula, which can limit the value of the mortgage to less than the funds actually owing.⁶ These types of claims are important to keep in mind, but are beyond the scope of this paper.

⁵ Ontario WSIB Fact Sheet: Clearance

<http://www.wsib.on.ca/WSIBPortal/faces/WSIBDetailPage?cGUID=WSIB015708&rDef=WSIB_RD_ARTICLE&_afLoop=11670639729113325&_afWindowMode=0&_afWindowId=71s1ccz34_98#%40%3FcGUID%3DWSIB015708%26_afWindowId%3D71s1ccz34_98%26_afLoop%3D11670639729113325%26rDef%3DWSIB_RD_ARTICLE%26_afWindowMode%3D0%26_adf.ctrl-state%3D71s1ccz34_198>

⁶ Crawford, Simon. "Priority Issues between Mortgage and Unregistered Interests". (LSUC Commercial Mortgage Transactions 2014) p.6-2

1. Mortgages and Other Mortgages

Priority

S. 93(4) of the *Land Titles Act* (“LTA”) states that a mortgage is security to the extent of the money or money’s worth actually advanced under the mortgage (not exceeding the amount for which the mortgage is expressed as security) - unless all or some of the money or money’s worth was advanced after the registration of a subsequent mortgage of which the first mortgagee has actual notice. The registration of the second mortgage does not constitute actual notice.⁷

In practice, s. 93(4) means that the first mortgagee does not need to subsearch title each time the mortgagor obtains a subsequent advance unless the mortgagee needs to check for registered construction liens. Where the first mortgagee may run into trouble, though, is if it becomes aware of a second mortgagee, in which case advances under the first mortgage automatically run behind the second. To ensure this does not happen, on discovering any subsequent mortgages, the first mortgagee should cease all advances under its mortgage until it obtains a postponement from any subsequent mortgagees. If it can’t obtain those postponements, then the first mortgagee should provide no further advances until the subsequent mortgages have been discharged or it is otherwise satisfied as to the priority of its next advance.

Subordinate mortgagees should specify in any postponement agreement that their security is only subordinated to the extent of a maximum amount and that such subordinated positions shall not extend to any re-advances under the first mortgage.

Note that an interim financing mortgage, or debtor-in-possession financing, may take priority over pre-existing secured claims.⁸

Also note that a lender can hold priority as both a secured and unsecured creditor after default by a borrower. Once an execution is filed as a result of a lender obtaining judgment, the execution attaches to all real property owned by the borrower in the jurisdiction of filing but provides the lender with the status of an unsecured creditor with respect to all property other than the mortgaged property.⁹

Priorities of two unregistered, unexecuted mortgages

An Ontario Superior Court of Justice decision, *MCAP Service Corp. v. Toronto Dominion Bank*,¹⁰ provides a law school exam-worthy fact pattern that highlights the complexities of

⁷ S. 73 of the *Registry Act* is the corresponding section.

⁸ *Bankruptcy and Insolvency Act* s.50.6, *Companies’ Creditors Arrangement Act* s. 11.2

⁹ Carter, Craig R. “Mortgage Financing: Successful Due Diligence and Document Preparation Strategies (OBA Fundamental of the Mortgage Loan April 2, 2014) p.3

¹⁰ 15 B.L.R. (4th) 66 (2006)

mortgage priorities.¹¹ The issue was whether a debt owing to MCAP Service Corp. (“**MCAP**”) or to The Toronto-Dominion Bank (“**TD**”) had priority with respect to proceeds from a sale of real property pursuant to a power of sale exercised by MCAP.

Mr. Camardo entered into a line of credit agreement with TD for \$187,500, secured by a mortgage. Though the mortgage was neither executed nor registered, TD advanced the entirety of the loan to Mr. Camardo who, 3 months later, paid back the entire loan.

A few weeks after he repaid his debt to TD and pursuant to a loan agreement, MCAP advanced Mr. Camardo the amount of \$290,000. This again was “secured” by a mortgage that was neither executed nor registered.

A few weeks after the MCAP loan was advanced, TD readvanced \$187,500 to Mr. Camardo under its line of credit agreement with him.

Neither the MCAP loan nor the second TD advance was repaid by Mr. Camardo. As well, neither MCAP nor TD had knowledge of the other as creditors of Mr. Camardo. The court found in favour of MCAP because it found that TD’s line of credit agreement did not act as continuing security. The agreement failed to describe Mr. Camardo’s obligation as continuing or renewable and therefore, at the time TD’s first advance was repaid, the agreement became ineffective.

