

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

LA PUE INTERNATIONAL INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c.B-3, AS
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE*
ACT, R.S.O. 1990, c.C.43, AS AMENDED

**FACTUM OF THE RESPONDING PARTY,
BUTTCON LIMITED**

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TO: SERVICE LIST

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**FACTUM OF THE RESPONDING PARTY,
BUTTCON LIMITED**

PART I - NATURE OF THE MOTION

1. This factum is being filed on behalf of Buttcon Limited (“**Buttcon**”), a lien claimant, in response to MarshallZehr Group Inc.’s (“**MarshallZehr**”) priority motion.
2. MarshallZehr’s motion is for a declaration that it was a “prior mortgage pursuant to section 78(3) of the *Construction Act* and thus has “full priority over all construction liens registered against the Property of the Respondent, La Pue International Inc. (“**La Pue**”).
3. MarshallZehr does so by claiming that its mortgage was registered prior to any liens arising with respect to the construction project or improvement of La Pue. It does so in the face of the evidence that liens had arisen prior to the registration of earlier mortgages and the advances and registration of the MarshallZehr Mortgage on December 1, 2021.
4. As a consequence, the MarshallZehr Mortgage is a subsequent or building mortgage under the *Construction Act*. The lien claimants have priority with respect to the holdback for the improvement.

PART II – FACTS

Background

5. La Pue is the registered owner of the lands and premises known as the Stanley District Project located at 5510-5526 and 5536 Ferry Street, 5943 Stanley Avenue and 5916 Allendale Avenue, Niagara Falls, Ontario. On this property La Pue was engaged in the

construction of an improvement consisting of three mid-rise buildings consisting of one mixed-use, one hotel and one residential building ("**Project**").

Responding Motion Record, Volume I, Affidavit of Alicia Rosati sworn on February 19, 2025 ("Rosati Affidavit"), para. 4.

6. La Pue acquired the various lots around April 20, 2018, which were subsequently consolidated under one parcel or P.I.N. 64349-0257 (LT) on December 19, 2019 and subsequently became P.I.N. 64349-0258 (LT) ("**Property**").

Motion Record, Affidavit of Cecil Hayes sworn on January 14, 2025 ("Hayes Affidavit"), Exhibit "B": Parcel Search dated November 19, 2021¹

Mortgages

7. On February 25, 2020, La Pue granted a mortgage with the principal amount of \$8 million, registered as instrument no. SN620981, in favour of Maple Corp Investments, Riverside Humber Corp., Freemac Tile & Granite Incorporated, Fredy Rossi, 1620375 Ontario Limited, 2205633 Ontario Limited, CBB Holdings Inc., 672510 Ontario Limited and Dominic Sericchi ("**Maple Mortgage**").

Hayes Affidavit, para.6(a)

8. On October 1, 2020, La Pue granted a further mortgage with the principal amount of \$3,000,000 registered as instrument no. SC644351 in favour of C.P.M.C. Marquez Holdings Inc. ("**Marquez**") ("**Marquez Mortgage**").

Hayes Affidavit, para. 6(b).

¹ Exhibit "B" of the Hayes Affidavit, is Parcel P.I.N. 64349-0257 (LT). Exhibit "F" of the Hayes Affidavit is the Application Consolidation Parcels on December 12, 2019, of the following P.I.N.s 64349-0181, 64349-0200, 64349-0202, 64349-0203, 64349-0204, 64349-0205, 64349-0214, and 64349-0215.

9. On October 2, 2020, La Pue granted a mortgage in the amount of \$2 million registered as instrument no. SN644659, in favour of The Sovereign General Insurance Company (“Sovereign”) (“**SGIC Charge**”). This charge is a collateral mortgage intended to secure the Tarion Warranty Corporation Bond as issued by Sovereign on the Project. A Tarion Bond is required in Ontario for all Condominium Projects. The principal balance of the SGIC Charge was increased to \$12 million pursuant to the Notice registered as Instrument No. SN658896 on January 26, 2021.

