

The 10% Rule Isn't Always 10%: Construction Mortgage Priority on Default

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The General Rule

Section 78 of the *Construction Act* (Ontario) establishes the priority of construction liens relative to mortgages.

- Construction liens generally have priority over mortgages.
- Where a **mortgage was registered before** the first lien arose in respect of an improvement, the mortgage generally has priority for advances made before the first lien arose, including the lesser of:
 - the actual value of the premises when the first lien arose; and
 - the total amount advanced by the lender before that time.
- **Subsequent advances** under the mortgage may also have priority, unless, at the time of the advance, a lien had been preserved or perfected or the mortgagee had received written notice of a lien.
- Where the **mortgage was registered after** the first lien arose, construction liens generally have priority over the mortgage to the extent of any deficiency in the required holdbacks.
- A similar holdback-deficiency priority applies to **building mortgages**, or mortgages taken out to repay a building mortgage, irrespective of when the mortgage was registered.

The Case

In *KingSett Mortgage Corporation v. Maplevue Developments Ltd.* [1], the Ontario Court of Appeal considered how to calculate the amount of construction lien claims that may rank ahead of a mortgage during enforcement proceedings. The issue was whether the 10% holdback should be calculated on all invoices issued under a construction contract or only on invoices that remained unpaid.

Background

KingSett held a mortgage over a development owned by Maplevue. Following Maplevue's default, a receiver was appointed, and the property was sold to a third party. The sale proceeds were subject to competing claims.

Two contractors had contracted directly with Maplevue to provide materials and services for the project. Some invoices had been paid in full, while others remained outstanding. There were no subcontractor lien claims associated with the contractors' work.

The contractors argued that their priority claims should include 10% of the total amount invoiced under their contracts. The receiver and purchaser argued that the holdback deficiency should be calculated only with respect to unpaid invoices.

The Decision

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The Court held that, where there are no subcontractor lien claims at the time of the priority dispute, a contractor that has been paid in full on an invoice cannot claim an additional amount representing the 10% holdback in priority to a mortgagee. In practical terms, where a contractor has been paid in full on an invoice, there is no outstanding holdback deficiency relating to that invoice for the purpose of determining priority over the mortgage.

The holdback regime is intended to protect parties further down the construction pyramid. It is not intended to provide a contractor with an additional recovery where the contractor has already been paid in full and no subcontractor claims are at issue.

Key Takeaways for Lenders

When a construction borrower defaults, lenders must assess potential construction lien claims that may rank ahead of their mortgage. This is particularly important in a receivership or distressed sale, where available proceeds may be limited.

The *KingSett* decision reinforces that lenders should:

- Consider the timing of lien claims and notices when assessing whether advances made under the mortgage have priority.
- Avoid assuming that construction lien priority exposure is automatically equal to 10% of all invoices issued on a project.
- Review the project's payment records and lien records to identify which contractor invoices have been paid in full and which remain outstanding.
- Determine whether subcontractor or supplier lien claims exist, as the absence or presence of such claims may affect the calculation of any holdback deficiency.
- Distinguish between actual holdback exposure and amounts that merely represent 10% of project costs or invoices. A PDF version is available for download [here](#).

[1] *KingSett Mortgage Corporation v. Maplevue Developments Ltd.*, 2026 ONCA 512.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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