The court also considered which outcome would be one of “right and justice” as between MCAP and TD. It concluded that to find in favour of TD would be to allow TD to take advantage of MCAP because of TD’s unregistered mortgage. As a result, MCAP was awarded priority over TD’s interest in Mr. Camardo’s land.

This finding seems slightly counterintuitive, because MCAP was also guilty of not registering its mortgage and, had both mortgagees registered their mortgages and TD remained unaware of MCAP, TD would have been in first place and entitled to the sale proceeds. However, the decision does drive home the importance of having a mortgage both executed and registered. It also highlights the importance of ensuring that, if the parties so intend, security should secure all of the obligations from time to time owing by the borrower to the lender in order to secure future advances under a revolving facility with the same priority as previous advances. Attention should also be given to securing contingent obligations. The parties should have clarity as to the nature and scope of the obligations being secured, the collateral being used for security, and the lender’s priority with respect to the collateral being used as security.

Remedies

Two remedies in particular are pertinent to situations with two lenders:

- (a) marshalling: this is a principal of equity. Where:
 - (i) Mortgagee A is in first position and Mortgagee B is in second position;

¹¹ The decision references S.73 of the *Mortgages Act*, however there was no such section at the time of the decision. It appears most likely the decision means S.73 of the *Registry Act*, in the context thereof.

(ii) Mortgagee A holds mortgages over a single borrower's Whiteacre and Blackacre properties; and

(iii) Mortgagee B holds a second mortgage only over Whiteacre,

Mortgagee B can force Mortgagee A to marshal its mortgages over both Whiteacre and Blackacre and act first upon Blackacre, the asset upon which Mortgagee A alone has rights, in order to maximise Mortgagee B's recovery against Whiteacre; and

(b) subrogation: the right of Mortgagee B to step into Mortgagee A's shoes where Mortgagee B pays off the debt owing to Mortgagee A. This is legislated in s.2(2) of the *Mortgages Act* and may be useful in a situation where there is a problem with Mortgagee B's mortgage (for example, imperfect registration).

Priorities and subsequent fees

In *Elle Mortgage Corporation v. Adalath et al*,¹² the Ontario Superior Court determined that a first mortgagee's priority over a second mortgagee did not extend to the fees and other costs relating to amendments to the mortgage terms. The court found that the standard charge terms contained only vague references to fees and expenses that could arise out of subsequent amending agreements and that it would not be appropriate for such vague references to "prejudice a potential subsequent lender who, at the time of registering its subsequent encumbrance, could not possibly know or ascertain the nature and amount of such fees/expenses that might be included in future amending agreements in which the subsequent encumbrancer had no input and, as a result, no means of protecting its security in the property."¹³ The court does not provide any suggestions as to what would not constitute a vague reference or how to safeguard the first mortgagee's priority with respect to its fees but providing notice of the amendments and of the fees to the second mortgagee might have provided the first mortgagee with greater security in this matter.

2. Mortgages and Leases

Priority

The general rule of priorities between leases and mortgages is based on chronology.

Where a notice of lease has been registered before a mortgage has been granted, or where a mortgagee has actual notice of the existence of a lease relationship prior to the registration of the mortgage,¹⁴ the lease has priority over the mortgage, meaning that the mortgage is subject to the interest of the lease in the subject property. In the event that the mortgagee takes possession of the property and steps into the shoes of the property owner and landlord under the lease, the mortgagee does not have the power to terminate the lease (although this is

¹² 2012 ONSC 7061

¹³ ¶34

¹⁴ 1420111 Ontario Ltd. v. Paramount Pictures (Canada) Inc. (2001) 56 O.R. (3d) 447

subject to any rights of termination the landlord may have pursuant to the lease) and the tenant cannot surrender the lease.

Where a mortgage is registered on title to a property prior to a lease being entered, the lease is subject to the mortgage. In this situation, where the mortgagee takes possession of the property under the mortgage, it is entitled to remove the tenant from the premises. Similarly, the tenant is entitled to act as though the lease has been terminated upon the mortgagee's possession of the property and, in the event it leaves the premises, has no obligation to pay rent to the mortgagee. An obligation to pay rent may arise where the tenant does not vacate the premises upon the mortgagee taking possession.