Hayes Affidavit, para. 15

10. On December 1, 2021, the Maple Mortgage was discharged pursuant to instrument no. SN703200. On the same day, the Marquez Mortgage was discharged pursuant to instrument no. SN703201.

Hayes Affidavit, para. 14

11. After the discharges, on December 1, 2021, La Pue granted a mortgage, with the principal amount of \$13.8 million and registered as instrument no. SN703091, in favour of MarshallZehr (“**MZ Mortgage**”).²

Hayes Affidavit, para. 14

Liens Arose Prior to Registration of Mortgages

12. Work in relation to the Project had already commenced in 2018.

Rosati Affidavit, paras. 6, 14.

² The SGIC Charge was also postponed to the MZ Mortgage pursuant to instrument on SC703098 registered on December 1, 2021.

13. Various architectural and engineering plans had already been procured by La Pue as confirmed in the Contract with Buttcon.

Rosati Affidavit, paras. 6 and 14.

14. Buttcon and La Pue entered into a Construction Management Contract - for Services and Construction for the Project, in accordance with an agreement between the Defendants dated April 28, 2020 (“**Contract**”).

Rosati Affidavit, para. 5

15. Prior to the execution of the Contract, Buttcon was engaged in various work in relation to the Project. This is reflected in the Contract proving that work commenced on April 6, 2020. However, the first services or work billed by Buttcon to La Pue was on May 30, 2020.

Rosati Affidavit, para. 7

16. Buttcon’s invoices from May 30, 2020 to November, 2021, detail the labour, services and materials provided with respect to the Project all prior to the registration and advances of the MZ Mortgage on December 1, 2021.

Rosati Affidavit, para. 8

17. For example, Buttcon’s invoice 1-1462, dated May 31, 2020, provides details of the work being carried out on May 8, May 15, May 22, and May 29, 2020 by Buttcon’s estimators, the project coordinator, the superintendent and the project estimator. The subsequent invoices provide details with such similar and related services, all again, prior to the registration of the MZ Mortgage.

Rosati Affidavit, paras. 9 and 10.

18. On or about July 14, 2020, Buttcon sent out Tender Packages for Site Services, Shoring and Caissons, Bulk Excavation and Removals and dewatering were also sent out with a closing date of July 28, 2020. As part of the tendering package, there was a site visit to the Project on July 21, 2020. There were subsequent tender packages issued on November 12, 2020.

Rosati Affidavit, para. 11

19. Some of Buttcon's supply of services were done off site of the Project, but other supply involved direct work on the Project site, as detailed below. As construction manager, Buttcon was involved in all aspects of the Project. It provided services in terms of estimates, co-ordination, tenders, supervision and entered into subcontracts with suppliers and subcontractors with respect to the Project. These involved various site visits and work on site. Prior to the registration of the MZ Mortgage, Buttcon's subcontractors had been retained and were carrying out work with respect to the Project.

Rosati Affidavit, paras. 12 - 13

20. On or about November 29, 2021, Astro Excavating Inc. ("**Astro**") had mobilized and was carrying out work on the Project site.

Rosati Affidavit, para.13(f).

Liens Arose Prior to the MZ Mortgage

21. Pawel Fugiel of La Pue has also advised that the Maple Mortgage and Marquez Mortgage were provided to La Pue both for construction and land loans. As noted above, the Project, however, was underway with various consultants and plans, as shown by the architectural

drawings of 2018 and 2019. In addition, Buttcon supplied labour and services off-site and also on-site prior to the registration of the MZ Mortgage.

Rosati Affidavit, para. 14

22. In any event, the Maple Mortgage and the Marquez Mortgage were discharged, and not assigned to MarshallZehr **on December 1, 2021**. As noted above, Buttcon, architects and other subcontractors had liens prior to the registration of the MZ Mortgage.

Rosati Affidavit, para. 15.

23. On March 17, 2023, Buttcon registered a construction lien as Instrument No. SN760306 in the amount of \$8,205,941.87. Buttcon has a contractor's lien pursuant to section 31 (2) of the *Construction Act*, R.S.O. 1990, c. C. 30.

