

Has the Construction Lien Period Expired?

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For commercial real estate lenders, advancing loan funds safely requires ensuring that no active construction liens can impact the property. This is crucial in mitigating financial risks associated with construction projects. The construction lien regime in Ontario is governed by the *Construction Act*, R.S.O. 1990, c. C.30, which provides clear guidelines on the lien period. Understanding and determining if the construction lien period has expired is essential for lenders.

Key Statutory Provisions

1. **Lien Period:** According to Section 31 of the Act, a lien must be preserved within 60 days after the date of the last supply of services or materials to the improvement. If the lien is not preserved within this period, it expires and can no longer be enforced.
2. **Publication of Certificate of Substantial Performance:** Per Section 32 of the Act, if a Certificate of Substantial Performance is published, the lien must be preserved within 60 days from the date of this publication.
3. **Perfecting a Lien:** Once preserved, a lien must be perfected within 90 days from the last day it could have been preserved. Perfecting a lien involves initiating legal action and registering a certificate of action on title, as stipulated in Section 36.

Steps for Lenders to Determine if the Lien Period Has Expired

1. **Verify the Date of Last Supply:** Confirm the date when the last services or materials were supplied to the improvement. This can be obtained from the contractor or subcontractor invoices and records.
2. **Check for Certificate of Substantial Performance:** Determine if a Certificate of Substantial Performance has been issued and published. This certificate signifies that the project has reached a point where it is substantially complete and can be used for its intended purpose. The publication date of this certificate triggers the 60-day lien preservation period.
3. **Conduct a Title Search:** Perform a title search to check for any registered liens. This will reveal if any liens have been preserved within the required timeframe. If no liens are found within 60 days of the last supply or the publication of the Certificate of Substantial Performance, the lien period may have expired.
4. **Review Legal Actions:** Ensure no legal actions have been initiated to perfect a lien within 90 days of the lien preservation period. If no certificate of action is registered on the title within this period, any preserved lien will lapse.

Practical Considerations

1. **Close Monitoring:** Lenders should closely monitor construction timelines and maintain communication with project managers and contractors to stay informed about key dates, such as the last supply date and the issuance of the Certificate of Substantial Performance.
2. **Professional Assistance:** Engaging legal professionals or, if possible, title insurers can provide additional security in verifying that all lien periods have expired before advancing funds.
3. **Holdback Funds:** Ensure that the statutory holdback (10% of the contract price) is properly managed and retained until the expiry of the lien period, as required by Sections 22 and 26 of the Act.

Determining if the construction lien period has expired is a critical step for commercial real estate lenders in Ontario to safeguard their investments. By understanding the timelines and requirements set out in the Construction Act, conducting thorough due diligence, and utilizing professional resources, lenders can confidently advance loan funds while minimizing the risk of lien-related complications.

For any related questions, please contact the writer. To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at <https://grllp.com/zzlotnick#media-insights>. A PDF version is available for download [here](#).

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