Change in priority

A change in priority between a mortgage and a lease requires the mortgagee and the tenant to have established privity of contract. Generally this is done through subordination, non-disturbance, and attornment agreements:

- (a) Subordination Agreement: mortgagee and tenant agree to a reversal of the priority of their interests. Typically a tenant subordinates its interest to the mortgagee. Usually also contains either non-disturbance or attornment language.
- (b) Non-Disturbance Agreement: mortgagee and tenant agree that that the tenant will be entitled to remain in possession of the premises even after a default by the mortgagor under the relevant mortgage. Typically this is conditional on the tenant remaining in compliance with its lease and can attempt to place limits on the tenant's rights after the mortgagee's possession which may be detrimental to the tenant's rights.
- (c) Attornment Agreement: mortgagee and tenant agree to establish a relationship should the mortgagee become a mortgagee-in-possession or otherwise step into the landlord's shoes in the enforcement of its security. Typically tenant agrees to pay rent to the mortgagee following receipt of a notice of attornment. Tenant should review carefully to determine which landlord obligations the mortgagee has agreed to and whether tenant will be required to attorn to successors and assigns.

Lenders may also require that notices of existing lease be registered on title to the subject property prior to registration of the mortgage.

Where the lease existed prior to the mortgage, a lender may require a landlord to require the tenant to provide a subordination agreement. In this event, the tenant should seek to have non-disturbance rights incorporated into the subordination agreement so that the lender agrees to not disturb the tenant's possession and quiet enjoyment of the premises on the terms of the lease upon loan enforcement for as long as the tenant does not default under the lease.

Without going into great detail, courts have debated whether or not an assignment of rents and leases, made for the purpose of providing security for a loan, is sufficient to establish privity of

contract between a tenant and lender.¹⁵ Entire papers have been written on *Goodyear* so please refer to those papers for an in-depth analysis¹⁶. Sufficient here to say that neither an assignment of rents and leases, nor an estoppel certificate constitute privity of contract between a tenant and lender as a true assignment of a lease because neither assign the landlord's obligations to the mortgagee. The court also noted that an absolute assignment should not be used to secure debts as there would be no means for the debtor to recover the rights which had been assigned.

3. Mortgages and Construction Liens

Our next presenter, David Preger, is speaking about priorities under the *Construction Lien Act* (“**CLA**”), so I will not go into this matter in depth except to say that s. 78 of the CLA sets out priorities as between mortgages and construction liens and provide a brief discussion thereof to round out this review of mortgage priorities.

S.78 provides that, except as set out therein, liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the property (s.78(1)). As a reminder, with respect to the timing of when a lien arises, the CLA states that liens arise as soon as “the person first supplies services or materials to the improvement” (s.15).

Where there is a construction loan, regardless of the timing of registration of the mortgage securing that loan, any liens arising from the improvements being financed by the construction loan take priority over the loan to the extent of any deficiency in the holdbacks legislated by the CLA (s.78(12)). The phrase used to describe construction loan in the CLA is “a mortgage with the intention to secure the financing of an improvement”; one focus of caselaw has been interpreting whose intention is definitive and how to determine such intention.¹⁷

Where there is a non-building mortgage registered prior to the time the first lien arose, the mortgage's priority is as follows:

- (a) for an advance made prior to the time the first lien arose, the lesser of the value of the property when the first lien arose or the total amount of the advance made under the mortgage prior to the time the first lien arose (s.78(3)); and
- (b) for an advance made after the time the first lien arose, the advance has priority over liens unless there was (i) a preserved or perfected lien against the property when the advance was made or (ii) the mortgagee received written notice of a lien prior to the time the advance was made.

Finally, subject to ss.78(2) and (5), a mortgage registered after the time the first lien arose takes priority over any liens unless there was (i) a preserved or perfected lien against the property

¹⁵ For example, *Goodyear Canada Inc. vs. Burnhamthorpe Square Inc.*, 41O.R. (3d) 321 (O.C.A. 2002) “**Goodyear**”.

¹⁶ For example, Maréchaux, Max. “Goodyear- 10 Years Later” Commercial Mortgage Transactions”. (LSUC, February 2, 2008)

¹⁷ Gillgott, Roger. “Managing Priority Issues Between Mortgages and Construction Liens”. (LSUC Commercial Mortgage Transactions, September 16, 2014) pp7-4 and 7-5

when the advance was made or (ii) the mortgagee received written notice of a lien prior to the time the advance was made. S.78(5) limits the liability under (i) and (ii) above to the extent of any deficiency in the holdbacks legislated by the CLA. There is an exemption for “home buyers” at s.78(11).

There is a great deal of caselaw dealing with the timing of both advances and lien searches, as well as how these laws apply to different loan facilities (e.g. revolving lines of credit).