Hayes Affidavit, para. 20: Exhibit "S"

Receivership

24. On October 19, 2023, KSV Restructuring Inc. was appointed as receiver (the "**Receiver**") of the assets, undertakings and properties of La Pue.
25. On January 7, 2025, La Pue's receiver was granted an order approving the sale of the Property to a purchaser. The result of such a sale will be the expunging of the security interest of the lien claimants' liens. In contrast, MarshallZehr is seeking to be paid its principal and most of its accrued interest. However, MarshallZehr is not satisfied with that proposed recovery, but has brought this motion to deprive the lien claimants, who contributed to the construction of the Project, of any possible recovery. It is seeking to deprive them of the bare holdback, while seeking to recover interest as high as 28.5% after March 1, 2023. It is also financing the sale

to the new purchaser on terms that have not been disclosed, so it will continue to benefit with respect to La Pue's property, and the construction services provided by the lien claimants.

Rosati Affidavit, para. 16.

26. In short, the lien claimants should not be deprived of recovery with respect to a Project that they contributed their labour, services and materials. Their liens arose prior to the MZ Mortgage and thus they are entitled to the holdback for the Project.

Rosati Affidavit, para. 17

PART III - ISSUES

27. The issues raised by this motion include the following:
- (a) Issue no. I: Do the lien claimants have priority with respect to the holdback over the MarshallZehr Mortgage?
 - (b) Issue no. II: Is the MZ Mortgage a subsequent mortgage, such that lien claimants have priority with respect to the holdback?
 - (c) Issue No. III: Is MarshallZehr entitled to a priority based on payment of the Maple and Marquez Mortgages?

PART IV - LAW & ARGUMENT

Issue no. I: Do the lien claimants have priority with respect to the holdback over the MarshallZehr Mortgage?

i. The lien claim priority regime created by s. 78 is a complete code

28. It is well established that the priorities regime created by section 78 of the *Act* is a complete code for determining lien priority disputes of mortgagees. Section 78 replaces common law

claims with a statutory regime for lien claimants to preserve the priority to their liens against subsequent mortgagees. It is a legislated balance of interests that occupies the field of equity when determining the priority of a lien claim as against a registered mortgage, which should not be disturbed.

Peoples Trust Company et al. v. Vandyk-Backyard Queensview Limited et al., 2024 ONSC 6648, para. [29](#).

29. The overarching principle of the regime under section 78(1) is that liens arising in respect of labour and materials contributed to the improvement of a property, will have priority over registered mortgages, subject to exceptions specified in the remaining subsections. The subsequent mortgagee must qualify for one of the specified exceptions to the general priority of a lien claim, upon the lien arising.

Boehmers v. 794561 Ontario Inc. (1993), [1993 CanLII 8486](#) (ON SC) aff'd, [1995 CanLII 660](#) (ONCA)

Dal Bianco v. Deem Management Services et al (2020), 2020 ONSC 1500, 2020³ CarswellOnt 3530, 16 R.P.R. (6th) 244 (Ont. S.C.J.), para. [27](#).

30. Section 78 of the *Act* thus starts by establishing that all liens arising from an improvement have priority over all conveyances, mortgages or other agreements. In the first instance, liens will have priority over a mortgage unless an exception is specifically set out in section 78.

31. Section 78(1) of the *Construction Act* states as follows:

Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

³ affirmed [2021 CarswellOnt 18071](#) (Ont. C.A.).

Construction Act, R.S.O. 1990, c. C.30, s. 78.

ii. A lien arise prior to registration

32. A lien will arise even prior to any registration on title to the property by the lien claimant. The lien will arise when labour and materials are first supplied to an improvement of a property by a lien claimant. This is provided under section 15 of the *Construction Act* which states:

A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

Construction Act, R.S.O. 1990, c. C.30, s. 15.

iii. Onus on Mortgagee

33. Given the prima facie priority of lien claimants, the onus falls upon the mortgagee to prove that its mortgage falls within one of specified exemptions under s.78.

Dal Bianco v. Deem Management Services et al (2020), 2020 ONSC 1500, 2020 CarswellOnt 3530, 16 R.P.R. (6th) 244 (Ont. S.C.J.), para. [26](#), para. 27.

34. The *Construction Act* is to be interpreted liberally in favour of lien claimants. The overarching principle of the legislation is that lien claimants have priority over other interests. It is for this reason that the onus is on the mortgagee to establish its priority.

XDG Ltd. v. 1099606 Ontario Ltd. (2004), 2004 CanLII 15997 (ON SCDC), at para. [29](#).

iv. Exceptions in section 78 of the *Construction Act*

35. Section 78 also distinguishes between prior building and subsequent mortgages. A prior mortgage is described as a mortgage that is “registered” before any lien arose under the *Construction Act*. Subsequent mortgages have priority over liens only for advances made

under them before registration of the first lien or receipt by the mortgagee of the first written notice from a lien claimant that claims a lien on the subject property. A building mortgage is a mortgage taken by the mortgagee with the intention to secure the financing of an improvement. Liens arising from an improvement have priority over a building mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner, irrespective of when the mortgage was registered.

Construction Act, R.S.O. 1990, c. C.30, s. 78(1), (2), (3), (4), (5), and (6).

36. As of the date of this motion, Buttcon cannot rule out the possibility that the MZ Mortgage was a building mortgage. As discussed below, it does not make a difference if it is, as the MZ Mortgage was definitely a subsequent mortgage. Both types of mortgages require priority for a lien claimant of deficiency as to holdbacks.
37. Given the fact that the liens arose prior to the registration of the MZ Mortgage, any priority it may have must be based on an exception in Section 78 of the *Construction Act*.

Issue no. II: Is the MZ Mortgage a subsequent mortgage, such that lien claimants have priority with respect to the holdback?

38. The lien claimants maintain that the MZ Mortgage is a subsequent mortgage while MarshallZehr argues that it is a prior mortgage, as detailed below.

i. Subsequent Mortgage under section 78(5) and (6) of the *Construction Act*

39. Subsections 78(5) and 78(6) of the *Construction Act* provides the priority if the mortgage is not registered prior to the time when the first lien arose in respect of an improvement. Basically, the subsequent mortgage has the same priority as a building mortgage. The liens will have priority to the extent of any deficiency in the holdbacks required to be retained by the owner under the *Construction Act*.

Construction Act, R.S.O. 1990, c. C.30, s. 78(5) and 78(6).

40. The relevant provisions of the [*Construction Act*](#), are as follows:

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

[...]

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

41. Subsection 78(5) does not refer to “preserved” or “perfected” liens. The priority is simply to liens which have arisen. As noted above, pursuant to section 15 of the *Act*, liens “arise” when the person first supplies materials or services to the improvement. This means that if lienable services or materials are provided before a mortgage advance, the mortgagee loses priority to the extent of deficiencies in the holdback.

Construction Act, R.S.O. 1990, c. C.30, s. 15.

ii. Liens Arose prior the MZ Mortgage

42. Therefore, in determining the priority issue, the Court must determine when a lien first arose with respect to the Project.
43. As noted above, architects had prepared detailed plans at least by 2018. These were the first services provided that gave rise to liens. These liens arose well before the advances and the registration of the MZ Mortgage in on December 1, 2021.
44. The *Construction Act*, in s. 14(3), provides that subsection (1) applies to services or materials supplied by an architect as defined in the *Architects Act* and any employees of the architect. This is the result of an amendment to the *Act* in 2017. As such, the MZ Mortgage was registered after the time when the first such lien arose, namely, when the architects started work on the improvement.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT AND A PLAN OF COMPROMISE OR ARRANGEMENT OF CLARKSON ROAD DEVELOPMENTS GP

INC. AND OTHERS 2024 CarswellOnt 12454, 2024 ONSC 4625, ('Clarkson Road Case') para. [42-45](#).

45. Architects' supply of services was in respect of an improvement, the ultimate goal of which, was completion development or Project. The services and materials supplied by Buttcon in respect of which its lien arises were in respect of the same improvement as the improvement in respect of which the architects arose for services supplied prior to registration of the MZ Mortgage.

Clarkson Road Case, para. [42-45](#).

46. In addition, Buttcon also provided services and materials to the Project or improvement under its Contract dated April 28, 2020. Buttcon and its subtrades provided services commencing in 2020 and through to 2021, all prior to the registration of the MZ Mortgage.

Rosati Affidavit, paras. 5-13

47. The MZ Mortgage is thus a subsequent mortgage, which would entitle the lien claimants to priority in relation to the holdback.

Issue No. II: Is MarshallZehr entitled to a priority based on payment of the Maple and Marquez Mortgages?

i. Prior Mortgages

48. As noted above, subsection 78(3) of the *Construction Act* deals with prior mortgages and prior advances, or mortgages that were registered and advanced "prior to the time when the first lien arose in respect of an improvement". A mortgagee can thus only benefit by

exception provided under subsection 78(3) it can establish that no work or supplies have been provided to the improvement such as to give rise to a lien. But even this priority is further circumscribed under subsection 78(3) such that if the actual value of the property, at the time when the first lien arose, is less than the amount of the mortgage advances, then the lender's priority is limited to the value of the property at the time when the first lien arose.

Construction Act, R.S.O. 1990, c. C.30, s. 78(3).

Haflidson v. Salandy (2002), 16 C.L.R. (3d) 284 (Ont. Master), paras. 5 and 6.

49. MarshallZehr also argues that it is entitled to priority, on the basis that the Maple Mortgage (February 25, 2020), and the Marquez Mortgage (October 1, 2020), are prior mortgages, and it paid to discharge them. However, given that the liens first arose in 2018 for the same reasons as provided above, the Maple and Marquez Mortgages would not be considered as prior mortgages but would be subsequent mortgages.

ii. Payment of Prior Mortgages by a Subsequent Mortgage

50. MarshallZehr's argument also requires on it being able to get the priority as a result of repaying the Maple and Marquez mortgages. Buttcon argues that even if these mortgages were prior mortgages, that Marshallzehr would not be entitled to somehow obtain the priority as a result of these mortgages.

51. MarshallZehr relies on the case of *Ontario Wealth Management Corp. v. 1713515 Ontario Ltd.* [2013 ONSC 6503](#) (CanLII) (“*Ontario Wealth*”)⁴ to argue that payment of prior mortgages⁵ somehow provides subrogation such that it becomes a prior mortgage. This ignores the fact that it is from the date of registration that any priority arises with respect to the mortgagee, in contrast with the lien claimant.
52. *Ontario Wealth* involved a priority dispute between Ontario Wealth, as mortgagee, and Sica Masonry & General Contracting Ltd. (“**Sica**”), as a lien claimant. The case is distinguishable. Unlike the MZ Mortgage, Ontario Wealth’s mortgage was a prior mortgage.
53. Ontario Wealth’s mortgage was registered on November 10, 2008, while the claim for lien of Sica, was registered on April 8, 2010. Sica’s lien also states that the first supply or when its lien arose was on January 12, 2009. It was thus clear that the lien arose only after Ontario Wealth had registered its mortgage. There was no need to argue that Ontario Wealth’s priority arose as a result of having paid prior mortgages.

Responding Motion Record, Volume II, Affidavit of Cecilia Cece sworn on February 19, 2025.

Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd., [2014 ONCA 500](#), at para. [12](#).

54. In contrast, the work done by the architect, Buttcon, consultant and other subtrades going back at least 2018, was in respect of the same improvement or the Project. These services

⁴ A motion by the lien claimant to extend the time to appeal and for leave to appeal was dismissed by Strathy J.A. (as he then was): *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, [2014 ONCA 500](#).

⁵ Being the Maple Mortgage and the Marquez Mortgage.

and materials gave rise to a lien or liens prior to registration of the MZ Mortgage. As a result of this conclusion, s. 78(3) of the *Act* for prior mortgages does not apply.

55. In addition, Justice Cavanagh, in the *Clarkson Road Case*, thoroughly reviewed the *Ontario Wealth Case*, and noted that it was based on the specific facts, and primarily as the lien claimant had not filed any evidence. His Honour concluded at paragraph 31:

This finding was made based on the particular, and limited, evidentiary record before the motion judge. I do not regard *Ontario Wealth* as an authority for the general proposition that where services and materials for the same project were previously supplied under an earlier contract (for, say, pre-construction development), services or materials supplied under a new contract (for, say, construction work) should be treated as being in respect of a separate improvement.

Clarkson Road Case, para. [42](#).

Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd., [201 ONCA 500](#), at para. [29](#).

56. MarshallZehr has a mortgage that was registered after the time when the first lien arose in respect of this improvement. It has a subsequent mortgage which is governed by s. 78(5) and s. 78(6) of the *Act*. Under s. 78(5), the lien of Buttcon and the other lien claimants would have priority over the MZ Mortgage to the extent of the deficiency in the statutory holdbacks that should have been retained by the owner.

PART V - RELIEF REQUESTED

57. Buttcon seeks an order dismissing the MarshallZehr motion with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2025.



Fernando Souza
Counsel for Buttcon Limited

SCHEDULE “A” - LIST OF CASES AND AUTHORITIES

1. *Peoples Trust Company et al. v. Vandyk-Backyard Queensview Limited et al.*, 2024 ONSC 6648
2. *Boehmers v. 794561 Ontario Inc.* (1993), [1993 CanLII 8486](#) (ON SC) aff'd, [1995 CanLII 660](#) (ONCA)
2. *Dal Bianco v. Deem Management Services et al* (2020), 2020 ONSC 1500, 2020 CarswellOnt 3530, 16 R.P.R. (6th) 244 (Ont. S.C.J.) affirmed [2021 CarswellOnt 18071](#) (Ont. C.A.)
4. *XDG Ltd. v. 1099606 Ontario Ltd.* (2004), 2004 CanLII 15997 (ON SCDC), at para. [29](#).
5. *IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT AND A PLAN OF COMPROMISE OR ARRANGEMENT OF CLARKSON ROAD DEVELOPMENTS GP INC. AND OTHERS* 2024 CarswellOnt 12454, 2024 ONSC 4625.
6. *Haflidson v. Salandy* (2002), 16 C.L.R. (3d) 284 (Ont. Master)
7. *Ontario Wealth Management Corp. v. 1713515 Ontario Ltd.* [2013 ONSC 6503](#) (CanLII)
8. *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, [2014 ONCA 500](#), at para. [29](#).

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the *Rules of Civil Procedure*, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (Rule 4.06.1(2.2)).



Date: September 19, 2025

Fernando Souza
Counsel for Buttcon Limited

SCHEDULE “B” - STATUTORY REFERENCES

Construction Act, R.S.O. 1990, c. C.30, s. 14.

Creation of lien

14 (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1); 2017, c. 24, s. 12 (1), 66.

No lien for interest

(2) No person is entitled to a lien for any interest on the amount owed to the person in respect of the services or materials that have been supplied by the person, but nothing in this subsection affects any right that the person may otherwise have to recover that interest. R.S.O. 1990, c. C.30, s. 14 (2).

Architects

(3) For greater certainty, subsection (1) applies to services or materials supplied by an architect as defined in the *Architects Act* and any employees of the architect. 2017, c. 24, s. 12 (2).

Construction Act, R.S.O. 1990, c. C.30, s. 15.

15 A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

Construction Act, R.S.O. 1990, c. C.30, s. 22.

22 (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17 (1), 66.

Construction Act, R.S.O. 1990, c. C.30, s. 78.

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the

improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

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v. LA PUE INTERNATIONAL INC., Respondent**

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Ontario
SUPERIOR COURT OF JUSTICE

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